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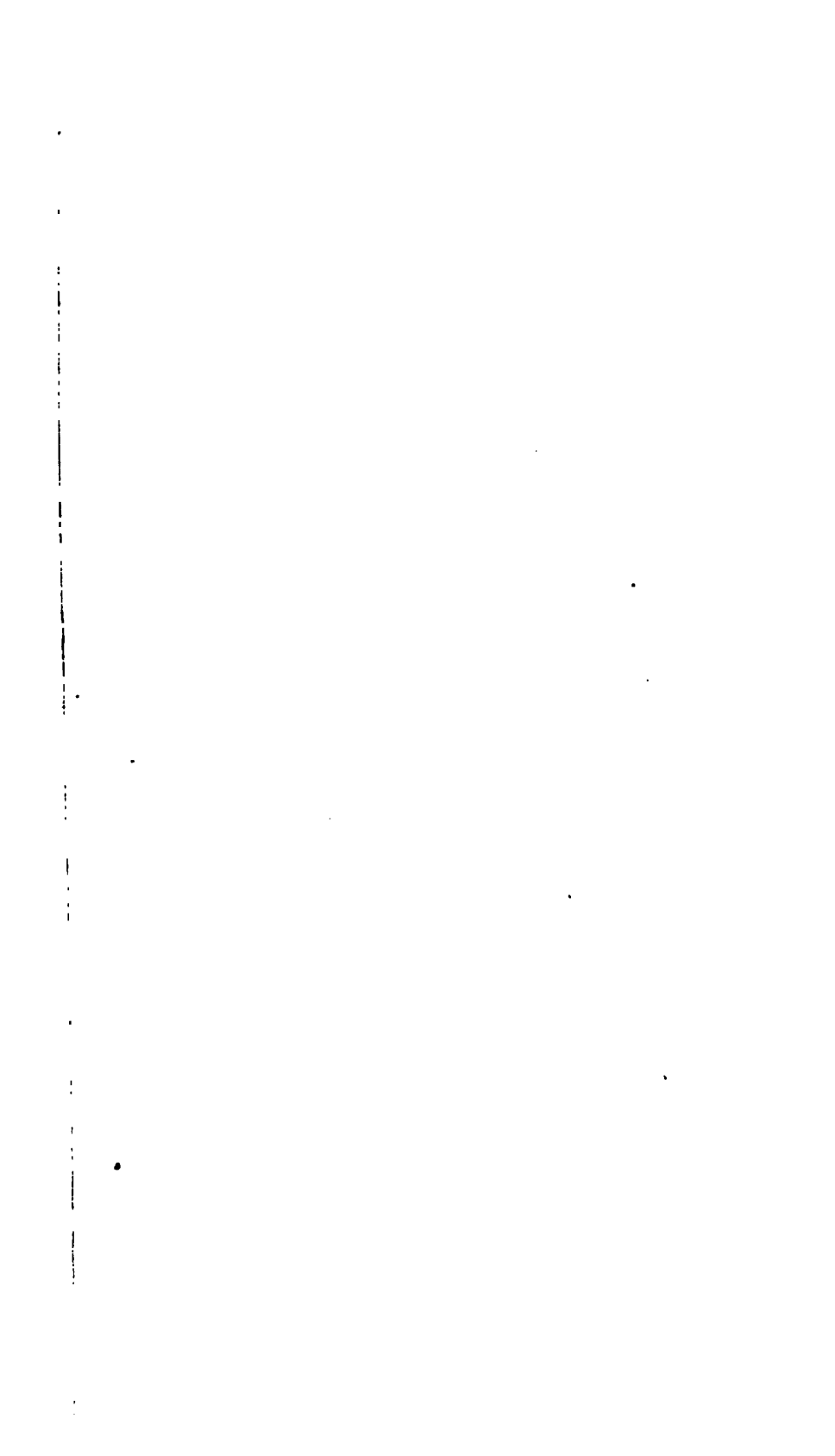
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**OF THE SEVERAL STATES.**

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**By A. C. FREEMAN.**

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# AMERICAN STATE REPORTS.

## VOLUME 124.

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**AMERICAN STATE REPORTS.**  
**VOLUME 124.**



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**ALABAMA.**

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**GREEN v. LINEVILLE DRUG COMPANY.**

[150 Ala. 112, 43 South. 216.]

**EVIDENCE**—Judicial Notice.—The court judicially knows that a designated town in the state is not on a railroad. (p. 19.)

**VENDOR AND PURCHASER**—Delay in the Shipment of Goods, What does not Amount to as a Matter of Law.—Under a plea setting up that a contract required a shipment at once, a delay of seventeen days cannot be held, as a matter of law, to be unreasonable. (p. 20.)

**VENDOR AND PURCHASER**—Shipment of Goods so that Purchaser Could not Get Possession of Them at the Place Agreed upon.—Where a contract of sale provides for the payment of the purchase price when the goods arrive at L., it is not satisfied by a shipment requiring payment at a different place and before the goods arrive at L. (p. 20.)

**VENDOR AND PURCHASER**—Pleading, When Sets Up a Breach of a Contract to Sell.—A plea in an action by a vendor for the price of goods sold which alleges that the agent of the plaintiff represented to the defendant that he could and would have the property shipped at once and delivered within ten days, and by making such statement, induced the defendant to sign the contract, which he would not otherwise have done, is sufficient. (p. 20.)\*

Action for damages for breach of contract to purchase goods of the plaintiff and refusing to accept the goods when shipped. The defendant's pleas 2, 3, 5 and 7 were as follows.

"(2) That plaintiff failed to comply with the terms of said contract, and himself breached said contract, in this: That he did not ship and deliver the alleged articles as called for by said contract, but failed or refused to do so, though the

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\*The court doubtless decided some points not included in the foregoing syllabi, but we are unable to include them in our syllabi, because the opinion is so vague that, though construed with the aid of the accompanying statement of facts, we cannot understand it.

defendant was ready and willing at all times to comply with the terms of said contract.

“(3) By the terms of said contract plaintiff agreed to ship at once, by payment of \$130 on delivery of goods at Lineville, Ala., but, notwithstanding these terms, plaintiff did not ship said apparatus until after, to wit, seventeen days, and failed and refused to deliver said goods at the stipulated price, \$130, on arrival of goods at Lineville, but, on the contrary, shipped them to Oxford, Alabama, with bill of lading attached, so that defendant could not get possession of same without paying the stipulated price, \$130, in Oxford, Ala., though the said plaintiff well knew that said payment was not to be made under the contract until arrival of goods at Lineville, and plaintiff never fulfilled this part of the contract, but refused to comply with same requiring payment at Oxford before goods reached Lineville, and by this breach of the contract, plaintiff prevented the defendant from getting the apparatus according to contract.”

“(5) Defendant, for further plea, says that plaintiff knew at the time of contract that defendant bought the apparatus for use in connection with its drug business, and it further avers that the said plaintiff refused to comply with the contract, in that they failed to ship apparatus according to the terms of contract, and refused to let defendant have the same unless on payment of \$130, made in Oxford, Ala., before goods were allowed to be taken from the railroad station there, when plaintiff well knew that payment of said money was not due until arrival of goods at Lineville; that by this failure of plaintiff to comply with the contract, defendant sustained the following damages, to wit: (Here follows an itemized statement.) All of which were lost to defendant by plaintiff's failure to perform the contract, and he here offers to recoup said damages against the alleged demand of the plaintiff and asks damages for the excess.”

“(7) Defendant, for further plea and answer to said complaint, says that the selling agent of said plaintiff represented to defendant that he could and would have the said apparatus shipped out at once, and that plaintiff would have same delivered in 10 days; and defendant further says that, relying upon these statements, he signed said contract, and that the said agent, by making said statements, which were not true, induced defendant to sign the contract, which he would not otherwise have done.”



These pleas were demurred to. On the trial, judgment was entered for the defendant and the plaintiff appealed.

Walter B. Smith, for the appellant.

E. J. Garrison, for the appellee.

<sup>116</sup> HARALSON, J. This was an action for damages for an alleged breach of contract, in refusing to accept certain goods ordered by defendant from the plaintiff. To the complaint, the defendant filed seven pleas, and the plaintiff interposed demurrers to the second, third, fourth, fifth, sixth and seventh. The court sustained demurrers to the fourth and sixth pleas, but overruled those to the second, third, fifth and seventh pleas. The overruling of the demurrers to these last pleas is assigned as error. The second plea is nothing more than the general issue, and the court did not err in overruling the demurrer to it. The third plea sets up delay in shipment of the goods, and also claims that the plaintiff broke the contract by shipping the goods to Oxford, <sup>117</sup> Alabama, with bill of lading attached, so that defendant could not get possession of same without paying the stipulated price of one hundred and thirty (\$130.00) dollars in Oxford, while the written contract stated that the payment was not to be made until the arrival of goods at Lineville. The contract, which is attached as an exhibit to the complaint, shows that the defendant ordered the goods shipped to Oxford, Alabama, and the court judicially knows that Lineville, Alabama, was not on a railroad. The contract is not at all plain as to when the goods were to be paid for. The record does not show whether the contract, which was in the form of an order, was partly in print and partly in writing, nor, if so, what part of it was in writing and what part was printed. As copied in the transcript, however, there is some indication that the instrument was at first a blank order of some kind, which was filled out. Part of it is as follows:

“Terms and Conditions.

“\$——— paid on signing hereof; \$——— upon receipt of bill of lading: \$———. This is to be delivered at this price \$130.00, on arrival of goods at Lineville —— until the total sum of \$——— is paid. Settlement to be made by notes bearing 6 per cent interest, and by your regular agreement securing title to your firm against all third parties, all of which I (or) we agree to execute on receipt of bill of lading, or in

default of such settlement, your firm may, at your option, declare the whole amount due and payable."

From this somewhat indefinite and contradictory language in the contract as to terms, it is impossible to say whether or not the defendant was to pay the one hundred and thirty dollars on the arrival of the goods at Lineville, or whether the defendant was to execute notes for said amount on receipt of the bill of lading. The third plea sets up a delay of seventeen days in making the shipment, and that plaintiff shipped the goods in such a way that defendant could not get possession of same, without paying the stipulated price, at Oxford. Under the facts alleged in the plea, the court could not have held, as a matter of <sup>118</sup> law, that seventeen days was an unreasonable delay; but the shipment of the goods in such way that plaintiff could not get possession of them until he had paid the stipulated price, in Oxford, was evidently not in compliance with the terms of the contract, and the plea was not subject to any of the grounds of demurrer interposed to it.

Defendant's fifth plea is bad. None of the damages claimed therein by way of setoff or recoupment are recoverable in a case of this kind, and the demurrers to it should have been sustained: *Alabama Chemical Co. v. Geiss*, 143 Ala. 591, 39 South. 255.

The plea numbered 7, at most, sets up the unfulfilled promise of the selling agent of the plaintiff that the goods would be delivered within ten days, and avers that if this promise had not been made the defendant would not have signed the contract. This plea is not subject to any of the grounds of demurrer interposed to it, and the demurrer was properly overruled.

Since the case must be reversed, it is unnecessary for this court to pass upon the sixth assignment of error.

Reversed and remanded.

Tyson, C. J., and Simpson and Denson, JJ., concur.

#### FACTS OF WHICH THE COURTS WILL TAKE JUDICIAL NOTICE.

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#### I. Scope and Definitions.

We discuss in this note only those matters of fact of which courts will take judicial notice. Facts relating to locations and boundaries, of which judicial notice will be taken, are treated in the monographic note appended to *Gunning v. People*, 82 Am. St. Rep. 439, so that as to these particular classes of facts, the discussion in this note will be limited to the cases decided since the former note was written. In connection with this note, see, also, the note appended to *Temple v. State*, 49 Am. Rep. 201. In the note attached to *Knickerbocker Trust Co. v. Iselin*, 113 Am. St. Rep. 870, will be found a discussion of the extent to which judicial notice will be taken of the laws of sister states and of foreign countries. And the general subject of judicial notice is treated in an extended note appended to *Lanfear v. Mistier*, 89 Am. Dec. 663.

The doctrine of judicial notice is often stated in the books as a rule dispensing with proof, or with averment, or both, on certain subjects. With regard to general public statutes, or the general rules of law of the state where the court is, there is no objection to this definition, for the court is bound to take notice of the law. But with respect to all matters of fact, the rule as to judicial notice is necessarily based on an essentially different principle, for the court is not bound to take notice of many of those matters of fact of which it may take notice, and whether it does so or not often depends upon the character of the case, the circumstances connected with it, and the disposition of the trial judge; in other words, the question whether such or such a matter of fact will be judicially

known in any particular case, is very largely discretionary with the court. So that the language found in many of the cases to the effect that the court is bound to take notice of this or that fact, means no more than that the court may do so, if in its discretion the sense of justice requires it. This is proven by the fact that the cases are very rare where a decision has been reversed, because the trial court declined to take judicial notice of matters of fact without proof. Nor is this surprising, for, as judicial notice of a fact takes the place of proof and is of equal force, the law which allows the court to act upon the existence of facts not proven should be applied with great caution, and should never be extended to facts about which any reasonable doubt exists. It is evident, therefore, that in its application to matters of fact, the rule of judicial notice is of little practical service, as a rule of trial evidence, but that its chief value is in the law of appeal, for, as was said by Justice Brown of the New York court of appeals, "Courts are not bound to take judicial notice of matters of fact. Whether they will do so or not depends on the nature of the subject, the issue involved and the apparent justice of the case. The rule that permits a court to do so is of practical value in the law of appeal, where the evidence is clearly insufficient to support the judgment. In such case judicial notice may be taken of facts which are a part of the general knowledge of the country, and which are generally known and have been duly authenticated in repositories of facts, open to all; and especially so of facts of official, scientific, or historical character": *Hunter v. New York O. & W. Ry. Co.*, 116 N. Y. 615, 23 N. E. 9, 6 L. R. A. 246. While, however, courts are not bound to take judicial notice of matters of fact, there are a thousand and one facts of which they do take such notice. "To require proof of every fact would be utterly and absolutely absurd," said Mr. Justice Swaine in *Brown v. Piper*, 91 U. S. 37, 23 L. ed. 200; though he added: "This power [judicial notice] is to be exercised by courts with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be resolved in favor of the negative." We will now proceed to show as fully as the limits of this note will permit, the various matters of fact of which judicial cognizance has been taken.

## II. Facts of Which Judicial Notice will be Taken.

a. **Facts Already Judicially Decided.**—As a general rule, facts which have been already judicially decided are properly within the range of judicial cognizance. Thus, in Arkansas, the courts will take judicial notice of what is meant by the equity of redemption of Real Estate Bank Lands, because all matters connected with the organization, history, and dissolution of that bank have been so much discussed, and made so much the subject of legislation and judicial controversy: *Davies v. Hunt*, 37 Ark. 574. So, too, in an action of trespass to try title where the plaintiff claimed the land as a settler in *Power & Hewitson's Colony*, it was held unnecessary for plaintiff to

have introduced the contract of Power & Hewitson under which he claimed his right as a settler, because these facts had been judicially determined, and had become a part of the history of the country: *Hatch v. Dunn*, 11 Tex. 708. And while a custom of merchants not to extend credit to their customers beyond six months could not be assumed, yet, when such custom is once proved and decision made thereon, it becomes the law of the land of which courts will take notice: *Branch v. Burnley*, 1 Call (Va.), 147; and to same effect is *Consequa v. Willings*, Pet. C. C. 225, Fed. Cas. No. 3128.

b. *Facts Within the Personal Knowledge of the Judge.*—Where a judge has personal knowledge of a fact which is judicially cognizable, proof of such fact is never required. Thus, where a motion was made in a chancery proceeding to strike a paper which purported to be a certificate of evidence in the cause, upon the ground that it had never been presented to, or signed by, the judge whose name appeared to be signed to the same, it was held that no proof was necessary, because the court to whom the motion was addressed had personal knowledge of the matters alleged as the grounds for the motion: *Secrist v. Petty*, 109 Ill. 188.

But a fact not judicially cognizable must be proven though known to the members of the court individually. Thus where the question whether the statute of limitation was suspended depended upon the nonresidence of the defendant, the fact that the members of the court individually knew that the defendant was a resident of another state was not a fact of which they could take judicial notice: *Wheeler v. Webster*, 1 E. D. Smith, 1. So, too, a court can only take judicial notice of such acts and proceedings as properly go upon the record. Therefore, the knowledge, opinion or recollection of a judge that a clerk directed by an order of court to do a certain act, knew the contents of such order, is his personal and not his judicial knowledge, and will not support a judgment in contempt for failure to obey such order: *Dines v. People*, 39 Ill. App. 565. And where a probate judge refused letters of administration on an estate to the next of kin on the ground of mania a potu as a fact within the knowledge of the court, such refusal was held to be irregular, as the judge should have been sworn as a witness: *Smith v. Moore*, 4 Miss. (3 How.) 40. In *State v. Lincoln Gas Co.*, 38 Neb. 33, 56 N. W. 789, where an application for mandamus involving the reasonableness of a rule of the defendant gas company to charge its customers twenty-five dollars a month for the use of its meters was submitted on the pleadings, the court could only consider the averments therein, and could not resort to its own experience to test the reasonableness of such rule. "What might be our private judgment upon this question of fact is of no consequence, for we can now only consider the averments, admissions and denials of the pleadings." But in *Brown v. Lincoln*, 47 N. H. 468, where it was necessary to establish the genuineness of a signature to an instrument to entitle it to be received as evidence, the personal knowledge of the presiding judge, who was

acquainted with the handwriting of the signer, was held sufficient prima facie without further proof of the genuineness of the signature.

In *re Van Nostrand's Estate*, 3 Misc. Rep. 396, 24 N. Y. Supp. 850, where, on the settlement of the account of an administrator, his attorney testified that the credits claimed by the administrator on account of attorneys' fees were reasonable, it was held that the court could not act on its personal knowledge that such items were greater than the customary charges for similar services, when no evidence contrary to that given by the attorney had been submitted. This seems in conflict with the decisions in California, under which the courts in that state, when authorized to fix the value of the services of plaintiff's attorney in foreclosure suits, may act upon their own knowledge of what is a reasonable compensation, and in the absence of any evidence on the subject: *Edwards v. Grand*, 121 Cal. 254, 53 Pac. 796; *Hellier v. Russell*, 136 Cal. 143, 68 Pac. 581.

### c. Matters of Common Knowledge.

1. **In General.**—The books are full of cases which announce the doctrine that courts will take judicial notice of such matters of common knowledge as are or may be known to all men of ordinary intelligence and understanding. In *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. Rep. 862, 34 L. ed. 455, Mr. Justice Harlan said: "If a fact alleged to exist, upon which the rights of parties depend, is within common experience and knowledge, it is one of which the courts will take judicial notice." And in *King v. Gallum*, 109 U. S. 99, 3 Sup. Ct. Rep. 85, 27 L. ed. 870, it was held that, "the court will take judicial notice of matters of common knowledge, and of things in common use." So, too, Mr. Justice Field, in *Ho Ah Kow v. Nunan*, 5 Law. 552, Fed. Cas. No. 6546, said: "We cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men." But notwithstanding the doctrine thus asserted by eminent jurists in both the federal and state courts, the question, after all, as to what matters of fact shall be considered of such "common knowledge" as to require judicial notice to be taken of them must rest in each particular case in the discretion of the court, and we will proceed to show how the general rule above stated has been acted upon by the different courts.

2. **Of Which Judicial Notice has been Taken.**—Courts will take notice of the fact that, as a general rule, trains running upon a railroad are run, directed, and controlled by the owners of the road: *South & North Ala. R. Co. v. Pilgreen*, 62 Ala. 305; that a "fence pole" is a heavy club: *Baker v. Hope*, 49 Cal. 598; that matter carried through the mail generally reaches its destination in spite of much imperfection in the address: *Gamble v. Central R. R. & Banking Co.*, 80 Ga. 595, 12 Am. St. Rep. 276, 7 S. E. 315; that the Chicago river is situated in the midst of the city of Chicago, where a dense population exists, and near which much of the business of the

city is transacted: *Harmon v. City of Chicago*, 110 Ill. 400, 51 Am. Rep. 698. Courts will take judicial notice of such soil conditions existing within the limits of their territorial jurisdiction as are matters of common knowledge: *City of Chicago v. Duffy*, 117 Ill. App. 261; and also that the use of dynamite in the construction of a tunnel under a populous city is inherently dangerous: *City of Chicago v. Murdoch*, 113 Ill. App. 656; affirmed, 212 Ill. 9, 72 N. E. 46.

"In a suit on an insurance policy, the courts will judicially know that vacant buildings, as a class, are more exposed to damage from fire than they would be if occupied: *White v. Phoenix Ins. Co.*, 83 Me. 279, 22 Atl. 167. And in an action for personal injuries, where no care has been taken in approaching a known danger, the court will take judicial cognizance that the party is guilty of negligence, and has not exercised reasonable care: *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274. Judicial notice will also be taken of the fact that a box freight-car, standing still at a highway crossing, will not frighten a horse of ordinary gentleness: *Gilbert v. Flint & P. M. R. Co.*, 51 Mich. 488, 47 Am. Rep. 592, 16 N. W. 868; and that telephone poles in a highway must be set near the side thereof, generally outside the curb or ditch line, and, therefore necessarily in line with trees in the highway: *Wyant v. Central Telephone Co.*, 123 Mich. 51, 81 Am. St. Rep. 155, 81 N. W. 928, 47 L. R. A. 497. In *Post v. Chicago B. & Q. Ry. Co.*, 121 Mo. App. 562, 97 S. W. 233, an employé of the railroad company sought to recover damages for injury he sustained while cutting weeds on a slanting bank of the right of way with a scythe, his contention being that he had not been furnished by the railroad company with a safe tool for the work. A demurrer to the complaint was sustained, the court taking judicial notice of the use of an ordinary scythe for the cutting of weeds. And where property sought to be partitioned was covered by a mortgage, the court could take judicial notice of a general depression in the market value of real estate: *Walker v. Walker*, 3 Abb. N. C. 12. In *Frace v. New York L. E. & W. R. R. Co.*, 143 N. Y. 182, 38 N. E. 102, plaintiff sought to recover damages for destruction of his property by fire alleged to have been kindled by sparks escaping from an engine passing on defendant's road. It was held that the court could take judicial notice of the fact that diamond stock and straight stock spark-arresters are in very general use upon the railroads of the country. Courts will also take notice of the construction of an ordinary horse street-car: *Kleffman v. Dry Dock & E. B. B. R. Co.*, 93 N. Y. Supp. 741, 104 App. Div. 416; and that no locomotive can be so constructed that some sparks will not escape therefrom: *White v. New York Central & H. B. R. Co.*, 181 N. Y. 577, 74 N. E. 1126. In an action against an express company for delay in the shipment of goods from Erie, Pennsylvania, to Lenoir, North Carolina, the court took judicial notice that Lenoir was connected by rail with the principal trunk lines leading north, and that Erie, Pennsylvania, was accessible by railway, and that express companies provide greater dispatch in the delivery of freight than other carriers, and select for their business the most direct routes, and that fourteen days was too long

a time for the transportation of goods by express between Erie and Lenoir. But the court refused in this case to take judicial cognizance of the facts necessary to determine how much too long a time was taken: *Harper Furniture Co. v. Southern Express Co.*, 144 N. C. 639, 57 S. E. 458. In *Nelson v. Narraganset Electric Lighting Co.*, 20 R. I. 258, 106 Am. St. Rep. 711, 58 Atl. 802, 67 L. B. A. 116, it held that judicial notice will be taken of the fact that an electric lighting company cannot erect and maintain its lights in the streets of a city without authority from the municipality; but this is rather taking notice of a matter of law than of a question of fact. In *San Antonio & A. P. Ry. Co. v. Mertink* (Tex. Civ. App.), 102 S. W. 153, it was said that courts will judicially know that railway cars and the cowcatcher of the engine extend beyond the rails on both sides. The case of *Spiking v. Consolidated Ry. & Power Co.*, 33 Utah, 313, 93 Pac. 838, decided January 25, 1908, was an action for negligently causing the death of a pedestrian by being struck by a street-car. The negligence was predicated entirely on the omission of the defendant street railway company to provide the car with any fender or guard. No proof was submitted as to the purposes for which fenders were used on street-cars, but the jury were charged that "if you find that such car did not have a fender, you cannot find against the defendants upon that alone, unless you find, also from the evidence that, if the car had a fender, the accident might have been averted thereby." It was insisted by counsel for the defendant that this instruction was no based upon a subject of which there was any evidence, and was therefore erroneous. Said the court: "Undoubtedly such is the general rule which has been laid down by this and many other courts. Does the claim here made come within the rule? We do not think so, for several reasons. . . . It is apparent that both the court and counsel for appellant treated the purpose for which fenders were used on street cars as a matter of general knowledge. If this was the correct view then the object, purpose and use of fenders was in the case to be considered by the jury, as if it had been testified to by witnesses. It is elemental that any facts which are generally known and accepted, and of which courts take judicial knowledge, are part of the case as fact and the court may instruct upon them to the same extent as upon other facts." Courts will judicially recognize the fact that the sale of proprietary medicines and nostrums depends less upon the merits of the medicines themselves than upon the expedients used to recommend them: *Fowle v. Park*, 48 Fed. 789. In *Territory of New Mexico v. Denver & R. G. R. Co.*, 203 U. S. 38, 27 Sup. Ct. Rep. 1, 51 L. Ed. 78, it is said that the supreme court of the United States will take notice that in certain states and territories of the west, cattle are required to be branded in order to identify their ownership, and that they run at large in great stretches of country, with no other means of determining their separate ownership.

3. Of Which Judicial Notice has been Denied.—It is not every fact which may be generally believed or understood to exist, that will be judicially recognized without proof. Thus courts will not take judicial



notice as to whether a partition fence sufficient to inclose and restrain "sheep" will also restrain and inclose "hogs": *Enders v. McDonald*, 5 Ind. App. 297, 31 N. E. 1056; and in determining whether an offer was accepted by mail within a reasonable time, courts will not take judicial notice that the places from which letters are dated are the postoffices of the respective writers, nor of the character of the mail communications between such places: *Ferrier v. Storer*, 63 Iowa, 484, 50 Am. Rep. 752, 19 N. W. 288. In an action on a note to recover the purchase price of a mower defended on the ground of failure of consideration, a charge that "facts which are notoriously known, and within the knowledge of the jury, as well as others in general, need not be proved, but may be taken notice of by the jury without being proved," was properly refused where the facts to which such instruction related were the price of mowers at the time when the note was given and the condition of the weather and the roads: *McCormick Harvesting Machine Co. v. Jacobson*, 77 Iowa, 582, 42 N. W. 499. In *City of St. Louis v. St. Louis Theater Co.*, 202 Mo. 690, 100 S. W. 627, the action was for breach of a city ordinance prohibiting the maintenance of signs extending more than eighteen inches over the sidewalk from the buildings to which they were attached. The validity of the ordinance was attacked as unreasonable. The court refused to take judicial notice of the conditions of the place and street upon which the sign was located or of the public requirements and necessities at such place and on such street. In *Porter v. Waring*, 2 Abb. N. C. 230, it was held that courts cannot properly take judicial notice of the width of streets or of sidewalks.

Judicial notice will not be taken of facts stated in encyclopedias, dictionaries, or other publications unless they are of such universal notoriety and so generally understood that they may be regarded as forming a part of the common knowledge of every person: *Kaolatype Engraving Co. v. Hoke*, 30 Fed. 444.

d. **Facts Pertaining to the Course and Laws of Nature.**—Courts will take judicial notice of the seasons and of the general course of agriculture, so as to know whether, at a particular date, the crops of the country would be matured, so as to be severed: *Floyd v. Ricks*, 14 Ark. 256, 58 Am. Dec. 374. Hence, the courts will take judicial cognizance that a mortgage on a cotton crop made in January, was upon a crop not then in being: *Tomlinson v. Greenfield*, 31 Ark. 557; or if such a mortgage was made in July, that it was made upon a crop then in being: *Person v. Wright*, 35 Ark. 169. And judicial notice will be taken by the courts of the time of harvest of the counties where they preside: *Mahoney v. Aurrecochea*, 51 Cal. 429. Judicial notice will be taken of the course and laws of nature. Hence such notice will be taken of the location of the falls of the Potomac river, near Washington, D. C., where the velocity of the current of a great river is impeded by the tide, and of the variation between mean high tide and mean low tide at a certain point: *Senfferle v. McFarland*, 28 App. D. C. 94. Courts will take judicial notice of facts of unvarying occurrence, but not of the vicissitudes of climate or of seasons. This it has been held, though we think the question requires further consideration, that judi-

cial notice will not be taken of the time when crops of wheat, oats and barley mature, because the time for these crops to mature vary in different localities: *Dixon v. Niccolls*, 39 Ill. 372, 89 Am. Dec. 312. Though in *Culverhouse v. Worts*, 32 Mo. App. 419, it was held that while judicial notice would not be taken of the precise day that a given crop reaches its maturity, such notice would be taken that certain crops matured at certain seasons; and in *Garth v. Caldwell* 72 Mo. 622, judicial notice was taken of the fact that corn is mature in December. Judicial notice will be taken of the fact that, in certain localities at certain seasons, there is a heavy rainfall, and that in consequence there is liability to freshets: *Elser v. Village of Gross Point*, 223 Ill. 230, 114 Am. St. Rep. 326, 79 N. E. 27. In *Abshin v. Mather*, 27 Ind. 381, it was held that where a promise was made in November, 1861, to pay a sum of money "after harvest," and suit was instituted upon the promise in 1864, the court would take judicial notice that the time of performance had passed, though no such averment was made in the pleadings. "The court will take notice of seed time and harvest," said Judge Gregor. And in *Ross v. Boswell*, 60 Ind. 235, it was held that judicial notice would be taken of the course of the seasons and of husbandry and that the use of a farm for six months during the cropping season is worth much more than during six months including winter. *Dayton & W. Traction Co. v. Marshall*, 36 Ind. App. 491, 75 N. E. 85. Judicial notice was taken of the fact that a certain time after 4 a. before 6 o'clock in the afternoon on September 16th was before sunset.

Courts will take judicial cognizance of the effect of the waters of a stream during a flood, turned nearly at right angles to the lands of a riparian owner, dependent on the laws of nature: *Morton v. Oregon Short Line Ry. Co.*, 48 Or. 444, 120 Am. St. Rep. 827, 87 F. 151, 1046, 7 L. R. A., N. S., 344; and judicial notice will be taken that on or about January 10th, no fruit is growing on peach and apple trees: *Putnam v. St. Louis Southwestern Ry. Co. of Texas* (71 Civ. App.), 94 S. W. 1102. But courts do not judicially know that a foggy night brings a foggy morning: *Texas & N. O. R. Co. v. Leham* (Tex. Civ. App.), 95 S. W. 686.

**e. Facts Relating to the Qualities and Properties of Matter.**—cases in which the courts have been most frequently called upon to apply the doctrine of judicial notice with reference to the qualities and properties of matter have been those involving prosecutions for violations of statutes prohibiting the sale of spirituous and intoxicating liquors. That judicial notice will be taken of the fact that alcohol, brandy, whisky, gin and rum are intoxicating liquors seems to be undisputed, for in *Snider v. State*, 81 Ga. 753, 12 Am. St. Rep. 325, 3 S. E. 631, they were said to be "intoxicating liquors per se; and simply because it is within the common knowledge and ordinary understanding that they are intoxicating liquors. By this rule of common knowledge, courts take judicial notice that certain things are verities, without proof." But with regard to other beverages cor

ing more or less alcohol and generally considered spirituous and intoxicating, there is quite a diversity of opinion among the courts as to how far the rule of judicial notice as to the intoxicating effect of such beverages should be extended. Thus in *Watson v. State*, 55 Ala. 158, it was held that courts will take judicial notice that lager beer is a malt liquor, and to the same effect is *Netso v. State*, 24 Fla. 363, 5 South. 8, 1 L. B. A. 825, and *State v. Goyeth*, 11 R. I. 592, and in *Briffit v. State*, 58 Wis. 39, 46 Am. Rep. 621, 16 N. W. 39, it was held that "beer" was a malt liquor and intoxicating. In *Klare v. State*, 43 Ind. 483, it was held that judicial notice would not be taken of the fact that beer was intoxicating; and a similar ruling was made in *Lathrope v. State*, 50 Ind. 555; *Shaw v. State*, 56 Ind. 188; *Plunkett v. State*, 69 Ind. 68, and *Kurz v. State*, 79 Ind. 488. But in the later case of *Myers v. State*, 93 Ind. 251, these cases were overruled and a conviction for selling intoxicating liquor on Sunday was sustained, when the only beverage sold was "beer," and there was no proof of its intoxicating properties, the court saying: "Beer is a liquor infused with malt, and prepared by fermentation for use as a beverage. As a consequence, where 'beer' is called for at a place where intoxicating drinks are sold, the bartender, having in view the primary meaning, as well as the common use of the word, is justified in inferring; and must reasonably infer, that malted and fermented beer is wanted. If any other kind of beer is desired, it is expected that qualifying words will be used, such as spruce beer, root beer, small beer, ginger beer, and the like, thus attaching a remote and secondary meaning to the word 'beer,' as descriptive of particular beverages. When, therefore, a witness testifies to the sale or giving away of beer under circumstances which make the sale or giving away of any intoxicating liquor unlawful the prima facie inference is that the beer was of that malted and fermented quality declared by the statute to be an intoxicating liquor, and the court trying the case ought to take judicial notice of the inference which thus arises from the use of the word 'beer' in its primary and general sense." But quite a different view from that expressed in the case last named was taken by the supreme court of New York in the case of *People v. Hart*, 24 How. Pr. 289, where it was held that the court could not take judicial notice that "lager beer" belonged to the prohibited class of liquors designated in a statute as "beer." In *Killip v. McKay*, however, (13 N. Y. St. 5. 47 Hun, 631), it was held that, in an action to recover the penalty for selling strong and spirituous liquors, the court would take judicial notice that common beverages sold under the name of beer and beer are intoxicating. So, too, in the late case of *White v. Manning* (Tex. Civ. App.), 102 S. W. 1160, it was held that recovery could be had on a retail liquor dealer's bond for selling liquor to a person without proof that the beer sold was intoxicating. Judicial notice will be taken of the fact that apple brandy is intoxicating: *Thomas v. Commonwealth*, 90 Va. 92, 17 S. E. 788; and also "old hard hard cider": *Eureka Vinegar Co. v. Gagette Printing Co.*, Fed. 570. Courts will take judicial notice that kerosene is a

product of crude petroleum: *Moeckel v. Cross*, 190 Mass. 280, 76 N. E. 447, but, will not take judicial notice, that kerosene oil is a "burning fluid" or "chemical oil," as such words are used in an insurance policy, forbidding the use of such articles on the insured premises: *Mark v. National Fire Ins. Co.*, 24 Hun, 565; affirmed, 91 N. Y. 663. Nor will judicial notice be taken that kerosene oil is a refined coal-oil or a refined earth oil: *Bennett v. North British & Mercantile Ins. Co.*, 8 Daly (N. Y.), 471. And where the legislature had declared by law that certain grades and quantities of kerosene are safe and proper to use, the court will not take judicial notice that kerosene is always inflammable, i. e., explosive: *Wood v. North Western Ins. Co.*, 46 N. Y. 421. Courts will take judicial notice of the fact that natural gas is an inflammable, explosive substance, intrinsically dangerous: *Jamieson v. Indiana Nat. Gas & O. Co.*, 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652. In *State v. Hays*, 78 Mo. 307, it was held that it was unnecessary in an indictment for arson to aver that coal-oil is inflammable, as the courts would take judicial notice of such fact. "Courts do not require proof," said Judge Phillips, "that fire will burn, or powder explode, or gas illuminate, or that many other processes in nature and art produce certain known effects." The doctrine in this case seems opposed to the ruling in the case of *Wood v. Northwestern Ins. Co.*, 46 N. Y. 421. The refusal of the court in the *Wood* case, however, to take judicial notice of the explosiveness of kerosene was based on the fact that the legislature had declared that there is a degree of purity to which kerosene can be brought, and at which it is comparatively safe, and the court was unwilling to accept as an inevitable fact that which the legislature had assumed was possible. In an action to recover for injuries resulting from an explosion in a coal mine, the supreme court of Kansas refused to take judicial notice that dry, fine coal dust is a dangerous and explosive element: *Cherokee & P. Coal & Mining Co. v. Wilson*, 47 Kan. 460, 28 P. 178. In a prosecution against a tobacconist for violation of a statute prohibiting the keeping open of shops on Sunday, the resale of "drugs and medicines" excepted, the court judicially knew that tobacco and cigars are not drugs and medicines, and may exclude testimony that they are: *Commonwealth v. Marzynski*, 149 M. 68, 21 N. E. 228. In a suit on an insurance policy to recover for loss by fire, courts will not take judicial notice that gin and turpentine are "inflammable liquids" within the meaning of that term as used in a clause of the policy prohibiting the keeping of such materials in the insured building: *Moseley v. Vermont Fire Ins. Co.*, 55 Vt. 14.

**f. Facts Relating to the Operation and Effect of Natural Forces.** Courts will take judicial notice of the operation and effect of natural laws. Thus judicial cognizance will be taken of the fact that a brick wall built three feet, eight inches from certain windows extending fifteen inches above them is a detrimental obstruction to light and air: *Ware v. Chew*, 43 N. J. Eq. 493, 11 Atl. 746. That electricity is dangerous, and so generally recognized: *W. v. City Electric Company* (Mich.), 104 N. W. 613. But courts will

take notice that a train going at a rate of twenty to twenty-five miles an hour can be stopped within eighty or ninety yards: Southern Ry. Co. v. Gullatt (Ala.), 43 South. 577. And in a suit against a street railway company to recover damages for personal injuries, where the evidence was conflicting as to whether or not a car, while being pushed at about four miles an hour with the brakes set, down a slight grade, would jump forward at the release of the brakes when within six or eight inches of another car to which it was to be coupled; there was no error in refusing to take judicial notice that a car under such circumstances could not jump forward: Chicago etc. R. Co. v. Champion (Ind.), 32 N. E. 874. But in Rome Railway & Light Co. v. Keel, 3 Ga. App. 769, 60 S. E. 468, decided February 24, 1908, which involved the same question as that involved in the case last cited, a very different conclusion was reached as to what facts in connection with the operation of primary physical laws should be judicially noticed by the courts. In this case the plaintiff sought to recover damages from a street railway company for personal injuries caused by a sudden jump of the car while plaintiff was boarding it, thereby throwing him to the ground. The car was approaching a usual station, and plaintiff having signaled the car to stop, the motorman had applied the brakes, but failed to get the car to a full stop. As the car passed plaintiff boarded the step of the front platform safely, but as he was stepping on to the platform the brakes were released, and the car jumped forward and threw him off. The only negligence alleged was, that the motorman threw off the brakes, and thereby caused the car to jump forward. The complaint was held bad on demurrer. Said the court: "The case rests solely upon the proposition that a release of the brakes caused the car to jump forward with a jerk; a proposition wholly contradictory of the laws of physics and to ordinary experience. Leaving out of consideration external causes, including condition of the track, curves, etc., we dare say that no motorman can impart a jerk to his car by releasing his brakes or by throwing off his current. Jerks and jolts come from throwing on the brakes or the current, active forces that tend to disturb inertia. . . . Under these laws of nature of which the court must take judicial notice, a sudden jump or jerk of the car cannot be produced by merely throwing off the brakes. . . . A party will not be permitted to maintain in his pleadings a contradiction of those things of which the court is required to take judicial cognizance. Of the primary physical laws the courts must take notice. Therefore, the pleading is demurrable when it sets up a contradiction of these laws. Since a physical impossibility cannot exist at all, it cannot be admitted even by demurrer. Such an allegation must be treated by the courts just as they would treat an allegation that what is not law is law; i. e., it must be wholly disregarded."

§ Scientific Facts and Principles.—Courts will take judicial notice of scientific facts which experience has rendered axiomatic, but not of facts concerning which men eminent in the particular branch of learning widely differ: St. Louis Gas Light Co. v. American Fire Ins.

Co., 33 Mo. App. 348. Thus courts of justice do not ignore the great improvement in the means of communication which the telephone has made. Its nature, operation and ordinary uses are facts of general scientific knowledge, of which courts will take judicial notice: *Western Union Tel. Co. v. Rowell* (Ala.), 45 South. 73; and to same effect is *Wolfe v. Missouri Pacific Ry. Co.*, 97 Mo. 473, 10 Am. St. Rep. 331, 11 S. W. 49, 3 L. R. A. 539. So, too, courts will take notice of electricity and its nature, but not of the various methods of generating, transmitting, and using it: *Crawfordsville v. Braden*, 130 Ind. 149, 30 Am. St. Rep. 214, 28 N. E. 849, 14 L. R. A. 268. Courts will not judicially know that a powder magazine may not be so constructed and provided as to insure absolute safety from lightning: *Kinney v. Koopman*, 116 Ala. 310, 67 Am. St. Rep. 119, 22 South. 593, 37 L. R. A. 497. Nor will they know that sowing oats or planting corn in a young orchard is not good care or husbandry, or that good care will make poor varieties of trees bear good fruit: *Long v. Pruyn*, 128 Mich. 57, 92 Am. St. Rep. 443, 87 N. W. 88. And in an action against a gas company to recover damages for alleged negligence in the construction of its main in the street so that gas escaped into plaintiff's premises, which exploded and set fire to her dwelling, the complaint was held good against demurrer, because the court could not judicially know that gas would not pass under the soil from a street main to a house in sufficient quantities to cause an explosion: *Mississinewa Min. Co. v. Patton*, 129 Ind. 472, 28 Am. St. Rep. 203, 28 N. E. 1113. But in adjudicating upon surveys, courts are bound to notice judicially the magnetic variation from the true meridian: *Bryan v. Beckley* 16 Ky. (Litt. Sel. Cas.) 91, 12 Am. Dec. 276; and they will judicially know that persons engaged in business who cannot read or write have their faculties more acutely educated, for the reason that they are compelled to depend on their memory, and cannot rely on written memoranda: *People v. Martin*, 32 N. Y. Supp. 933.

Judicial cognizance will be taken of the nature and power of dynamite, and that its use as an explosive is intrinsically dangerous: *City of Chicago v. Murdock*, 212 Ill. 9, 103 Am. St. Rep. 221, 72 N. E. 4. But in proceedings to revoke the certificate to practice medicine of so-called "specialist," who advertised to cure nearly all diseases by certain electrical devices, and guaranteeing a cure, the court will not take judicial notice that such claims are false: *Macomber v. Board of Health*, 28 R. I. 3, 65 Atl. 263. Courts will take judicial notice that a rapidly moving body creates a partial vacuum in its path, which draws to such body objects near its path, and which objects are carried or thrown forward with a force proportionate to the rapidity of its movement: *San Antonio etc. Co. v. Mertink* (Tex. Civ. App. 102 S. W. 153 (a judgment for the plaintiffs in this case was reversed on appeal because of defect of parties, but the doctrine above announced was not questioned).

#### h. Geographical Facts.

1. *In General.*—The prominent geographical features of the country are proper subjects of judicial notice. Thus, where the city of San

Pasadena, California, sought to enjoin a water company which supplied water to the cities of South Pasadena and Pasadena, from selling its plant to the latter city, it was held that the courts will take notice that the two cities interested are situated in a comparatively arid region, where there is little, if any, water not already applied to some extremely valuable public or private use, and that water sources in that vicinity are in great demand, and command a high price when they can be purchased at all: *City of South Pasadena v. Pasadena Land & Water Co.*, 152 Cal. 579, 93 Pac. 490. And in *Brannan v. Henry*, 142 Ala. 698, 110 Am. St. Rep. 55, 39 South. 92, it was held that the supreme court judicially knows the ranges, townships and sections in a county.

2. *Surveys*.—Courts will take judicial notice of the system of surveys in a state. Thus in a suit to quiet title, where one of the parties deraigned title under a sale to the state for delinquent taxes which was described as the "S.  $\frac{1}{2}$  of N.  $\frac{1}{2}$ , Sec. 13, T. 19 S., R. 23 E.," in the county of Tulare, state of California, it was held that the description was sufficient to identify the property, though it failed to state the base and meridian: *Bank of Lemoore v. Fulgham*, 151 Cal. 234, 90 Pac. 936.

3. *Location of Railroads*.—Courts will take notice of the directions, runs and locations of the important railroads in the state: *Texas Central R. Co. v. Marrs* (Tex. Civ. App.), 101 S. W. 1177. Thus in an action by a shipper against a railroad company for failure to promptly deliver freight-cars, as ordered, it was held that the court would take judicial notice that the line of the defendant's road over which the shipments were to be made from Rose, Kansas, to Kansas City, Kansas, extended easterly from Rose to the eastern line of the state, and then for a long distance through the eastern line of Missouri, and returns in the state at Kansas City: *Patterson v. Missouri Pacific Ry. Co.* (Kan.), 94 Pac. 138.

And the courts of Texas will take judicial notice that several railroads run into the city of Texarkana: *Texas & P. R. Co. v. Black*, 87 Tex. 160, 27 S. W. 118; and that the Gulf C. & S. F. and the Houston & T. C. railroads touch the same points, and are practically parallel and necessarily competing lines: *Gulf C. & S. F. Ry. Co. v. State*, 72 Tex. 404, 13 Am. St. Rep. 815, 10 S. W. 81, 1 L. R. A. 849. Courts will also take judicial notice of the termini of railroads: *Galveston H. & S. A. Ry. Co. v. Johnson* (Tex. Civ. App.), 29 S. W. 428; and of the respective runs and location of railroads between a point in the state to a point in another state: *Texas & N. O. Ry. Co. v. Walker* (Tex. Civ. App.), 95 S. W. 743.

In *Worden v. Cole*, 74 Kan. 226, 86 Pac. 464, it was said that the supreme court of Kansas will take judicial notice of an important line of railroad which traverses the state upon a firmly established route and that certain lands conveyed to it by the authority of an act of Congress within the limits of such permanent location, and a part of the lands granted to the railroad company. But the courts

will not assume that the lines of the constituent members of a consolidated railroad company, when completed according to their charters, will be so located as to admit the passage of trains from one to the other continuously without break or interruption: *Georgia Pac. Ry. Co. v. Gaines*, 88 Ala. 377, 7 South. 382. Nor will the courts of Tennessee judicially know that the line of a railroad company chartered by the state lies partly within another state: *Hobbs v. Memphis & C. B. Co.*, 56 Tenn. (9 Heisk.) 873.

4. **Location of Counties and County Seats.**—Courts will take judicial notice of the county in which a certain city is located: *An-niston Electric & G. Co. v. Elwell*, 144 Ala. 317, 42 South. 45. And of the boundary lines of counties fixed by public statutes: *Merritt v. Trinity County*, 3 Cal. App. 168, 84 Pac. 675; *Stanford v. Bailey*, 122 Ga. 404, 50 S. E. 161; *Atchison T. & S. F. Ry. Co. v. Paxton*, 75 Kan. 197, 88 Pac. 1082; *State v. Southern Ry. Co.*, 141 N. C. 846, 54 S. E. 294. Thus in *Merritt v. Trinity County*, 3 Cal. App. 168, 84 Pac. 675, where one of two adjoining counties brought suit against the other to recover taxes paid it on land in the former, it was held the duty of the court to take judicial notice of which county the land was in. And in *Rogers v. Cady*, 104 Cal. 288, 43 Am. St. Rep. 100, 38 Pac. 81, that where lands are clearly and distinctly described by the complaint in a judicial proceeding by reference to the section, township and range of the United States government survey, the court must take judicial knowledge of the county in which they are situated.

5. **Location of Cities and Towns.**—Courts will take notice of the geographical position of cities and towns within the limits of their jurisdiction. Thus judicial notice will be taken that a certain city in the state is not on a railroad: *Green v. Lineville Drug Co.*, 150 Ala. 112, ante, p. 17, 43 South. 216; and that the county seat of a certain county is a municipal corporation: *City of Brownsville v. Arbuckle*, 30 Ky. Law Rep. 414, 99 S. W. 239. Judicial notice will be taken that a certain town is in a certain county: *Cleveland C. C. & St. L. Ry. Co. v. Miller*, 40 Ind. App. 165, 81 N. E. 517; also that two certain villages lie between two other towns: *Lowville & B. R. R. Co. v. Elliott*, 101 N. Y. Supp. 328, 115 App. Div. 884. Courts will take judicial notice that a certain place is a city, and the county seat of a certain county in another state: *Phillips v. Lindley*, 98 N. Y. Supp. 423, 112 App. Div. 283. But in *Ingersol v. Davis*, 14 Wyo. 120, 82 Pac. 867, where the question of defendant's absence from the state was material in determining when the statute of limitations began to run, testimony of a witness that he had seen them at the Denver Tramway Company, and that they were working there and living there, a block away from South Broadway and that he had not seen them in the state of Wyoming since, was held insufficient to show defendant's absence from the state, as the court could not take judicial notice of the location of these places.

Courts will take judicial notice of the existence of villages and towns, but it will not take notice of the extent of territory include.



in a village: *People v. Pederson*, 220 Ill. 554, 77 N. E. 251; though it is held in *Ex parte Wygant*, 39 Or. 429, 87 Am. St. Rep. 673, 64 Pac. 867, 54 L. B. A. 636, that courts will take judicial notice of statutes creating municipal corporations and of the extent of their limits as fixed thereby.

6. **Rivers, Lakes and the Navigability of Waters.**—Courts will take judicial notice of the location and navigable character of important rivers and lakes, but not as to those of insignificant capacity and doubtful utility. Thus, in *People v. Board of Supervisors*, 122 Ill. App. 40, the court refused to know judicially that Rock river was a navigable stream. It said, however: "It is true that the navigability of a river may be so generally known that courts will take judicial notice of its character, but this does not change the question from one of fact to one of law. . . . Rivers like the Mississippi and Ohio are so generally known to be navigable that courts may safely act on that assumption, without proof; still the navigability of those rivers is a fact of the same class as the navigability of any small stream about the character of which the most serious contention may exist. . . . It will not do to say that the character of streams of water as respects their navigability can never become the subject of judicial investigation, as a question of fact before a jury. If the court must take judicial notice of all streams that can be shown to be navigable, it follows that all others must be judicially known not to be navigable." In *McKinney v. Northcut*, 114 Mo. App. 146, 89 S. W. 351, it was held that, while the courts would take judicial notice of the navigability of all tide water and of rivers on which navigation is conducted as a matter of common knowledge, they would not notice whether a stream is navigable for the purpose of floating logs. Judicial notice will be taken that the Passaic river is a tidal stream, the bed of which, so far as the tide ebbs and flows, is the property of the state of New Jersey: *McCarter v. Hudson County Water Co.*, 70 N. J. Eq. 525, 61 Atl. 710. And that the Tennessee river is a navigable river: *Terrell v. City of Paducah*, 28 Ky. Law Rep. 237, 92 S. W. 310.

7. **Distances.**—Courts will take judicial notice of the distance between station towns on a certain railroad: *Johnson v. Atlantic Coast Line R. Co.*, 140 N. C. 574, 53 S. E. 362.

[For further discussion of all facts included under subdivision h (Geographical Facts) in this note, see the note attached to *Gunning v. People*, 82 Am. St. Rep. 439.]

1. **Historical Facts.**—Courts take judicial notice of matters of public history: *Payne v. Treadwell*, 16 Cal. 220; *Williams v. State*, 64 Ind. 553, 31 Am. Rep. 135; *Bell's Heirs v. Barnet*, 25 Ky. (2 J. J. Marsh.) 516; *Prince v. Skillin*, 71 Me. 361, 36 Am. Rep. 325; *Magee v. Chadoin*, 30 Tex. 644. Thus, courts take judicial notice of the abolition of slavery: *Glover v. Taylor*, 41 Ala. 124. That the Civil War was terminated prior to June 1, 1865: *Turner's Admr. v. Patton*, 49 Ala. 406. That the regular mails established by the laws of the United States were suspended in Louisiana prior to Febru-

ary 1, 1862: *Donegan v. Wood*, 49 Ala. 242, 20 Am. Rep. 275; that the people of Alabama were in a condition of financial embarrassment in the year 1867: *Ashley's Admr. v. Martin*, 50 Ala. 537; of the disturbed condition of business during the period of the Civil War, and of the difficulty of making safe and profitable investments during that period: *Foscue v. Lyon*, 55 Ala. 440. And of the period covered by the Civil War: *Hanks v. Harris*, 29 Ark. 323; and of Sherman's march to the sea and the date of its occurrence: *Williams v. State*, 67 Ga. 260. Courts will take notice of the years during which the Boer war was in progress: *Dowie v. Sutton*, 227 Ill. 183, 118 Am. St. Rep. 266, 81 N. E. 395.

Judicial notice will be taken of a county created by a public statute, but not of the time of the division of counties and the erection of new ones by county commissioners under the general law: *Buckinghouse v. Gregg*, 19 Ind. 401. Courts will take judicial notice of the location and limits of the grant of the state of Virginia commonly called "Clarke's Grant": *Carr v. McCampbell*, 61 Ind. 97. Judicial notice will be taken that the people who colonized and settled Illinois emigrated thereto from states in which the common law was in force: *Holmes v. Mallett*, *Morris* (Iowa), 82. In *Pitts v. Lewis*, 81 Iowa, 51, 46 N. W. 739, it is held that judicial notice will be taken of the date when a county in the state was organized; and to the same effect is the ruling in *Ellsworth v. Nelson*, 81 Iowa, 57, 64 N. W. 740. But in *Trimble v. Edwards*, 84 Tex. 497, 19 S. W. 772, where, in an action of trespass to try title, a deed filed for record certified by the clerk of a mother county from which another county had been organized, was held properly excluded, because it was not proven when the other county was organized. Courts judicially know that the state of Missouri was not one of the states that joined with the Confederate states: *Douthitt v. Stimson*, 63 Mo. 268. And judicial knowledge will be taken of the historical fact that a tract of land known as the "Plutney Estate" was ceded by the state of New York to the state of Massachusetts by treaty and deed of cession executed December 16, 1786, and that the Indian title to such land has been extinguished under proper authority: *Howard v. Moot*, 64 N. Y. 262. Courts will take judicial notice that the state of Missouri had representatives in the provisional congress of the Confederate states prior to the year 1861, and was represented there till the end of the Civil War: *Wood v. Cooper*, 49 Tenn. (2 Heisk.) 441. But while the courts will take judicial notice of the actual existence of the Civil War from 1861 to 1865, they will not take notice of the fact that civil law was suspended in a certain county at a particular time, or that at such time clerks of the courts could not issue process and sheriffs levy execution and sell lands. Courts will take judicial notice of General Ewing's Military Order No. 11, dated August 25, 1863, requiring removal from residences of persons in border counties: *Holmes v. Pring*, 93 Mo. 452, 6 S. W. 347; but not of a military order extending the time of stay of execution on a judgment by a military commander in the war: *Johnson*

v. Wilson's Admr., 29 Gratt. (Va.) 379; and to same effect is *Burke v. Miltenberger*, 86 U. S. 519, 22 L. ed. 158. Nor will judicial notice be taken of the position of the lines in the field at any particular period of the war: *Kelley v. Story*, 53 Tenn. (6 Heisk.) 202. In the recent case of *Day v. Smith*, 87 Miss. 395, 39 South. 526, decided December 17, 1905, the controlling question was whether the sale of the land in controversy on May 6, 1861, for the unpaid taxes of 1860, and the tax deed executed and delivered to the purchaser thereunder were void, for the reason that the taxes of the two intermediate years—1861 and 1862—were in aid of the Confederate states government. It was held that judicial notice would be taken of the condition of the county in 1861, of what the actual status of Mississippi was at that time, and that Mississippi then had a de facto government, with de facto officials, which officers were bound, necessarily, to execute the mandates of the de facto government then in power and exercising authority. But though it is unquestionably true that the courts will take judicial notice of the historical facts connected with the Civil War, and of the condition of the county during that period, they will not take judicial notice that a person entertaining particular views was not safe in his person or property in a particular county at some particular time during the period of that war. An interesting illustration of this is afforded by the case of *Simmons v. Trumbo*, 9 W. Va. 358. The plaintiff in this case sought to recover from the defendant the amount of a bond, which defendant had contracted during the war and paid in 1862 in Confederate money. At the time of payment, plaintiff first refused to accept Confederate money, but was told by defendant that it was as good as any money, and if he did not accept it he would be considered disloyal to the South and be put in prison and kept there during the war. Plaintiff's contention was that he had accepted payment in the Confederate currency under duress per minas, and the question before the court was whether it would judicially recognize that the statements of defendant as to plaintiff's imprisonment would be true, if the plaintiff had refused to accept the money offered. Plaintiff was awarded a verdict in the lower court, but on appeal the supreme court said: "In deciding this question this court should not only consider all the facts certified, but also such facts as are matters of general history, affecting the whole people, of which the courts take judicial notice: such as that the late war was pending at the time these bonds were surrendered, having commenced in Virginia on April 27, 1861; that Confederate notes were issued early in the war by the Confederate government, and that these notes, in a short time, became almost exclusively the currency of the Confederate states; that at the time the first of these bonds was surrendered, say, sometime between December, 1861, and March, 1862, Confederate notes were but slightly depreciated, and were received then, throughout the Confederate states, in the payment of debts, and in all the channels of trade, without doubt or question; that the county of Pendleton was then, de facto, within the jurisdiction of the gov-

ernment of Virginia, at Richmond, which adhered to the Confederate states, and not de facto within the jurisdiction of the restored government of Virginia at Wheeling, the courts taking judicial notice of the territorial extent of the jurisdiction and sovereignty, exercised de facto, by their own government; and that lastly, Confederate notes were never made a legal tender in payment of debts by the Confederate government. . . . And we hold, in this case, . . . that, in the absence of all evidence to the contrary, this court ought to have rather assumed that every man, whether a sympathizer with the Union or with the Confederate states, was everywhere safe in his person and property, so long as he demeaned himself properly and obeyed the laws of the de facto government, under which he lived; and as no law required him to receive a particular currency, that neither his person nor property could have been endangered by simply declining to receive such currency. If such was not the case, in any particular locality, this fact ought to have been proved, and not been thus assumed by the court, as a historical fact, of which the court could take judicial notice."

Judicial notice will be taken that a certain portion of territory in the state of Texas was embraced in the territory of Austin and Williams from February, 1831, to April 29, 1834: *Robertson's Admr. v. Teal's Heirs*, 9 Tex. 344; and courts also know of the existence of Martin DeLeon's colonial contract, and that Fernando DeLeon was commissioner of that colony: *Wheeler v. Moody*, 9 Tex. 372; and that Martin DeLeon was authorized to colonize within the coast border: *Kilpatrick v. Sisneros*, 23 Tex. 113. But in *Morris v. Edwards*, 1 Ohio, 189, it was held that public history, not of the state at large, but of a particular town or city, as, for instance, that bank notes were below par, or other facts of recent occurrence, relating to a particular section of the country, cannot be judicially noticed by the courts. And in *McKinnon v. Bliss*, 21 N. Y. 206, it was held that the appellate court would not take judicial notice of facts recited in a local history, but that to justify judicial knowledge of historical facts, they must be of a general and public nature; and not those which concern individuals or merely local communities; and the court cites with approval the case of *Gregory v. Baugh*, 4 Rand. 611, which was an action brought by Baugh to recover his freedom. The case turned upon the question whether the plaintiff was of Indian descent, and the trial judge charged the jury that it was a question to be decided upon probabilities and circumstances, among which it was lawful for the jury to consider "facts connected with the history of the country," as if formally proved to them. Said Judge Carr, speaking for the appellate court: "This, I presume, cannot mean that the jury are to consider such facts as if formally proved, when proved; but that without proof, they are to consider them as if formally proved; that is, that each juror might take any facts as formally proved which he may have heard in any way to satisfy his mind, and might consider as connected with the history of the country.

If this be the meaning, it is contrary to law; for it is laid down in the books that there must be some proof adduced of historical facts."

But, though in the case of *McKinnon v. Bliss*, 21 N. Y. 206, the court refused to take judicial notice of matters of purely local history, the general rule undoubtedly is that courts will take judicial notice of whatever ought to be generally known within the limits of their jurisdiction, and this rule is laid down by the court of appeals of New York in *People v. Snyder*, 41 N. Y. 397, where it was held that the courts of New York would take judicial notice that the western portion of the state of New York was, by its own act, ceded to the state of Massachusetts, and, by the latter, conveyed to certain parties, who afterward, under the proper authority of both states and of the Union, extinguished the title of the Indians to it. And in *Lanfear v. Mestier*, 18 La. Ann. 497, 89 Am. Dec. 658, it was held that the courts of Louisiana would take judicial cognizance of all military orders issued by the commanding general or military governor while the city of New Orleans was held by the United States troops, and which affected proceedings of the courts of the state. And the courts of Alabama will take judicial notice that all the lands of a certain county in the state were held under the government of the United States: *Lewis v. Harris*, 31 Ala. 689. And, also, that the mails between Huntsville, Alabama, and New Orleans, Louisiana, were re-established prior to December 18, 1865. The courts of Tennessee will take judicial notice when the courts in a certain county in the state were closed during the Civil War and military authority prevailed: *Killsbrew v. Murphy*, 50 Tenn. (3 Heisk.) 546. Matters of contemporaneous history are also proper subjects of judicial cognizance. Thus, on the question of the proper assessment of railroad property, the courts will take judicial notice that railroads have been assessed and paid ad valorem taxes in previous years, and making it the duty of the railroad assessors, in fixing assessments of the roads, to take into consideration the value of their franchises: *Gulf & S. I. R. Co. v. Adams*, 85 Miss. 772, 38 South. 348. And in *Kentucky I. C. & Mfg. Co. v. Adams*, 32 Ky. Law Rep. 823, 106 S. W. 1198 (decided January 30, 1908), where the question was whether certain lessees were entitled to specific performance under the terms of a lease, which contained a right to purchase, when they had abandoned the land in 1898 and ceased to pay rent, but reoccupied it four years later, and before the expiration of the lease. It was held that the court would take judicial notice that the country had not recovered in 1898 from the panic of 1893, and that all values were low, and that there was little market for real estate, and that in 1902 the country was rapidly recovering from the panic and prices everywhere had risen. So, too, the courts will take judicial notice that, under the treaty of Paris between the United States and the Kingdom of Spain, the Philippine Islands became a part of United States territory, and that after that time the inhabitants of those islands were in a state of insurrection against the government; and also that such insurrection had not ended in 1902 as to the Island of

**Mindinao:** *La Rue v. Kansas Mutual Life Ins. Co.*, 68 Kan. 539, 75 Pac. 494; and in an action to recover damages for injuries to a passenger on a street-car, resulting from stones thrown by strike sympathizers, the court will take notice of the fact that on a certain date, which was the date of the injury, the governor had ordered a military force to the town in question to preserve order, and had issued a proclamation calling upon all persons, riotously assembled, to disperse: *Bosworth v. Union R. Co.*, 26 R. I. 309, 58 Atl. 982.

**j. Facts Relating to the Circulating Medium.**—The character of the circulating medium, and popular language in reference to it, will be judicially noticed by the courts. Thus, the courts of Alabama will take judicial notice that, as a general thing, contracts made in January, 1865, were made with reference to Confederate currency: *Buford v. Tucker*, 44 Ala. 89, and that during the Civil War between the states, Confederate state treasury notes, or their convertible equivalents, composed the only circulating medium in Alabama: *Morris v. Morris*, 58 Ala. 443. In *Dillard v. Evans*, 4 Ark. 175, it is held that the court is bound to take judicial notice of the fact that in March, 1840, bank paper continued the common medium of exchange or ordinary circulation in the state of Arkansas; and where a bill was drawn for "\$2,000 in currency," the courts will take judicial notice that at the date of the bill currency was not regarded as cash by the community, and hence that the bill was non-negotiable: *Farwell v. Kennett*, 7 Mo. 595. But in *State v. Shelton*, 26 Tenn. (7 Humph.) 31, it was held that whether bank notes circulate as currency is a question of fact which must be proved; and to the same effect is *Laird v. Folwell*, 57 Tenn. (1 Heisk.) 92. Though the courts of Tennessee do not recognize the power of the Confederate states to coin money, they will take judicial notice of the fact that such money was issued, and for a time served the purpose of currency: *Henley v. Franklin*, 43 Tenn. (3 Cold.) 472, 91 Am. Dec. 296; and judicial knowledge will be taken of the fact that gold and silver disappeared as a circulating medium during the Civil War in the southern states: *Wood v. Cooper*, 49 Tenn. (2 Heisk.) 441.

**k. Statistical Facts.**—As the courts take judicial notice of historical facts, so, also, will they take such notice of statistical facts. Thus, judicial notice will be taken of the results of the United States census as shown by the returns: *People v. Williams*, 64 Cal. 87, 27 Pac. 939; *Worcester Nat. Bank v. Cheney*, 94 Ill. 430; *Stultz v. State*, 65 Ind. 492; *Hawkins v. Thomas*, 3 Ind. App. 399, 29 N. E. 157; *Board of Managers v. County Court*, 89 Mo. 237, 1 S. W. 307. Thus, the courts will take judicial notice of the population of a county: *State v. Marion County Court*, 128 Mo. 427, 30 S. W. 103, 31 S. W. 23; *Farley v. McConnell*, 7 Lans. (N. Y.) 428. And in *Ruckert v. Richter*, 127 Mo. App. 664, 106 S. W. 1081, which involved the question of the jurisdiction of a justice of the peace in Cole county, Missouri, judicial notice was taken that such county had less than five thousand population. So, also, will the courts take judicial

notice of the population of cities and towns: *Ferrell v. Ellis*, 129 Iowa, 614, 105 N. W. 993; *Stultz v. State*, 65 Ind. 492. Thus, in re Constitutionality of Senate Bill No. 293, 21 Colo. 38, 39 Pac. 522, it was held that, when a bill, by its terms, was made applicable to all towns and cities contiguous to any city of one hundred thousand or more population, the court would take judicial notice of the fact that there was only one city in the state with such population, and that there is no probability that any other would come within its terms for many years; and in *Gannett v. Independent Telephone Company of Syracuse*, 55 Misc. Rep. 55, 106 N. Y. Supp. 3, the question was whether or not the use of a city street for the maintenance of telephone poles and wires was a street use. It was assumed on the trial that a certain street in the city was in a thickly populated district, but after the evidence was closed the plaintiff raised the point that there was no evidence but that the street in question was sparsely populated, and had the characteristics of a rural highway. It was held that judicial notice would be taken of the fact that the city had over one hundred thousand population.

The courts will take judicial notice of standard mortality tables showing the natural expectancy of duration of one's life at a given age: *McDonnell v. Alabama Gold Life Ins. Co.*, 85 Ala. 401, 5 South. 120; *Kansas City M. & B. R. Co. v. Phillips*, 98 Ala. 159, 13 South. 65; *Valente v. Sierra Ry. Co. of California*, 150 Cal. 534, 91 Pac. 481; *Alexander's Exr. v. Bradley*, 66 Ky. (3 Bush.) 667; *Davis v. Standish*, 26 Hun (N. Y.), 60; *Abell v. Mutual Life Ins. Co.*, 18 W. Va. 400. The courts of Indiana will take judicial notice that national bank stock constitutes a material portion of the moneyed capital of the state: *Wasson v. First Nat. Bank*, 107 Ind. 206, 8 N. E. 97. In *Georgia Ry. & Bkg. Co. v. Wright*, 125 Ga. 589, 54 S. E. 52, where a railroad company sought to enjoin the enforcement of an execution for the collection of taxes, it was held that though the courts of Georgia will take judicial notice that the mass of property in the state is made up of lands and the different forms of personalty, such notice cannot be taken as to the quantity of personalty.

**1 Facts Pertaining to the Phenomena of Animal and Vegetable Life.**—Courts will take judicial notice of the facts of natural history. Thus, in the very recent case of *Scarborough v. Woodill* (Cal. App.), 93 Pac. 383, one of two adjoining owners sought to enjoin his cotenant in certain line trees from exercising control over their joint property therein, by cutting down every alternate tree, until he had partitioned his part of the line. The question was whether the trees served to shelter and protect the buildings of the plaintiff, i. e., whether there were any peculiar conditions or circumstances, justifying the issuance of an injunction, none being specified in either the complaint or the findings. "This court," said Taggart, J., "will take judicial notice of the flora and climatic conditions of this country." And in *Ex parte Hawley* (S. D.), 115 N. W. 93, it was held that judicial notice will be taken of the fact that trees and other

forms of plant life are subject to destructive communicable diseases. But in *Patterson v. McCausland*, 3 Bland (Md.), 69, it was held that courts cannot judicially know that the eccentric layers in the trunk of a tree mark each year's growth of the tree, and thus indicate its age by the number of such layers. It is announced in *Grimes v. Eddy*, 126 Mo. 168, 47 Am. St. Rep. 653, 28 S. W. 756, 26 L. R. A. 638, that the courts will take judicial cognizance of the fact that what are commonly known as "Texas cattle" are infected with contagious disease at certain periods in the year.

In *Lyon v. Marine*, 55 Fed. 964, 5 C. C. A. 359, the question was to determine what custom duties should be required on a certain shipment of wools and hairs. It was held that judicial notice would be taken of the fact that native sheep of all countries have a moderate percentage of hair in their fleeces, and is therefore more or less depreciated in value thereby.

m. **Facts Relating to Human Life, Health, Habits and Acts.**—Courts will take judicial notice of those facts relating to human life, health, habits and acts known to men of ordinary understanding. Thus, in *Southern Ry. Co. v. Covenia*, 100 Ga. 46, 62 Am. St. Rep. 312, 29 S. E. 219, 40 L. R. A. 253, it was held that in an action by the parent of a child under two years of age to recover for the loss of services of such child, by negligent death, the court will take judicial notice, on demurrer, of the fact that a child of such tender years is incapable of rendering services authorizing the parent to recover. Said Simmons, J.: "The question is therefore squarely made whether the court, on demurrer, can take judicial cognizance of the fact that a child of this tender age is incapable of rendering such service as would authorize the parent to recover, or whether in such a case the court is bound to submit the matter to the jury. . . . The fact that a child of less than two years of age cannot perform any services of value to its parent is matter of common knowledge to all men. It is as well known to the judge as it is to the jury. It being so known to the judge, why should he not act upon it when he is called upon to do so by proper pleading? Why is he less qualified than the jury to declare a well-known fact? Why should he submit such a question to a jury when, if they found contrary to this well-known fact, he would be compelled to set aside their verdict? Why should he go through the farce of a trial, at the expense of the country in time and money, in order to have a jury decide a fact which is already well known to everyone? There is no necessity for a jury trial where there is no issue of fact. In our opinion, there can be no issue of fact as to the ability of a child two years old to perform valuable services. Even if the parents should testify that a child of that age could render services of the value of two dollars per month, it would be so inconsistent with every person's knowledge of the incapacity of children of that age to render service, that such testimony would be unworthy of credit." And the recent case of *Wolfe v. Georgia Ry. & Electric Co.*, 2 Ga. App. 499, 58 S. E. 899, is extremely interesting because of the novel question it decides with reference to what judicial notice



will be taken of the status, condition, and habits of a race rapidly growing in numbers, especially in the southern states. The action here was to recover damages from the street-car company for the alleged misconduct of a conductor of the defendant railway company, in compelling a white passenger, but whom he thought to be of African descent, to occupy that portion of the car designated for negroes. A demurrer of the complaint on the ground that no cause of action was stated was sustained by the lower court, and the controlling question on review was, whether the appellate court would take judicial notice that it was an actionable wrong to publicly call a white man a negro. The question was given very careful consideration by the court, and the conclusion it reached, and the reasons therefor, can be best understood from the language of Judge Russell, who delivered the opinion. Said he: "The question has never heretofore been directly raised in this state as to whether it is an insult to seriously call a white man a negro, or to intimate that a person apparently white is of African descent. We have no hesitation, however, after the most mature consideration of every phase of the question, in declaring our deliberate judgment to be that the willful assertion or intimation embodied in the declaration now before us constitutes an actionable wrong. We cannot shut our eyes to the facts of which courts are bound to take judicial notice. Certainly, every court is presumed to know the habits of the people among which it is held, and their characteristics, as well as to know leading historical events and the law of the land. To recognize inequality as to the civil or political rights belonging to any citizen or class of citizens, or to attempt to fix the social status of any citizen, either by legislation or by judicial decisions, is repugnant to every principle underlying our republican form of government. Nothing is further from our purpose. . . . But the courts can take notice of the architecture without intermeddling with the building of the structure. It is a matter of common knowledge that, viewed from a social standpoint, the negro race is in mind and morals inferior to the Caucasian. . . . We are not compelled to plant our decision on the ground of inequality or inferiority. We take judicial notice of an intrinsic difference between the two races. Certainly, if a court can take judicial notice of near a thousand things, some even of slight importance, which have been judicially recognized without proof, this court may be presumed to observe that there is a marked difference between a Caucasian and an African. . . . An insult or a slander may consist in the imputing of crime. But an insult does not necessarily consist in the use of language imputing a crime. It more generally consists in the use of language effecting the social status and personal feelings or business relations of the person insulted. Courts and juries are bound to notice the intrinsic difference between whites and blacks, and the mixture of whites and blacks in this country."

Judicial notice will be taken of the fact that a great majority of medical writers and practitioners advocate vaccination as a

preventive of smallpox: *Auten v. Board of Directors of Special School District*, 83 Ark. 431, 104 S. W. 130; and that vaccination is commonly believed to be a preventive of smallpox: *Viemeister v. White*, 88 App. Div. 44, 84 N. Y. Supp. 712; affirmed, 179 N. Y. 235, 103 Am. St. Rep. 859, 72 N. E. 97, 70 L. R. A. 796. So, too, courts will take judicial notice that pneumonia is a disease: *Kiernan v. Metropolitan Ins. Co.*, 13 Misc. Rep. 39, 34 N. Y. Supp. 95; and in an action involving the question of adverse possession where the record showed that the defendant's ancestor had been dead thirty-two years before the commencement of the suit, the court will judicially know that ten years had elapsed since his children attained their majority: *Floyd's Heirs v. Johnson*, 12 Ky. (2 Litt.) 109, 13 Am. Dec. 255. In *Hunter v. New York O. & W. Ry. Co.*, 116 N. Y. 615, 23 N. E. 9, 6 L. R. A. 246, a brakeman sought to recover damages for personal injuries caused by striking his head against something while sitting on top of a boxcar going through a tunnel. The negligence charged was in not giving plaintiff notice of a brick arch in the tunnel which reduced its height to four feet seven inches above the top of the car; it was held that the court judicially knows that unless the plaintiff was nine feet high, his head could not have struck an object four feet seven inches above the top of the car, and that there is no authenticated instance of a man of such height; and a judgment for the plaintiff was accordingly reversed. Said Brown, J., speaking for the court: "There was no evidence given on the trial as to the plaintiff's size or height, and the argument is now made that as the jury saw him, and could, therefore, judge of his size, it must be assumed that it was not impossible for his head to have reached as high as the arch; and the learned judge who presided at the trial appears to have submitted this question to the jury, saying: 'If the plaintiff was sitting down, it is for you to say whether his head would reach to that height.' . . . We know that the plaintiff's head could not have reached to a height sufficient to come in contact with the arch. We know that the average height of a man is less than six feet; that the average length of the body from the lower end of the spine to the top of the head is less than thirty-six inches; that the measurement varies but little in adults; and that the chief difference in the height of men is in the length of their lower limbs. To assume, therefore, as we must, in order to sustain the judgment, that the top of the plaintiff's head, when in a sitting position, was four feet seven inches above the board on which he was sitting, is to assume him to have been not only far above the average height of man, but of a height beyond that of which we have any authentic record. . . . I think, therefore, the court may take judicial notice of the fact that a man could not strike his head against an obstruction four feet and seven inches above the place on which he was sitting." Courts will take judicial notice that it is more dangerous to ride on the running-board of a street-car than on the platform or inside: *Bridges v. Jackson Electric Ry. L. & P. Co.*, 86 Miss. 584, 39 South. 788; and that overflows and

floods are followed by disease, and that swamps are detrimental to public health: *Applegate v. Franklin*, 109 Mo. App. 293, 84 S. W. 347. Judicial notice will also be taken that cigarettes are generally made with tobacco rolled within "small pieces of tissue paper of the size of about 1¼ inches by 3¼ inches": *Kappes v. City of Chicago*, 119 Ill. App. 436. In an action to recover the value of a watch, where the plaintiff had left his vest on the counter of a clothing store while trying on clothes, and the vest was taken, it was held that the court would take judicial notice that business men generally wear their watches in their vests during business hours: *Wamser v. Browning King Co.*, 95 N. Y. Supp. 1051, 109 App. Div. 53. The courts will take judicial notice that immediately after the Civil War the negro race was far inferior to the white race in intelligence and knowledge of the relations of human life: *Hunt v. Wing*, 57 Tenn. (10 Heisk.) 139. But the phrase "colored men" has no legal technical significance which the courts are bound judicially to know: *Pauska v. Daus*, 31 Tex. 67.

In *Bolton v. Ovitt*, 80 Vt. 362, 67 Atl. 881, the action was to recover for personal injuries to a child of ten years, whose hand had been drawn into the cogwheels of a corncutter, so that his thumb was broken and bruised and his hand otherwise injured, causing him to lose two fingers and a part of the hand. There was no proof adduced that the child had suffered any pain from the injury, and it was strenuously insisted by defendant's counsel that, under the modern treatment of injuries, a patient cannot recall a moment of pain or suffering in a large number of cases; and that in view of aseptic surgery and the use of anesthetics and the great strides of modern science, that no inference of pain or suffering from the mere fact of an injury could be drawn. But it was held that the court would take judicial notice, without proof, that the plaintiff suffered pain, there having been no evidence showing that the plaintiff received any such treatment as that contended for by defendant's counsel.

n. **Language, Words and Phrases, and Abbreviations.**—Courts will generally understand words in common use in the same sense in which they are usually understood by the masses of men, without proof. Thus in *Edwards v. San Jose Printing and Pub. Soc.*, 99 Cal. 431, 37 Am. St. Rep. 70, 34 Pac. 128, which was an action for a libelous publication made preceding an election, accusing plaintiff of "having charge of the sack," it was held that judicial notice would be taken of the fact that the word "sack" signifies, in the current newspaper literature of the day, a corruption fund. Said the court: "There can be no doubt that where a libel or slander is couched in language having a covert meaning not apparent upon its face, or in words or phrases not used otherwise than as slang, or cant terms, it is necessary for a plaintiff not only to allege and prove the slanderous or libelous sense in which the words were used by the defendant, but also that they were understood in the same sense by those to whom they were addressed. But we are of the opinion that this case does not fall within the rule just stated. Courts cannot affect

to be ignorant of the recent meaning which the word 'sack' has acquired in the current newspaper literature of the day, when used in the connection in which it appears in the publication complained of. As thus used it signifies a fund in hand to be used for the purposes of corruption; and to say that a person has charge of such a fund to be used on a given occasion is, in effect, to say that such person is to disburse the fund for the purposes of corruption. This meaning was doubtless first given to the word by vile and corrupt persons, engaged in distributing and receiving such funds, and, when first used in that sense, might well have been regarded as a slang expression, of the meaning of which courts would not then have taken judicial notice, but it is now so frequently used to convey this particular meaning, that it can hardly be considered, when employed for that purpose, as simply the language of slang and understood by the vulgar." In *Ex parte Berry*, 147 Cal. 523, 82 Pac. 44, an ordinance which prohibited the use of automobiles on certain roads was attacked as being unreasonable. No proof was submitted as to what an automobile was, and this was held unnecessary, as the court would assume judicial knowledge of an automobile, and its characteristics—i. e., that it made unusual noises, is usually made to go at great velocity, was highly dangerous when used on country roads, and was liable to frighten horses, etc. But in *City of Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572, the constitutionality of an act was involved, which contained a proviso that no "black Republican or indorser or approver of the *Helper's Book*" should be appointed to any office under the board of police. It was held that the court could not judicially know who were meant to be affected by the proviso, though it was generally understood that it referred to persons of certain political and religious opinions.

And while the courts will take judicial notice of the meaning of words in the English language, they will not do so where such words are ambiguous or have two distinct meanings. Thus, to charge a physician with "malpractice" in a particular case is not conclusively libelous in itself, if untrue, but is a question for the jury, because such word "has several meanings; one of them implying illegal or immoral conduct, is libelous; and the others—bad or evil practice, practice which is not good, practice which is contrary to established rules—are not libelous: *Rodgers v. Kline*, 56 Miss. 808, 31 Am. Rep. 389.

Courts will also take judicial notice of the fluctuations and mutations of language: *Venada's Heirs v. Hopkins' Admr.*, 24 Ky. (1 J. J. Marsh.) 285, 19 Am. Dec. 92. Thus, in action upon a note dated on the twelfth day of July, 1817, payable in "Kentucky currency," the question was whether the action could be maintained. It was held that if, at the date of the note, anything but gold or silver had become the only medium of universal circulation (a fact the court is bound judicially to know), then the suit could not be maintained, because at the date of the note Kentucky currency never would be understood in its popular acceptance to mean anything but gold or silver, which was then the common circulating medium in the state,

and that a note subsequently given, after the suspension of specie payment, and a paper circulating medium had been established, payable in the "currency of the state" could not be maintained, because "currency of the state" would not be for the payment of money: *Lampton v. Haggard*, 19 Ky. (3 T. B. Mon.) 149. So, also, the courts will take judicial notice of the vernacular language of the people and whether given words, letters and figures are or are not couched in the ordinary language used by the courts and the people. Thus, in an action to determine adverse claims to land, when the defendant set up a tax deed, and it appeared that the land was described in the assessment as "N.W.<sup>4</sup> N.W.<sup>4</sup>, of N.E.<sup>4</sup> N.E.S.W., W.<sup>2</sup> S.W.," it was held error to permit the defendant to file an amended answer and prove how these letters were generally understood through the state and those parts of the United States where the government system of surveys was used for descriptions, since the court would judicially notice the vernacular language and decide what abbreviations and symbols and ideas have been adopted by the people generally, and become a part of the language: *Power v. Bowdle*, 3 N. D. 107, 44 Am. St. Rep. 511, 54 N. W. 404, 21 L. R. A. 328.

And it is generally established by the cases that courts will take judicial notice of the meaning of abbreviations which are in common use and have a well-understood meaning among people in general. Thus courts will judicially know the meaning of the abbreviation "admr.": *Moseley's Admr. v. Mastin*, 37 Ala. 216. And in *Estate of Lakemeyer*, 135 Cal. 28, 87 Am. St. Rep. 96, 66 Pac. 961, it was held that the court would take judicial notice that the words and figures "New York, Nov. 22, '97," appearing as the date of a holographic will, constituted a sufficient date. "The object of writing is merely to express the thought or intention of the writer; and this may be as effectually done by abbreviations of words or other conventional signs, if commonly used and generally recognized, as by words fully written or spoken. Such abbreviations form, indeed, part of language, and do not differ essentially in their nature from words which, like them, are themselves merely signs of thought." And the above doctrine is upheld in *Dages v. Brake*, 125 Mich. 64, 84 Am. St. Rep. 556, 83 N. W. 1039. Judicial notice will be taken that the letters "N. P.," following the name of a person signing the certificate of an oath, clearly indicate the office of notary public: *Rowley v. Berrian*, 12 Ill. 198. But in *Johnson v. Robertson*, 31 Md. 476, it was held that the court could not judicially know the meaning of the words "October 3-4" appearing at the foot of a newspaper advertisement.

Courts will take judicial notice that the letters "C. O. D." are not cabalistic, but have acquired a fixed and determinate meaning: *United States Express Co. v. Keefer*, 59 Ind. 263; *State v. Intoxicating Liquors*, 73 Me. 278. But a different ruling as to the characters "C. O. D." from that followed in the two last cases cited is found in *McNichol v. Pacific Express Co.*, 12 Mo. App. 401, where in a suit against an express company involving a shipment C. O. D. the court said: "We do not know that the meaning of the abbreviation

'C. O. D.,' as used by expressman, is sufficiently a matter of common knowledge that the circuit court should take judicial notice of it. . . . Ordinarily, the construction of written instruments is for the court and not for the jury; but when a writing contains technical (other than legal) terms, mercantile abbreviations or phrases, or obscure expressions, the meaning of such terms or expressions is to be ascertained by the jury." Though in *South Missouri Land Co. v. Jeffries*, 40 Mo. App. 360, it was held that the court would take judicial notice that the abbreviation "Supt." means superintendent, and that he is a managing agent; and in *Weaver v. McElhanon*, 13 Mo. 89, it was stated that judicial notice would be taken of abbreviations of man's Christian name, and the court accordingly took such notice of the fact that a summons reciting the signing of a note by "Christy" or "Christ" McElhanon referred to a note signed by Christopher McElhanon; and this rule that judicial notice will be taken of abbreviations in Christian names is also announced in *Stephen v. State*, 11 Ga. 225. But in *Andrews v. Wynn*, 4 S. D. 40, 54 N. W. 1047, where a mortgage was executed by "Edward H." Andrews, and the complaint in foreclosure alleged its execution by defendant "E. H." Andrews, it was held that the court could not judicially recognize that Edward H. and E. H. were one and the same persons, or that "E. H." is not the full Christian name of a person.

And in *Accola v. Chicago B. & Q. R. Co.*, 70 Iowa, 185, 30 N. W. 503, where a petition filed with the clerk of the circuit court, prior to taking depositions to perpetuate testimony, recited the defendant's name as "C. B. & Q. R. Co.," and stated that plaintiff intended to bring an action against the same, it was held that the court could not judicially know that the Chicago, Burlington and Quincy Railroad Company was the defendant referred to.

The courts will take judicial notice that a note payable at a bank in "Ind." is payable in the state of Indiana: *Burroughs v. Wilson*, 59 Ind. 536. Directly opposed to this is the case of *Ellis v. Park*, 8 Tex. 205, where it was held that the court could not take judicial notice that "St Louis, Mo.," as it appeared in the date of a contract referred to St. Louis in the state of Missouri; and the case of *Russell v. Martin*, 15 Tex. 238, where a judgment on a note payable in "New Orleans, La.," was obtained in Texas, for the legal rate of interest in Texas, was affirmed because the court could not judicially know that a note payable in New Orleans, Louisiana, was payable in the state of Louisiana.

In these two Texas cases the court gives no reason for its holding, and in view of the fact the abbreviations "La." and "Mo." are so universally recognized as meaning the states of Louisiana and Missouri, respectively, it seems hard to understand any ground upon which these cases can be sustained, especially when these abbreviations were preceded by the names of two large cities whose location in the respective states is a matter of common knowledge.

**o. Facts Relating to Time, Days and Dates.**—Courts will take judicial notice of the computation of time, and upon what day of the

week any certain day of the month falls. Thus judicial knowledge will be taken of the days on which Sunday falls: *Brennan v. Voght*, 87 Ala. 647, 11 South. 893; *Swales v. Grubbs*, 126 Ind. 106, 25 N. E. 877; *McIntosh v. Lea*, 57 Iowa, 536, 10 N. W. 895; *First Nat. Bank v. Kingsley*, 84 Me. 111, 24 Atl. 794; *Philadelphia W. & B. R. R. Co. v. Lehman*, 56 Md. 209, 40 Am. Rep. 415; *Webb v. Kennedy*, 20 Minn. 419; *Morgan v. Burrow* (Miss.), 16 South. 432; *Reed v. Wilson*, 41 N. J. L. (12 Vroom) 29; *Wilson v. Van Leer*, 127 Pa. 371, 14 Am. St. Rep. 854, 17 Atl. 1097; or of the particular day of the week on which any date mentioned in the testimony falls: *Cohn v. Kahn*, 14 Misc. Rep. 255, 35 N. Y. Supp. 829. Courts will take judicial notice that the date on which a judgment by default was recorded in a given year was, or was not, a day which would render the default prematurely taken: *Bethune v. Hale*, 45 Ala. 522. And judicial notice will be taken of the time the sun rises on a given day: *People v. Chee Kee*, 61 Cal. 404. Courts will take judicial cognizance of the fact that twenty years had not intervened between April 23, 1842, and January 31, 1862: *Harding v. Third Presbyterian Church*, 20 Ind. 71; and that the date of a notice claimed to have been given by a surety to the holder of a promissory note was on Sunday and that the notice was therefore void: *Chrisman v. Tuttle*, 59 Ind. 155. So, too, as courts judicially follow matters of general knowledge in marking time, they will also follow the hours as they move consecutively forward: *Hedderich v. State*, 101 Ind. 564, 51 Am. Rep. 768, 1 N. E. 47; and will know that 3:20 o'clock A. M. in October is not daylight: *Cincinnati Hamilton etc. Ry. Co. v. Worthington*, 30 Ind. App. 663, 96 Am. St. Rep. 355, 65 N. E. 557, 66 N. E. 478. Courts will take judicial notice that a certain day of a given calendar month was the first Monday in such month, and the day designated for the commencement of the term of a certain court: *State v. Todd*, 72 Mo. 288; and that the first Monday of October, 1873, fell on the sixth day of the month: *Mason v. Crowder*, 85 Mo. 526. Courts will take judicial notice of the rendition of a judgment on election day: *Rice v. Mead*, 22 How. Pr. (N. Y.) 445. But the courts are not bound to take judicial cognizance of what are or are not legal days: *Schlingmann v. Fiedler*, 3 Mo. App. 577. Judicial notice will be taken of the time the moon rises and sets on a given date: *Case v. Perew*, 46 Hun (N. Y.), 57; and the courts of North Dakota will take judicial notice that "standard" or "railroad" time has been in use for designating the hour of the day in that state since territorial times. The rule was applied in this case to a notice of sale of real estate under foreclosure of a mortgage. The notice designated that the sale would be at "2 o'clock P. M.," and it was made at that hour according to standard or railroad time, which was about twenty-eight minutes faster than "sun time," at the place of sale. The validity of the sale was attacked upon the ground that it had been made nearly a half hour too soon, but it was held that the sale was valid, as the court would take judicial notice as above stated: *Orvik v. Casselman*, 15 N. D. 34, 105 N. W. 1105.

Courts will take judicial notice of the coincidence of the days of the week with the days of the month; hence counsel may refer to an almanac in his argument to the jury, to show that a witness has testified falsely as to a certain day of a certain week or month, although the almanac is not proven or put in evidence: *Wilson v. Van Leer*, 127 Pa. 371, 14 Am. St. Rep. 854, 17 Atl. 1097.

The courts of Rhode Island will judicially know that November 6, 1906, was the date of holding an election for congressional, state and township officers under the general law: *State v. Custer*, 28 R. I. 222, 66 Atl. 306.

**p. Facts Relating to Weights, Measures and Values.**—No general rule can be stated with reference to those facts pertaining to weights, measures and values of which courts will take judicial notice. In *Pearson v. Darrington*, 32 Ala. 227, it is held that an appellate court cannot take judicial cognizance of the value of an attorney's services, by looking at his argument as shown in the record; and in *Millener v. Driggs*, 10 N. Y. St. Rep. 237, it was held that a court will not take judicial notice of what is a just and reasonable charge for a physician to make under given circumstances. While in *Bell's Heirs v. Barnett*, 25 Ky. (2 J. J. Marsh.) 516, it is said that judicial notice will be taken of the price of ordinary labor; and in *Adams Express Co. v. Hoeing*, 9 Ky. Law Rep. 814, this rule was extended to skilled labor, and in *Edwards v. Grand*, 121 Cal. 254, 53 Pac. 796, and *Hellier v. Russell*, 136 Cal. 143, 68 Pac. 581, to the reasonable value of the services of attorneys. The express company, in this case had lost some maps prepared for a geological survey. Though the maps had no market value, it was shown that it took two and one-half months to make them and that they were worth three hundred dollars. It was held that the court would take judicial notice that such work could only be performed by skilled labor, and that one hundred and twenty dollars per month was a fair compensation for such labor. Courts will not take judicial notice of the value of certain notes of a certain bank at any particular time. Thus, judicial notice cannot be taken of the value of the notes of the Bank of the Commonwealth at any particular time: *Feemster v. Ringo*, 21 Ky. (5 T. B. Mon.) 336. *Letcher v. Kennedy*, 26 Ky. (3 J. J. Marsh.) 701. Nor do the courts judicially know the value of Canada currency and the rate of Canadian interest: *Kermott v. Ayer*, 11 Mich. 181. But in *Johnston v. Hedden*, 2 Johns. Cas. 274, in an action on a bond, it was held that the court will take judicial notice of the value of an English pound and its equivalent in American money. Courts will not take judicial notice of the present value of a life insurance policy, depending partly on extraneous facts and partly on the accuracy of an intricate computation: *Price v. Connecticut Mutual Life Ins. Co. of Hartford*, 48 Mo. App. 281; nor will a court take judicial notice of what are fair and usual commissions on acceptances paid without funds: *Seymour v. Marvin*, 11 Barb. (N. Y.) 80. Courts will not take judicial notice of the rule for measuring corn in the shock, or the capacity of a railroad car of a certain size: *South & N. A. R. Co. v. Wood*, 74 Ala. 449, 41 Am. Rep. 819. But judicial notice will be taken of the fact that



the three customary surveys of logs upon the waters of the Penobscot river, namely, the "woods scale," "boom scale" and "scale below the boom," are widely different things: Putnam v. White, 76 Me. 551.

It has been held, but the holding is more than questionable, that judicial notice will not be taken of the quantity of land embraced in given courses and distances, for in Tison v. Smith, 8 Tex. 147, where a suit to recover the purchase price of land was defended upon the ground, among others, that the area contained in the metes and bounds did not embrace the quantity of land purchased, the court said: "Whether there is a deficiency or not would have to be determined by the evidence of a scientific surveyor, and we have no such evidence before us in the record."

**q. Facts Relating to Matters of Art and Skill.**—Courts will take judicial notice of arts which have been long recognized and the scientific principles on which they are based are generally known. Thus, courts will take judicial notice that photography is an art producing fac-similes, or representations of objects by the action of light on a prepared surface: Luke v. Calhoun County, 52 Ala. 115. But the court will not take judicial cognizance of the proper method of boring and tubing salt wells, so as to make the tubing serve its purpose and shut out detrimental matters that would otherwise injure the work: Clark v. Babcock, 23 Mich. 164. Upon a bill to restrain the infringement of a patent, where novelty is in issue, judicial notice may be taken of the character, construction, use, etc., of a manufactured article which has for many years been in common use throughout the country, such as the ice-cream freezer: Brown v. Piper, 91 U. S. 37, 23 L. ed. 200.

In determining the validity of a patent courts will take judicial notice of matters of common knowledge relating to the state of the art: Heaton-Peninsular Button Fastener Co. v. Schlochtmeier, 69 Fed. 592. Hence courts will take judicial notice that a patented article was well known and in general use long before the issuance of the patent: Terhune v. Phillips, 99 U. S. 592, 25 L. ed. 293. The court will take judicial notice that the "Baker Patents," for the process of treating coffee, and the products of such process, consists of cutting or crushing the roasted coffee and minnowing the dust, chaff and disengaged product, is void for lack of invention, because of the old and familiar use of the same process in the cleaning of grain so long known and practiced: Baker v. F. A. Duncome Mfg. Co., 146 Fed. 744. But unless the existence of the prior art is a matter of common knowledge, the courts will not take judicial notice of such fact, for in the recent case of American Sulphate Pulp Co. v. De Grass Paper Co., 157 Fed. 660, it was held that where neither the pleadings nor the proof, in an action for the infringement of a patent, brought into the record the prior art, the circuit court could not take judicial notice of it in determining the validity of the patent. Said Judge Cox: "It is only when the court, by bringing to its aid matters of common knowledge, is convinced that the patent is void on its face that such proof can be dispensed with."

**x. Facts Relating to the Management and Conduct of Occupations.**

Courts will take judicial notice of the general course of transactions, and the ordinary course of dealings among men. Thus, judicial notice will be taken that, as a general rule, trains running upon a railroad are run, directed and controlled by the owners of the road: *South & N. A. R. Co. v. Pilgreen*, 62 Ala. 305; and to same effect is *Evansville & C. R. R. Co. v. Smith*, 65 Ind. 92. And it is the duty of courts to judicially know the general source of the transactions of human life, and whatever ought to be known within the limits of their jurisdiction—e. g., the peculiar nature of lotteries and the mode in which they are carried on: *Saloman v. State*, 28 Ala. 83. But the courts will not judicially know that the footboard in front of a switch engine is the post of duty of the yardmaster: *Highland Ave. & B. R. Co. v. Walters*, 91 Ala. 435, 8 South. 357. The courts will take judicial cognizance of the fact that railroad lines are marked out and fixed by the company's engineer; and hence in an action against a railroad company for damages to property, caused by excavations in the construction of its road, it cannot be contended that the company is not connected with the damage, when, so far as is shown, the grading contractor might have avoided the injury by making shallower cuts: *Alabama M. Ry. Co. v. Caskry*, 92 Ala. 254, 9 South. 202. Courts will take judicial notice of the political and social conditions of the country which they rule, in order that legislation may be made properly applicable to protect the rights of miners in their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles to other localities to supply the necessities of gold-diggers: *Irwin v. Phillips*, 5 Cal. 140, 63 Am. Dec. 113. But judicial notice will not be taken of the rules of a board of brokers with reference to which a contract was made, when such rules do not amount to usages or customs of the trade in general: *Goldsmith v. Sawyer*, 46 Cal. 209.

Courts will take judicial notice of the dereliction of street railway companies in failing to provide adequate accommodations for their passengers. Hence in a suit for personal injury, where a passenger was injured by being thrown from the platform of a crowded street-car, there was no error in a refusal to charge that the plaintiff was guilty of negligence per se, though signs were posted on the car warning passengers not to ride on the platforms and at that particular time there was room inside, "for, while theoretically justice is blind, practically justice is ever alert, watchful and progressive": *Capitol Traction Co. v. Brown*, 29 App. D. C. 473, 12 L. R. A., N. S., 831.

Courts will take judicial notice of the fact, in the absence of proof to the contrary, that the owner of an omnibus line is a common carrier of passengers and baggage: *Parmelee v. McNulty*, 19 Ill. 556; and in an action against a railroad company to recover for an injury, where it appeared that the cars which caused the injury were propelled by a locomotive having on it a sign "Railroad Switching Association," and that the association was not a corporation, but an

association of several railroads, but who they were was not proven, it was held that the general course of railroad business may be judicially noticed, on the principle that "courts will not pretend to be more ignorant than the rest of mankind": *Pittsburg, Ft. W. & C. R. Co. v. Callaghan*, 50 Ill. App. 676. Courts will take judicial notice of the general business affairs of life, and of the manner in which ordinary railroad business is conducted, and of the every-day practical operation of them. Thus, in an action by a conductor who had been discharged without cause and refused a clearance card, the court will judicially know that what is known as a clearance card is simply a letter, be it good, bad or indifferent, given to an employé at the time of his discharge or end of service, showing the cause of such discharge or voluntary quittance, the length of time of service, his capacity, and such other facts as would give to those concerned information of his former employment; but that it is in no sense a letter of recommendation: *Cleveland C. C. & St. L. Ry. Co. v. Jenkins*, 174 Ill. 398, 66 Am. St. Rep. 296, 51 N. E. 811, 62 L. R. A. 922. But courts will not take judicial notice that the rights of way of railroad companies are fenced as the track is constructed: *Chicago & M. Electric R. Co. v. Diver*, 213 Ill. 26, 72 N. E. 758. Courts will take judicial notice that employés in a bank, other than the cashier, must have access to the funds: *La Rose v. Logansport Nat. Bank*, 102 Ind. 332, 1 N. E. 805. The courts judicially know of the necessity for greater speed of railroad trains than of vehicles propelled by horses, and that the former must have the preference at highway crossings: *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274. Courts will also take judicial notice that atmospheric or vacuum brakes are in general use on passenger trains and common on freight-cars, and are rarely ineffective: *People v. Detroit United Railway*, 134 Mich. 682, 104 Am. St. Rep. 626, 97 N. W. 36, 63 L. R. A. 746; and that it is customary to store wheat in mass with other wheat of the same grade and quality in general commercial elevators: *Davis v. Kabe*, 36 Minn. 214, 1 Am. St. Rep. 663. Judicial notice will be taken that telephones have become an ordinary medium of communication: *Globe Printing Co. v. Stahl*, 23 Mo. App. 451. But courts will not judicially know the number of newspapers printed in a county, or that they are printed therein: *Alkeson v. Lay*, 115 Mo. 538, 22 S. W. 481.

Courts will take judicial notice that it is the uniform custom of life insurance companies to require a properly executed application for a policy, with an authenticated medical examination, as a condition precedent to issuance of a policy: *Taylor v. Grand Lodge A. O. U. W. of Minnesota*, 101 Minn. 72, 118 Am. St. Rep. 606, 111 N. W. 919, 11 L. R. A., N. S., 92; and judicial notice will be taken that in the operation of street-cars they stop at street crossings to take on and let off passengers, and that such stoppage is in the nature of a general invitation to all persons who desire passage to get aboard whether the car is crowded or not: *Baskett v. Metropolitan St. R. Co.*, 123 Mo. App. 725, 101 S. W. 138; and that mercantile agencies

collect and communicate information concerning the financial condition of persons in business: *Holmes v. Harrington*, 20 Mo. App. 661. The courts will take judicial notice that the practical running of the great railroads is managed by overlooking officers, who use the telegraph to keep informed where trains are, and direct their movements from hour to hour: *Slater v. Jewett*, 85 N. Y. 61, 39 Am. Rep. 627; but they will not know judicially in mechanic's lien cases, that proof of work and material furnished will require the examination of a long account: *Cassady v. McFarland*, 139 N. Y. 201, 34 N. E. 893. Judicial notice will be taken that contracts to buy real estate are often made with the expectation of the purchaser to sell again at a profit before he is compelled to complete his contract: *Anderson v. Blood*, 86 Hun, 244, 33 N. Y. Supp. 233. Judicial notice will be taken that the maintenance of switch engines at railroad sidings tends to promote the safety, not only of the employes of the railroad company, but of the traveling public: *Southern Ry. Co. v. Blandford's Admx.*, 105 Va. 373, 54 S. E. 1. Courts will judicially know that a bank which makes a collection for a foreign correspondent, never, unless specially requested, remits the specie, but sends its draft or certificate of deposit: *Bowman v. First Nat. Bank*, 9 Wash. 614, 3 Am. St. Rep. 870, 38 Pac. 211; and will also judicially know that when one who agrees to sell to another goods "f. o. b. on cars" at the place of shipment, such terms mean that the seller will, without expense or act of the buyer, deliver to the latter such goods in cars at such place: *Vogt v. Shienebeck*, 122 Wis. 491, 106 Am. St. Rep. 989, 100 N. W. 820, 67 L. R. A. 756. The court will take judicial notice that a particular common carrier engaged in interstate commerce also operates trains over its lines solely within the state: *United States v. Adair*, 152 Fed. 737.

**s. Facts Relating to Customs and Usages.**—The rule of judicial notice as applied to usages and customs is, that such notice will be taken of a custom or usage which has become general, but of one that is special, that is, limited to a particular locality or business, or class of people, judicial notice will generally not be taken. There is some conflict among the cases, however, in the application of this rule, arising from a difference of opinion, as to when a custom or usage has become sufficiently established as to be universal, or whether it is really local, or affects only a particular locality, or a certain class of persons. Thus, in *Munn v. Burch*, 25 Ill. 35, it was held that the custom of bankers to allow customers to check out their funds in parcels will be judicially noticed, while in *Planters' Bank v. Farmers' & M. Bank*, 8 Gill & J. (Md.) 449, the court refused to take judicial notice of a usage of the bank to pay current deposits to depositors on demand at the counter of the bank, where there was no proof of the usage and it had not previously been established judicially. "These usages," said the court, "however well known and recognized by the community at large, and adopted in all their transactions with the banks, not being of proof in the record before us, nor heretofore proved and established in courts

of justice, cannot be judicially known to us, or sanctioned as general mercantile usages, which are a part of the law of the land." In *Davis v. Hanley*, 12 Ark. 645, where the question was as to the sufficiency of notice to the acceptor of a protested bill of exchange, it was held that the court would take judicial notice, as a part of the "general customs and usages of merchants as well as of the general customs of our own country and as a matter that is generally known," that the hour of 7 o'clock A. M. on the 23d of June was at least two hours before the commencement of the ordinary, proper, mercantile hours of business for that day. Judicial notice will be taken that it is a custom of railroads to transfer from one to another loaded cars, for continuous transportation over different lines: *Burlington C. R. & N. Ry. Co. v. Dey*, 82 Iowa, 312, 31 Am. St. Rep. 477, 48 N. W. 98, 12 L. R. A. 436; and of a custom requiring a church to keep a record of its official acts: *Sawyer v. Baldwin*, 28 Mass. (11 Pick.) 492. So, too, Sundays and great festivals, such as Christmas, are so universally established by commercial usage as dies non in law, that courts will take judicial notice of such common use to observe them: *Sasscer v. Farmers' Bank*, 4 Md. 290; and the custom of appropriation of water rights on the United States' public domain is so well known, that one claiming water rights under such appropriation need not plead or prove such custom, as the courts will take judicial notice thereof: *Parkersville Drainage District v. Wattier*, 48 Or. 332, 86 Pac. 775. Judicial notice will be taken of the general custom of carriers of transferring sample trunks as personal baggage: *Fleischman, Morris & Co. v. Southern Ry. Co.*, 76 S. C. 237, 56 S. E. 974, 9 L. R. A., N. S., 519; and courts will take judicial notice of the usage of banks to treat a deposit for collection of checks on another bank, as a bailment, and not as creating the relation of debtor and creditor, which will allow the deposit to be checked out before collection of the check deposited: *Beal v. Somerville*, 50 Fed. 647, 1 C. C. A. 598, 17 L. R. A. 291. And judicial notice will be taken of the customs and usages governing the creation and existence of political parties which are matters of common and general information: *State v. Metcalf*, 18 S. D. 393, 100 N. W. 923, 67 L. R. A. 331. In *Hilton v. Boylance*, 25 Utah, 129, 95 Am. St. Rep. 821, 69 Pac. 660, 58 L. R. A. 723, it was held that courts will take judicial notice of the creed and general doctrine of the Mormon church, and of the principle of "celestial marriage," peculiar to the Mormon sect; but in *Youngs v. Ransom*, 31 Barb. (N. Y.) 49. It was held that the courts will not take judicial notice of the customs of any particular religious denomination which affects civil rights or disabilities. Said the court: "The canons, rubrics or rules of this or any other church among us are not laws; they are merely regulations for the conduct of its ministers and members, depending for their force upon the vows of the one and the consciences of the other, so far as they are within the limits of the rightful powers of such bodies. We know nothing of them judicially." It is well to notice that in *Hilton v. Boylance*, 25 Utah, 129, 95 Am. St. Rep. 821, 69 Pac. 660, the question before

the court was the validity of a marriage celebrated according to the doctrines of the Mormon church, and the court in taking judicial notice of the customs of that church based its ruling on the general doctrine that judicial notice should be taken of matters of history, but it is doubtful whether courts in other jurisdictions than that embraced in the home of the Mormon church would follow the example of the supreme court of Utah. However that may be, it is unquestionably settled by the cases that if a usage or custom is special, that is, limited to a particular locality, or business, or class of people, the rule permitting judicial notice to be taken of a general custom or usage is not applicable. Thus, courts will not judicially notice the existence of a custom whereby losses by the burning of a steamboat are comprehended among dangers of the river, under a contract to deliver goods in good condition, "damages of the river excepted": *Sampson v. Gazzam*, 6 Port. (Ala.) 123, 30 Am. Dec. 578; and the courts will not take judicial cognizance that it is customary for agents, in making sales of hotel furnishings, to enter into an agreement not to engage in a competing business: *Sanders v. Brown*, 145 Ala. 665, 39 South. 732. But Arizona courts will judicially know the "local customs, laws and decisions of courts," as to water rights, as these terms are used in the act of Congress of March 26, 1866, providing for the protection of such vested rights: *Clough v. Wing*, 2 Ariz. 371, 17 Pac. 453. Judicial notice will not be taken of the usages and customs of mining districts: *Sullivan v. Hense*, 2 Colo. 424. Courts will not judicially know that it is the general usage and custom of traveling salesmen that sales include the soliciting of sales that the employer is willing to accept: *Schultz v. Ford Bros.*, 133 Iowa, 402, 109 N. W. 614; nor will judicial notice be taken of the existence of a custom whereby the owner of an untenanted house must have it guarded by a keeper, in order to enable him to recover his insurance in case of loss by fire: *Soye v. Merchants' Ins. Co.*, 6 La. Ann. 761; and courts do not judicially know that one-half per cent discount is given by the *lex mercatoria* in a bill of exchange received in payment: *Ward v. Everett*, 1 Dana (Ky.), 429; or of a custom in New York City to first regulate and grade a street before paving it, and to treat such work as separate and distinct: *In re Walter*, 75 N. Y. 354. In *Watt v. Hoch*, 25 Pa. 411, it was held that a custom of the merchants of Pittsburg to charge interest on accounts after six months had existed for so long, and become so uniform and notorious, the court would take judicial notice of it; while in *Wood v. Smith*, 23 Vt. 706, the court refused to take judicial notice of a general custom among merchants to charge interest on open accounts semi-annually. In *Cady v. Case*, 11 Wash. 124, 39 Pac. 375, it was held that judicial notice could not be taken of the custom of a lumber company to require its laborers to accept goods from its store in payment of their wages. Courts will not judicially know what constitutes business hours of a bank in another state, with reference to the presentment there of a negotiable instrument: *Columbia Banking Co. v. Bowen* (Wis.), 114 N. W. 451.

t. **Facts Relating to Corporations, Associations, and Members Thereof.**—Courts will take judicial notice of the existence of domestic corporations created by public law: *McKiel v. Real Estate Bank*, 4 Ark. 592; *Town of Washington v. Finley*, 10 Ark. 423, 52 Am. Dec. 244; *Shaw v. State*, 35 Tenn. (3 Sneed) 86; *Owen v. State*, 37 Tenn. (5 Sneed) 493; *Bank of Alabama v. Simonton*, 2 Tex. 531. Thus in *McKiel v. Real Estate Bank*, 4 Ark. 592, it was held unnecessary in a suit by the Real Estate Bank to prove its corporate existence under the general issue, as the court would take judicial notice of it; and in *Hammett v. Little Rock & N. R. Co.*, 20 Ark. 204, it was said that the act incorporating the Little Rock and Napoleon Railroad Company was a public law, and created, ipso facto, it eo instanti, a corporation; and hence judicial notice would be taken of the existence of the corporation. And in *Atlanta & W. P. R. Co. v. Atlanta B. & A. R. Co.*, 124 Ga. 125, 52 S. E. 320, it was held that judicial cognizance would be taken of the charter granted a railroad company by the Secretary of State under the general law. Courts will take judicial notice of the banks incorporated in this commonwealth: *Jones v. Fales*, 4 Mass. 245; and that a bank not incorporated under a special act must have been incorporated under the general banking laws of the state: *Hurlbut v. Brittain*, 2 Doug. (Mich.) 191. But when there are several plank-road laws under which plank-road companies could be acting although it is the duty of the court to judicially know the provisions of the statutes under which such companies are organized, it is not the duty of the court to judicially know the fact as to whether a given corporation was created under one or the other; or whether, if created under one, it has subsequently accepted of the provisions of the other: *Danville & W. L. Plank-road Co. v. State*, 16 Ind. 456. Nor will the courts take judicial notice that the corporate existence of a corporation has ceased, when its charter has not expired by limitation: *Shea v. Knoxville & K. R. Co.*, 65 Tenn. (6 Baxt.) 277; and in *Cicero Hygiene Draining Co. v. Craighead*, 28 Ind. 274, it was held that an act requiring the existence of corporations to be judicially taken notice of by the courts in the counties where the articles of association are recorded does not require the supreme court to take such notice. Courts will take judicial notice that the Baltimore and Ohio Railroad Company is a corporation: *State v. Baltimore & Ohio R. Co.*, 15 W. Va. 362, 36 Am. Rep. 803.

It has been held, however, that judicial notice cannot be taken of a private corporation created by special law, for it was said in *Kelly v. Trustees of Alabama & Cincinnati R. Co.*, 58 Ala. 489: "Judicial notice cannot be taken of the charter of a private corporation, nor its corporate power or capacity, if it derives existence from such charter, by which we intend a special act of incorporation"; and to the same effect is *Holloway v. Memphis, El Paso & Pacific R. Co.*, 23 Tex. 465, 76 Am. Dec. 68. But this rule is not universal, for in some states the statutes require the courts to take judicial notice of both public and private official acts of the legislature, and of

course in these states the above rule would not be followed. In *People v. De Mill*, 15 Mich. 164, 93 Am. Dec. 179, for example, it was expressly held that judicial notice would be taken of a private corporation created by special charter, the court saying: "Where a corporation has been created by special charter, we do not regard it necessary, though perhaps usual, to do more in the information than to aver its existence in general terms; since the court is bound to take judicial notice of the charter." And where judicial notice is taken of the existence of a corporation, it will also take such notice of the name or legal being of such corporation: *Jackson v. State*, 72 Ga. 28; *Pendleton v. Bank of Kentucky*, 17 Ky. (1 T. B. Mon.) 171. But courts cannot take judicial notice of a foreign corporation, though it was chartered by a public law of the state of its domicile: *Lewis v. Bank of Kentucky*, 12 Ohio, 132, 40 Am. Dec. 469; *Owens v. State*, 37 Tenn. (5 Sneed) 493. Where, on appeal from a conviction for fraudulently keeping in possession three counterfeit bank notes—one on the Bank of Tennessee and two on banks in Kentucky—it was held that while it was unnecessary to allege or prove that the Bank of Tennessee was a chartered institution, because the courts would judicially know that fact as to the banks within the state; that it was otherwise as to extraterritorial banks; but in *Commercial Bank v. Newport M. Co.*, 1 B. Mon. (Ky.), 13, 35 Am. Dec. 171, it was held that the court must take judicial notice of the fact that "The Commercial Bank of New Orleans" was, as to Kentucky, extraterritorial, and from its name be deemed a foreign corporation. And the federal courts will take judicial cognizance of the existence of all national banks: *United States v. Williams*, 4 Biss. 302, Fed. Cas. No. 16,706.

u. **Facts Relating to the Powers and Acts of Corporations, and of Their Members and Employés.**—As courts will take judicial notice of the existence of private corporations created by public law, so, too, will they take judicial notice of the powers and acts of such corporations and of their members and employés. Thus, the courts of Alabama will take judicial notice that the society of Free Masons is purely a charitable corporation: *Burdine v. Grand Lodge of Alabama*, 37 Ala. 478; but will not take judicial notice of the principles by which laborers belonging to a labor union are bound: *Birmingham Paint & Roofing Co. v. Crampton & Tharpe* (Ala.), 39 South. 1020. In *Malone v. La Croix*, 143 Ala. 657, 41 South. 724, it was held that courts will take judicial notice of the divisions of the Methodist Episcopal church, and of the territory over which jurisdiction was to be, and has been, exercised by the subdivisions thereof, and of the articles of separation with reference to a territorial division of the common property. "We think the courts of the land can and will take judicial notice of the division of perhaps the largest and most powerful Protestant church in the United States, of the territory over which jurisdiction was to be, and has been, exercised by the subdivisions, respectively, and of the articles of separation, with reference to a territorial division of the common prop-



erty. Not only is this a fact of historical notoriety, but the title to property one held before the separation has often been passed upon by the high courts of the country, and in reference to the rights of ownership of the respective wings of the church thereto"; and a similar ruling was made in *Humphrey v. Burnside*, 4 Bush (Ky.), 215. But the case of *Sarahass v. Armstrong*, 16 Kan. 192, is in sharp conflict with the two cases just mentioned, *Brewer, J.*, speaking for the court, saying: "As to the general organization of the Methodist Episcopal church, its administration and control over local churches of that denomination, and their property, cannot be considered by us, for the facts concerning the same are not in the case-made, and they are not matters of which the court can take judicial notice." In *State Bank v. Watkins*, 6 Ark. (1 Eng.) 123, judicial notice was taken by the supreme court that the State Bank was authorized by its charter to require security to notes discounted by the bank. In *Caldwell v. Richmond & D. R. Co.*, 89 Ga. 550, 15 S. E. 678, where, in an action against a railroad lessee of another road, both of which had charters authorizing them to take private property for public purposes, it was held that the court would take judicial notice that railway companies are common carriers, and to same effect is *Boyle v. Great Northern Ry. Co.*, 13 Wash. 383, 43 Pac. 344. So, too, courts will judicially know that a street railway company organized under the laws of the state is a common carrier of passengers: *Indianapolis Street Ry. Co. v. Ray*, 167 Ind. 236, 78 N. E. 978; and courts will take judicial notice that the Ohio insurance company was by public law a bank of discount and deposit: *Gordon v. Montgomery*, 19 Ind. 110. In *Illinois Central R. Co. v. Johnson*, 40 Ill. 35, the supreme court of Illinois refused to take judicial notice that the Illinois Central Railroad Company had a seal other than a scrawl purporting to be a seal, which appeared on an appeal bond signed by said railroad company. And courts will not take judicial notice of the by-laws of a corporation: *Portage Lake M. & M. Benevolent Society v. Phillips*, 36 Mich. 22. But they will judicially know the powers and limitations of a corporation when they know under what law it exists: *Chapman v. Colby*, 47 Mich. 46, 10 N. W. 74. The courts will not judicially know that two railroad companies authorized by statute to consolidate have in fact consolidated: *Southgate v. Atlantic & P. R. Co.*, 61 Mo. 89; nor of the powers of an inferior officer of a corporation whose office is not created by the charter: *Brown v. Missouri K. & T. Ry.*, 67 Mo. 122. And where the complaint in an action to recover on a life insurance policy alleged that the defendant society was an old line insurance company, and the claims of other claimants depended on whether the society was a beneficial association, the court of appeals cannot take judicial notice that the society is a fraternal association as alleged in a bill of interpleader filed by it in the action: *Smith v. Grand Lodge A. O. U. W. of Missouri*, 124 Mo. App. 181, 101 S. W. 662. Courts cannot take judicial notice that a bank in a foreign state is insolvent: *Market Nat. Bank v. Pacific Nat.*

Bank, 27 Hun (N. Y.), 465; and on appeal to review an assessment of the property of a telegraph company, the supreme court will not take judicial notice of the existence or operation of telegraph lines of the relator outside of the state, nor that, under authority of an act of Congress, such relator, a private corporation, has entered into certain business relations with the United States: *People v. Tierney*, 57 Hun, 357, 10 N. Y. Supp. 940. Neither will courts take judicial notice that a designated railroad is part of a certain system, unless it is aware of the contract under which the system was created: *Miller v. Texas & N. O. R. Co.*, 83 Tex. 518, 18 S. W. 954; and judicial notice will not be taken that a railroad under its charter condemned or acquired title to any particular land or strip of land: *Chapman v. Pittsburg & S. R. Co.*, 18 W. Va. 184. Courts will judicially notice the powers of a private corporation created by a special law which provides that it shall be considered as a public act: *Beaty v. Knowler*, 29 U. S. (4 Pet.) 152, 7 L. ed. 813.

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### BYRD v. BEALL.

[150 Ala. 122, 43 South. 749.]

**CUSTOM AND USAGE, Difference Between.**—There is a distinction between custom and usage. The former refers to those usages which have existed and been universally recognized for so long a period as to have acquired the force of law and to be binding without regard to the assent of the individual; and the latter refers to the established method of dealing adopted in a particular place or by those engaged in a particular trade or vocation, which acquires legal force because people make contracts with reference to it. (p. 62.)

**USAGE, Evidence of, When Inadmissible.**—Where a contract is clearly unambiguous and free from words which may have a different meaning, no evidence can be received of a usage which will change the plain meaning of the contract. (p. 62.)

**CONTRACT for the Sale of Lumber, Meaning of Words in.**—A contract for the sale and shipment of lumber to the purchaser containing a provision guaranteeing "count and inspection of all lumber at point of destination," means that the seller guarantees that the lumber, when it reaches the point of destination, shall come up to the count and inspection as in the bills rendered to the purchaser. Such a provision does not justify the exclusion of evidence to prove the real condition of the lumber when it reaches its destination. (p. 63.)

**A USAGE, to be Binding, must either be known to the party sought to be affected or so general and so generally known as to justify the presumption that such party knew and contracted with reference to it.** (p. 63.)

**USAGE, When not Proved.**—Where, upon plea of a particular usage respecting the acceptance of lumber sold, the witness being asked whether there was any, and what it was, and having answered that in all of his experience he never knew a millman to re-

fuse to settle in the manner named, this does not prove the generality of the custom or usage, nor that any usage was generally recognized as binding. (p. 63.)

**A USAGE must be, with Some Exceptions, Reasonable, and not oppose nor alter established legal principles, nor upon a given statement of facts make the rights or liabilities of individuals other than they are at the common law.** (p. 63.)

**USAGE, When too Unreasonable to be Binding.**—A usage which compels a shipper of lumber to abide by the mere unsworn report of the consignee, in whose selection he has no choice, transmitted to the shipper by the unsworn statements of the party ordering the lumber, cannot be allowed. (p. 64.)

Appeal by the defendant from a judgment in favor of the plaintiff in an action to recover damages for the breach of an agreement to deliver lumber.

W. O. Mulkey, for the appellant.

C. D. Carmichael, for the appellee.

<sup>124</sup> **SIMPSON, J.** This suit was brought by the appellee (plaintiff) against the appellant (defendant), claiming damages for the breach of an agreement by which, in consideration of certain property transferred to him, the defendant had agreed to deliver to plaintiff all of the output of a certain lumber company, in which agreement it was stated that "count and inspection of all lumber at the point of destination" was guaranteed by said defendant. The case was really tried on the common counts, the contract was in evidence, and the <sup>125</sup> only point in controversy is as to the correctness of the ruling of the court in admitting proof of a certain custom, or usage, and in the charge of the court recognizing the binding efficacy of said usage.

Plaintiff introduced in evidence a letter by defendant to plaintiff, dated May 12, 1904, in which is stated: "The culls you charge seem awfully heavy, but if they are correct we will stand them." And it was shown that said letter was written "in reply to the statement sent defendant by plaintiff, including the account sued on." It was shown that the "plaintiff was dealing in lumber as a broker, and would get orders for lumber by the carload from third persons, and would direct the defendant Byrd, to fill these orders under the contract herein set out. The defendant would consign the lumber to such persons as plaintiff might direct, and would charge the amount to plaintiff under the contract. 'Culls' and 'rejects' were of a lower order or grade of lumber than the contract called for, and would therefore be subject to lower prices, and in many instances the consignee would re-

ject a lot of it, and claim a lot of it as culls, and would charge the difference to the plaintiff and settle with him accordingly," and plaintiff would send a statement to the defendant, charging such "culls" and "rejects," just as they had been charged to him, and that plaintiff had no personal knowledge as to the culls and rejects. While plaintiff was on the stand, he was asked the question whether or not, "at the time of the lumber transaction, . . . and prior thereto, there was prevailing in this section of country, among mill operators and shippers of lumber, any custom with reference to the course of dealing, on the subject of culls and rejects, in cases where lumber was shipped under contract, and the contract containing a guaranty of count and inspection at point of destination." The answer was "that the custom was to the effect that, under the circumstances stated, the millmen and shippers settled according to reports, as to count, inspection, freight, etc., received by the shippers from consignees at the point of destination, and that in all of his experience he had never known of the refusal of a millman to so settle." This is the evidence in regard to <sup>126</sup> the custom or usage which is excepted to, and on which the charge of the court is based.

Strictly speaking, there is a distinction between "custom" and "usage"; "custom" referring rather to those usages which have existed and been universally recognized for so long a period as to have acquired the force of law, and to be binding without regard to the assent of the individual, and such as the "law-merchant," etc., while "usage" refers to "an established method of dealing, adopted in a particular place, or by those engaged in a particular vocation or trade, which acquires legal force because people make contracts in reference to it": 29 Am. & Eng. Ency. of Law, 365; 12 Cyc. 1033. While they are frequently used interchangeably, it is a usage, strictly speaking, which is sought to be proved in this case. In discussing it we may, in following the wording of decisions, use the word "custom." While it is difficult to lay down in precise language rules which will make it clear in every case just where the line is which marks the admissibility or not of proof of a usage, yet there are certain general principles which are fully recognized by the authorities:

1. Where the contract itself is clear and unambiguous, and free from words, technical or otherwise, which may have different meanings, the words of the contract must govern, and no evidence can be received of a usage which would change the plain meaning of the contract: 29 Am. & Eng. Ency. of

Law, 376, and cases cited thereafter. The only ambiguous expression to which attention is called is that in which the defendant guaranteed the "count and inspection of all lumber at the point of destination." We are disposed to think that this provision can mean nothing but that the defendant guarantees that the lumber, when it reaches the point of destination, shall come up to the count and inspection as in the bills rendered to the plaintiff. It certainly has no reference to the evidence which will be necessary to prove what the real condition of the lumber was when it reached the point of destination.

2. A usage, to be binding, must be either shown to be known to the party who is sought to be affected thereby, or so general and so generally known as to justify <sup>127</sup> the presumption that said party knew it and contracted in reference to it: 29 Am. & Eng. Ency. of Law, 386, 387, 389, 391; 12 Cyc. 1039-1041; 2 Mayfield's Digest 1006, sec. 29; *Turner v. Dawson*, 50 Ill. 85; *Smith v. Rice*, 56 Ala. 417. The question asked the witness was simply whether there was "any custom," etc., and his answer was "that the custom was," etc., and that in all his experience he had never known a millman to refuse to settle in the manner named. This falls short of proving the generality of the custom or usage, and does not show at all that any usage was generally recognized as binding, but merely that they settled on these reports. This seems to be rather a habit, for convenience, or because the parties chose to take the word of those who reported, rather than a waiver of the right to have legal proof: *Jones v. Chaffin*, 102 Ala. 382, 15 South. 143.

While there are some exceptions, another requirement is that the usage must be reasonable, and not "oppose or alter established legal principles, and upon a given statement of facts make the rights or liabilities of individuals other than they are at common law" (29 Am. & Eng. Ency. of Law, 376; 12 Cyc. 1047), as a usage of attorneys to collect claims in depreciated bank bills (*West v. Ball*, 12 Ala. 340); or a usage which exempts carriers by water from liability caused by forcible and illegal seizure of goods, when the bill of lading excepted only "dangers of the river" (*The Belfast*, 40 Ala. 184, 88 Am. Dec. 761); or a usage that, when the contract of hiring specified that "the hirer was to lose the negro's lost time," that time "related to time lost by sickness or running away, and not to time lost in consequence of the negro's death" (*Barlow v. Lambert*, 28 Ala. 704, 65 Am. Dec. 374);

or where a usage among builders considered defective construction as "done in a workmanlike manner" (Anderson v. Whittaker, 97 Ala. 690, 11 South. 919); or a usage that a bill of lading passed by delivery without indorsement, so as to authorize the delivery of the goods to the holder (Louisville & N. R. R. Co. v. Barkhouse, 100 Ala. 543, 13 South. 534); or a usage that bank checks <sup>128</sup> payable to a person, "or bearer," should pass to a holder without indorsement (First Nat. Bank v. Nelson, 105 Ala. 180, 16 South. 707); or a custom or usage that a tenant should have the hay and stubble on the land which he entered (Anewalt v. Hummel, 109 Pa. 271); or a custom or usage that the outgoing tenant shall look exclusively to the incoming tenant, and not to the landlord, for compensation for seeds, acts of husbandry, etc. (Bradburn v. Foley, Eng. High Court of Justice, Common Pleas, Feb. 1878; Alb. Law Jour. 483),—all of which were declared bad.

In the light of these authorities we hold that a usage which compelled the shipper of lumber, under the contract in question, to abide by the mere unsworn report of the consignee (in whose selection he had no voice), transmitted to him by the unsworn statement of the party ordering the lumber, and deprived the shipper of the right to resort to the ordinary means of ascertaining the truth of such reports by the ordinary rules of evidence, is bad, and should not be allowed. It results that the court erred in not sustaining the objections to the evidence, and in giving the charge excepted to.

The judgment of the court is reversed, and the cause remanded.

Tyson, C. J., and Haralson and Denson, JJ., concur.

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*Evidence of Custom or Usage* to explain the meaning of a contract is discussed in the note to Kentucky Mfg. Co. v. People's Supply Co., 122 Am. St. Rep. 548.

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### CLISBY v. MASTIN.

[150 Ala. 132, 43 South. 742.]

**BANKS AND BANKING**—Effect of the Deposit of Money by a Public Officer.—If money realized from a judicial sale is directed by the court to be kept in its registry until further orders, but the register deposits it in a local bank in his name as register, such money becomes part of the funds of the bank, subject to its use as any other of its property, and the relation of debtor and creditor is created between the bank and the officer. (p. 65.)

**OFFICER, When Guilty of the Conversion of Moneys.**—If a public officer having money in his hands deposits it in his own name in a local bank, this amounts to its conversion by him. (pp. 65, 66.)

**PUBLIC OFFICER, When Becomes, with His Sureties, Liable for Moneys and Interest.**—If one in an official capacity has moneys in his hands which he deposits in a bank without any order of court for so doing, he and his sureties become bound absolutely as for a debt, and a cause of action arises against him and them in favor of the persons to whom the money belongs, and this liability bears interest. (p. 66.)

John A. Elmore, for the appellant.

Rushton & Coleman, for the appellee.

<sup>133</sup> DENSON, J. On a bill filed in the city court of Montgomery to have lands in which the complainant and the respondent in the bill were jointly interested under the provisions of a will sold for reinvestment, a decree was rendered ordering the sale of the lands. The lands were sold in accordance with the terms of the decree, and the purchase money was paid to the register. The register made a report of the sale to the court, and it was duly confirmed. The court made an order requiring that the money should be kept in the registry of the court until further order made in respect thereto. No further order was ever made. Instead of holding the money in possession or under his control, the register deposited it in a local bank in his name as register. The bank failed, and the money was lost. The foregoing are the facts presented by this record, and the only question presented for determination is whether or not <sup>134</sup> the register and his surety are liable on the bond for interest on the money that was lost.

The surety's contention that it is not liable is rested on the proposition that, no order having been made by the court that the money should be paid to anyone, or that it should be invested, no debt or cause of action arose to anyone in respect to the money, and therefore that no interest could be collected. It is the settled law of this state that a deposit of the kind made in this case constitutes a general deposit, by which the money becomes the property of, and a part of, the funds of the bank, subject to its use as any other of its property; and by it the relation of creditor and debtor, between the depositor and the bank, is created: *Alston v. State*, 92 Ala. 124, 9 South. 732, 13 L. R. A. 659. Not only so, but according to the same authority, as well as the statute, the deposit was made in express violation of the law; and it was also made in ex-

press violation of the order of the court: Code 1896, sec. 4668. Therefore, having been made in violation of the order of the court and in violation of the statute, the deposit amounted to a conversion by the register.

Furthermore, when the deposit was made, the register became eo instanti a debtor to the parties to whom of right the money belonged, and he and the surety on his bond were bound to absolute payment as for a debt; and a cause of action against the register and his surety on the bond at once arose: *State v. Houston*, 78 Ala. 576, 56 Am. Rep. 59; *Alston v. State*, 92 Ala. 124, 9 South. 732, 13 L. R. A. 659. The weakness in the surety's insistence consists in the failure to take into consideration the principles above announced.

On the foregoing consideration it is manifest that the surety is liable for interest, and the city court erred in decreeing otherwise.

Reversed and remanded.

Tyson, C. J., and Haralson and Simpson, JJ., concur.

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*The Liability of the Sureties of a Public Officer for the loss of public funds which he has deposited in a bank is discussed in the note to Feller v. Gates, 91 Am. St. Rep. 516.*

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## WILLIAMS v. CITY OF GAINESVILLE.

[150 Ala. 177, 43 South. 209.]

**MUNICIPAL CORPORATIONS—Public Streets, Right of to Maintain Wharf in Front of.**—If a land owner dedicates a public street terminating on the bank of a navigable river, the municipality has a right to maintain a free wharf at the end of the street where it intersects with the river. (pp. 67, 68.)

Suit to enjoin the erection and maintenance of a wharf across Water street in the town of Gainesville, where such street intersects the Tombigbee river. The bill showed that the owner of the land which subsequently constituted the town of Gainesville, in the year 1836, platted and mapped such town and dedicated certain streets to public use, reserving to himself, his successors and assigns, the title and use of the waterfront; that he owned and operated a ferry across the river and a warehouse near the ferry, continuing in the open, adverse and peaceable possession of the warehouse property and ferry during his lifetime; that complainant, through



mesne conveyances, acquired the property from the former owner, and held open, peaceable and notorious possession thereof up to the filing of the bill; that the dedication of the street went only to high-water mark, and the fee remained in the complainant, and that the defendant city proposed to erect and maintain a wharf between high and low water mark on lands belonging to complainant. The answer denied the ownership in fee by the complainant, and asserted the right of the city to erect and maintain a wharf across the street at its intersection with the river. The chancellor denied the relief sought by the complainant, and he appealed.

C. K. Abrahams, for the appellant.

L. B. Godfrey, R. Chapman and Vandegraaf & Sprott, for the appellee.

<sup>180</sup> TYSON, C. J. The single question presented by the record is the right of the city of Gainesville to maintain a free wharf at the intersection of Water street and the Tombigbee river. The insistence seems to be that the dedication of this street as a public highway limits its use by the public to travel along and over it simply to the bank of the river, with no right in the city to erect and maintain a wharf to enable the public to avail themselves of the rights of commerce and transportation afforded by the river; that since complainant is the owner of the fee, and the city has only an easement, he alone has the right to maintain a wharf where the river and the street intersect.

This contention, it must be conceded, is supported by some of the adjudged cases; but they are not in harmony with the great weight of authority, which sustains the right of the city to "improve, ornament, and grade its streets for public convenience, either by enlargement or extension, and, with a view to public accommodation, may erect at their termini suitable wharves or landings," and "the right of a city to erect wharves under such circumstances is not affected by the question whether the street has been regularly opened and condemned as a highway, or its use as such has been acquired by dedication, and it is unimportant, with regard to the exercise of this right, whether the law of the state does or <sup>181</sup> does not recognize in the bank owner a title to the land under the water to the middle of the stream": 30 Am. & Eng. Ency. of Law, 2d ed., pp. 484, 485, and cases cited in notes 2 and 3 on page 484 and 2 and 3 on page 485. Of the numerous cases cited in the notes we call especial attention to the case of

*Backus v. City of Detroit*, 49 Mich. 110, 43 Am. Rep. 447, 13 N. W. 380, in which the opinion was delivered by Judge Cooley, where a learned and exhaustive discussion of the subject may be found, sustaining the doctrine of the text above quoted. This principle was fully recognized by this court in *Webb v. City of Demopolis*, 95 Ala. 116, 13 South. 289, 21 L. R. A. 62. It is true in that case the street ran along and parallel to the river, while here the street intersects with the river; but the principle involved and applicable is the same.

There is no error in the decree and it must be affirmed.

Dowdell, Anderson and McClellan, JJ., concur.

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*A City may Establish a Public Wharf* where any duly dedicated street abuts upon a navigable stream, without regard to the question whether a riparian owner has title to the land under the water: *Backus v. City of Detroit*, 49 Mich. 110, 43 Am. Rep. 447. See, too, *Mayor etc. of Memphis v. Wright*, 6 Yerg. 497, 27 Am. Dec. 489. Ordinarily, the title of the owner of submerged lands is not burdened with an easement in favor of the owner of adjoining upland to build wharves out to navigable water: *Cobb v. Commissioners of Lincoln Park*, 202 Ill. 427, 95 Am. St. Rep. 258.

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## SOUTHERN RAILWAY COMPANY v. HARTSHORN.

[150 Ala. 217, 43 South. 583.]

**MUNICIPAL CORPORATIONS, Gifts of, When Assailable by Creditors.**—If a municipal corporation pays for property and has it conveyed as a gift to a railway corporation, such property may be reached by a bill filed by the creditors of the municipality, to subject it to the payment of their debts. (p. 70.)

**MUNICIPAL CORPORATIONS, Execution, Property of, When Subject to.**—Property held by a municipal corporation for other than governmental purposes is subject to levy for the payment of its debts. (p. 70.)

**MANDAMUS, Creditors' Bill not Barred Because There is a Remedy by.**—The fact that persons bringing a creditors' bill to reach property conveyed by a municipality might have secured an adequate remedy by mandamus does not prevent the maintenance of such bill. (p. 70.)

**CREDITORS' SUIT—Parties Defendant.**—If a debtor pays for real property and causes it to be conveyed as a gift to another, the creditors of the municipality have a right to maintain a suit to reach such property without making the grantor of such conveyance a party defendant. (p. 70.)

Suit brought by the creditors of Decatur, a municipal corporation, to reach and subject to the payment of their debts certain real property, conveyed to the Southern Railway Company, the municipality having furnished the purchase money

for such lot and caused the conveyance to be made to the railway. A demurrer was filed by the railway company on the ground that there was no equity to the bill, that it did not appear that complainants had any lien on the land, that the municipality was insolvent, nor that the defendants were guilty of fraud, or that the bill was filed on behalf of the complainants and such creditors of the defendant as did not join therein, and that it did not appear but the money with which the land was purchased was loaned to the railroad company, or that there existed in favor of the complainants any trust in or upon the funds with which the land was purchased, nor that it did not appear that the corporation had not full authority to do the acts complained of. The mayor and council demurred on the ground of misjoinder of the grantors in the deed. The demurrers and also a motion to dismiss were overruled, and the defendants appealed.

Humes & Speake and Callahan & Harris, for the appellant.

John C. Eyster and Tennis Tidwell, for the appellee.

<sup>230</sup> DOWDELL, J. The appeal in this case is prosecuted from the decree of the chancellor overruling respondent's demurrer to the bill and motion to dismiss the same for want of equity. The bill is one by creditors, and is filed under section 818 of the Code of 1896. The demurrer is addressed to the bill as a whole. The averments of the bill, as to the alleged fraud, are made in the alternative. The bill, among other things, alleges that the complainants are judgment creditors of the respondent, the mayor and council of the city of Decatur, a municipal corporation. The bill does not purport to be filed by the complainants as judgment creditors with lien, but as simple contract creditors, under section 818 of the Code. The bill avers that the land sought to be subjected to complainant's claims, and which was conveyed by Couch and others to the defendant, the Southern Railway Company, was so conveyed at the instance of the defendant, the mayor and council of the city of Decatur. The bill avers the purchase price, the consideration of the land so conveyed, was paid by the defendant, the mayor and council of the city of Decatur, and was in fact, and so intended to be, a gift or donation by the defendant, the mayor and council of the city of Decatur, to the defendant, the Southern Railway Company.

It cannot be doubted, if the respondent municipality were an individual person, and, while indebted, paid the purchase price of the lands conveyed to the Southern Railway Com-

pany, as here charged, intending the same as a gift or donation, the transaction would be deemed fraudulent as to creditors, and the case would fall directly within the principles stated in *McAnally v. O'Neal*, 56 Ala. 299, and *Pickett v. Pipkin*, 64 Ala. 520. Can there be any difference in principle under the facts stated in the present bill, for the reason that the debtor making the gift or donation is a municipal <sup>221</sup> corporation? Under the facts averred it is evident that the land sought to be subjected to complainant's claims was never held, or intended to be held, by the municipality for governmental purposes. It can hardly be questioned that property owned and held by municipal corporation other than for governmental purposes may be levied upon for the payment of debts: *Equitable Loan & Security Co. v. Edwardsville*, 143 Ala. 182, 111 Am. St. Rep. 34, 38 South. 1016. A court of equity, in dealing with a transaction, disregards mere forms, and always looks to the substance. If we regard the substance of the present transaction, the case as made by the bill would be the same as if the municipal corporation had held and owned the land in question, and other than for any public or governmental purpose, and, being indebted to the complainants, had made a deed of gift and thus donated the same to the defendant railroad company. It can hardly be questioned that such a voluntary conveyance would be a fraud in law upon existing creditors, and void as to such.

That the complainants may have a remedy at law by mandamus does not prevent the jurisdiction of a court of equity attaching in such a case: *Henderson v. Farley Nat. Bank*, 123 Ala. 547, 82 Am. St. Rep. 140, 26 South. 226; *Carter v. Coleman*, 82 Ala. 177, 2 South. 354; *Lehman v. Meyer*, 67 Ala. 396.

The grantors in the conveyance here assailed were not necessary parties defendant: *Bump on Fraudulent Conveyances*, 550.

We find no error in the ruling of the chancellor, and his decree will be affirmed.

Tyson, C. J., and Anderson and McClellan, JJ., concur.

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*The Property of a Municipal Corporation* which is not adapted to or used for public or governmental purposes is subject to execution: *Sherman v. Williams*, 84 Tex. 421, 31 Am. St. Rep. 66; *State v. Buckles*, 8 Ind. App. 282, 52 Am. St. Rep. 476; *Equitable Loan etc. Co. v. Edwardsville*, 143 Ala. 182, 111 Am. St. Rep. 39. Compare, however, *Pekin v. McMahon*, 154 Ill. 141, 45 Am. St. Rep. 114; *Emery County v. Burresen*, 14 Utah, 328, 60 Am. St. Rep. 898.

*The Demands Which will Support a Creditor's Bill* are discussed in the note to *Ladd v. Judson*, 66 Am. St. Rep. 271.

CENTRAL OF GEORGIA RAILWAY COMPANY v.  
JONES.

[150 Ala. 379, 43 South. 575.]

**CARRIERS, Baggage, Liability for, When not Terminated by Delay in Taking Away.**—If the baggage of a passenger reaches its destination, and he delays in calling for it within a reasonable time, and it is then taken away by a third person and lost through the negligence of the carrier's agents, it is answerable. (p. 71.)

**CARRIERS, Presumption of Negligence of on the Loss of Baggage.**—If a carrier has had the baggage of a former passenger in its depot or warehouse, it is, on the loss of such baggage, presumed, to have been negligent, and must assume the burden of disproving such negligence in an action by the owner to recover the value of the property so lost. (p. 71.)

Espy & Farmer, for the appellant.

E. F. Ellsberry, for the appellee.

<sup>280</sup> TYSON, C. J. This action was brought by plaintiff to recover the value of a trunk and its contents, alleged to have been lost by reason of the negligence of defendant's station agent. It is made to appear, both by the pleading and the proof, that the trunk was delivered by plaintiff to defendant to be transported as baggage, from a point in the state of Georgia to Malvern, a station on its line of road in this state. It was also shown that the trunk arrived at Malvern and was taken in charge by the defendant's station agent at that point, and that while in his possession it was taken by some one other than plaintiff during the day of its arrival or during the night of that day.

<sup>281</sup> The point is made that it was the duty of plaintiff to call for his trunk within a reasonable time, and that his failure to do so until the next morning after its arrival and its taking absolves the defendant from all liability. It may be that it was plaintiff's duty to call for his trunk within a reasonable time after its arrival, but his failure to do so did not absolve the defendant from all liability. His failure may have terminated the defendant's liability as carrier, which was that of an insurer, but that of warehouseman or bailee was still extant; and if the trunk was lost by reason of the negligence of its station agent, who received it, as alleged in the complaint, the defendant was liable, and proof of its loss raised the presumption of such negligence, and cast the burden of proof upon the defendant of acquitting itself of negligence: 3 Am. & Eng. Ency. of Law, 2d ed., pp. 750, 751, and note.

The defendant having wholly failed to discharge this burden, the affirmative charge requested by plaintiff was properly given.

Affirmed.

Dowdell, Simpson and Anderson, JJ., concur.

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*The Liability of Carriers for the Baggage of Passengers* is the subject of a note to Wood v. Maine Cent. R. R. Co., 99 Am. St. Rep. 343. The general rule is that a carrier is not permitted to invoke the act of God which destroys goods while in transportation, as an excuse for unreasonable delay and failure to deliver, when, if the carrier had discharged his duty, the goods would not have been destroyed: Rodgers v. Missouri Pac. Ry. Co., 75 Kan. 222, 121 Am. St. Rep. 416; Alabama Great Southern R. R. Co. v. Quarles, 145 Ala. 436, 117 Am. St. Rep. 54, and cases cited in the cross-reference note thereto.

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## ALABAMA GREAT SOUTHERN RAILWAY COMPANY v. ELLIOTT.

[150 Ala. 381, 43 South. 738.]

**CARRIERS, Liability of When Negligence Exposes Property to Damage After the Negligence Itself has Terminated.**—If a shipment of property is made, and, through the negligence of the carrier, is delayed, but after the delay, reaches its point of destination, where, before removal, it is damaged by a cyclone to which it would not have been exposed but for such delay, the carrier is answerable if there was not an unreasonable delay in removing the goods after notice of arrival. It is not essential to the carrier's liability that the loss should have occurred while he was in default. (p. 75.)

De Graffenreid & Evins and C. E. Waller, for the appellant.

Thomas E. Knight, for the appellee.

**383** SIMPSON, J. This was an action for damages resulting from the failure to deliver part of a certain lot of flour and delivering another portion of the same in a damaged condition. The assignments of error relate entirely to the ruling of the court on certain demurrers to pleas, and the facts, as set out in the pleading, are that the flour was delivered to the Louisville and Nashville Railroad Company at Evansville, Indiana, to be carried to the plaintiff at Moundville, Alabama, a place of about one hundred and fifty inhabitants, on the line of the defendant company. Said flour was delivered to the defendant company, at Birmingham, Alabama, on the seventeenth day of January, 1904, and

by it shipped out from Birmingham on the twenty-first day of January. It reached Moundville, in the same condition as received, on said twenty-first day of January, at 1 o'clock P. M., and notice was sent to the plaintiff of its arrival; but on the morning of the 22d of January, at 1 o'clock, a violent cyclone swept over the country and caused the damage complained of.

The only question presented by the assignments and briefs of counsel is whether or not, admitting the delay at Birmingham, the defendant is liable on account of the damage done by the act of God, to wit, the cyclone at Moundville, twelve hours after the goods reached said destination. In a recent case before this court, where the carrier to which the goods were delivered for shipment retained the same in its possession, without shipment, for a period of eleven days, and on the eleventh day said goods were practically destroyed by a cyclone, this court, recognizing the fact that there is a serious conflict in the decisions of other states, placed itself in the column of those holding the carrier liable: *Alabama Great South. R. Co. v. Quarles & Couturie*, 145 Ala. 436, 117 Am. St. Rep. 54, 40 South. 120, 5 L. R. A., N. S., 867. It will be noted that the facts in this case are not identical with those in the case just cited, in that, in that case, the cyclone occurred while the carrier was in default, to wit, during the delay, so that the delay and the cyclone were concurring causes. This court said: "When there is an unreasonable delay on the part of the carrier in forwarding the goods, and they are destroyed by the act of God during <sup>884</sup> this delay, he is not excused, for the reason that it was by his fault that they were exposed to the peril: Page 121, column 2, of 40 South. (117 Am. St. Rep. 54, 5 L. R. A., N. S., 867). Again, in commenting on a Massachusetts case holding otherwise, though not considered strictly analogous, we said: "It cannot be held to have approved the proposition that a defendant, when liable as an insurer, being at fault at the time the act of God caused the loss, could invoke that act as a defense": Page 122, column 1, of 40 South. (117 Am. St. Rep. 54, 5 L. R. A., N. S., 867). In the case of *Louisville etc. R. R. Co. v. Gidley*, 119 Ala. 523, 24 South. 753, also the leather was destroyed by fire while it was being unlawfully detained in the warehouse of defendant. Also, in the leading case on the side of liability, the goods were overtaken by a flood while being improperly detained at Albany: *Michaels v. New York C. R. R.*, 30 N. Y. 564, 86 Am. Dec. 415. The recent case of *Bibb Broom Corn Co. v. Atchison*

etc. R. Co., 94 Minn. 269, 110 Am. St. Rep. 361, 102 N. W. 709, 69 L. R. A. 509, holding in line with our decisions, also emphasizes the fact, stating: "The rule that permits a carrier to excuse his negligence by an act of God, overtaking him while thus in fault, seems to us unsound": Page 512, column 2, of 69 L. R. A., page 275 of 94 Minn., page 711 of 102 N. W. (110 Am. St. Rep. 361). Also, "If a loss occurs while his wrongful act is in operation and force, and which is attributable thereto, he should be held liable": Page 512, column 2, of 69 L. R. A., page 276 of 94 Minn., page 712 of 102 N. W. (110 Am. St. Rep. 361). So, in the case of *Wald v. Pittsburg etc. R. R. Co.*, 162 Ill. 545, 53 Am. St. Rep. 332, 44 N. E. 888, 35 L. R. A. 356, where the passenger's trunk, in place of being sent on the train with him, was detained and sent on another, which was caught in the Johnstown flood, this was treated as a deviation, and, as the act of God occurred during the deviation, the company was held responsible: Page 338 of 53 Am. St. Rep. In the case of *Southern Pac. Co. v. Boothe* (Tex. Civ. App.), 39 S. W. 585, the goods were transported by a different route from that over which they were shipped, and in consequence of the deviation the <sup>385</sup> consignee failed to receive notice of their arrival. The plaintiff sued in trover (the carrier having sold the goods because of the refusal of the consignee to receive them). The court denied the recovery, holding that the consignee should have received them, and would have been entitled to recover compensation for the difference in the value between the time when he should have received the notice and the time when he did receive it. In the case of *Michigan C. R. R. Co. v. Curtis*, 80 Ill. 324, the fruit trees were shipped from Rochester, through Chicago, to various points beyond, were delayed about eleven days at Chicago, and were frozen when received. The railroad company was held liable, the court saying: "They did not have the right to delay unreasonably the delivery of the trees, until they would inevitably be destroyed in the hands of the next carrier, and then be heard to say that they were destroyed in the hands of the company into whose hands they passed them for ultimate delivery" (page 327); also, "the jury were fully warranted in finding that it occurred (that is, the freezing) in Chicago, or at least in part, before leaving there," etc. (page 330). So it will be seen that this case is not analogous to the present one, as the freezing was a natural cause which might have been anticipated, and the jury were authorized to find that it actually occurred during the delay. It cer-



tainly did occur during the transportation. In the third edition of Hutchinson on Carriers numerous cases, pro and con, on the question of liability in this class of cases, are cited, including our own case of Alabama Great Southern R. R. Co. v. Quarles & Couturie, 145 Ala. 436, 117 Am. St. Rep. 54, 40 South. 120, 5 L. R. A., N. S., 867 (see sections 297-308, inclusive), and in all of those holding the carrier liable the act of God occurred while the delay "continued and was operative," so that the two were concurrent causes.

The appellant insists that under the influence of this class of decisions, the negligence having passed, the same could not be said to concur with the act of God. This court holds that the negligence, resulting in the delay at Birmingham, continued to be an active cause until the plaintiff had had a reasonable time, after the <sup>386</sup> arrival, within which to remove the goods. Hence, the causes were concurring, and the defendant cannot claim that the cyclone was the only proximate cause.

The judgment of the court is affirmed.

Tyson, C. J., and Haralson and Denson, JJ., concur.

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*While an Act of God will Excuse a Common Carrier for a loss of goods, yet where his negligence concurs in or contributes to the loss, he is nevertheless liable therefor:* Jones v. Minneapolis etc. R. R. Co., 91 Minn. 229, 103 Am. St. Rep. 507; Central of Georgia Ry. Co. v. Hall, 124 Ga. 322, 110 Am. St. Rep. 170. Hence, unnecessary delay on his part, subjecting the goods to loss by an act of God, which would not have happened had he been diligent, is of itself negligence that makes him liable for the loss: Alabama Great Southern Ry. Co. v. Quarles, 145 Ala. 436, 117 Am. St. Rep. 54; Rodgers v. Missouri Pac. Ry. Co., 75 Kan. 221, 121 Am. St. Rep. 416; Wald v. Pittsburg etc. R. R. Co., 162 Ill. 545, 53 Am. St. Rep. 332; Richmond etc. R. R. Co. v. Benson, 86 Ga. 203, 22 Am. St. Rep. 446; Green-Wheeler Shoe Co. v. Chicago etc. R. R. Co., 130 Iowa, 123, 106 N. W. 498, 5 L. R. A., N. S., 882; Bibb Broom Corn Co. v. Atchison etc. Ry. Co., 94 Minn. 269, 110 Am. St. Rep. 361, and authorities cited in the cross-reference note thereto.

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## WILKINSON v. LEHMAN-DURR COMPANY.

[150 Ala. 464, 43 South. 857.]

**RES JUDICATA**—Effect of Decree in Equity upon a Subsequent Action of Ejectment.—If a suit in equity involves the validity of a conveyance referred to in the pleadings, and such validity, though not denied by any of the parties, is necessarily affirmed by the decree, it is conclusive of such validity in a subsequent action of ejectment between the same parties or their privies in estate. (p. 77.)

**RES JUDICATA**—Insanity, Collateral Attack Based upon.—If, in a suit brought to enforce a vendor's lien, a decree is entered, it

effect as *res judicata* cannot be avoided by the heirs of the complainant by proving that before the commencement, and during the progress, of the suit he was insane. An attack on this ground is collateral, and hence not permissible in an action of ejectment. (p. 78.)

J. F. Stallings, for the appellants.

Alex Troy, Powell & Hamilton and J. M. Chilton, for the appellee.

<sup>466</sup> DENSON, J. This is an action of ejectment, brought by the heirs at law of W. W. Wilkinson, deceased, against the Lehman-Durr Company, to recover possession of a storehouse and lot in the city of Greenville. The plaintiffs claim title through their ancestor, W. W. Wilkinson. Defendant asserts title from the same source, by deed executed by W. W. Wilkinson to H. Z. Wilkinson, of date July 6, 1885, a mortgage made by H. Z. Wilkinson and wife to defendant, of date July 10, 1885, a mortgage by the same parties to Moses Weil in 1886, a foreclosure of the Weil mortgage and a purchase by Weil at the foreclosure sale, and a deed from Weil's executors to defendant, of date November 13, 1895.

Admitting the execution of the deed from their ancestor to H. Z. Wilkinson, plaintiffs assert that before and at the time of its execution, and continuing until his death, W. W. Wilkinson was non compos mentis, and incapable of making the deed, or of executing any contract. The plaintiffs adduced considerable testimony in support of this contention. Defendant insists, further, that if it be true that, at the time of the execution of the <sup>467</sup> deed to Z. H. Wilkinson, W. W. Wilkinson was non compos mentis, these plaintiffs, privies of W. W. Wilkinson, are estopped to set up that the deed is void, for the reason that their ancestor filed his bill in the chancery court of Butler county, a court of competent jurisdiction both as to the parties and the subject matter of the suit, seeking to enforce a vendor's lien upon their property, along with other property conveyed in the same deed to H. Z. Wilkinson, and made Moses Weil and this defendant parties thereto. In support of the alleged estoppel, the defendant introduced the bill, the answers, the testimony taken by both parties, and the decree of the chancery court in the cause. In the bill the execution of the deed from the complainant, W. W. Wilkinson, to H. Z. Wilkinson is alleged, and a copy of the deed is made an exhibit to the bill. It is shown by the bill that it formed the basis of the contract between the parties, whereby and through which the claim of a vendor's lien was made. The answers of the respondents to the bill

admit the execution of the deed as therein averred. Much evidence was taken in the chancery case; but no point having been made on the validity of the deed, and its execution and delivery being admitted in the answers, none of the evidence brought in question its validity. On the final submission of the cause on the pleadings and proof, the chancery court decreed that the complainant had no vendor's lien, and dismissed the bill, at the same time adjudging the costs of the suit against the complainant. The plaintiffs sought to avoid the chancery proceedings by proof that the complainant therein was insane at the time the bill was filed and throughout the progress of the cause in the chancery court.

The contract of sale between W. W. Wilkinson and H. Z. Wilkinson was evidenced by the deed, and the execution of the deed was a necessary averment in the bill and within the issuable facts made by the bill. Further, the averment as to the contract—the execution of the deed—necessarily implied that the deed was a valid one; and the bill in this respect may be taken as a declaration by the grantor of the validity of the deed. If the <sup>468</sup> respondents in the bill had denied the validity of the deed, it would then have been a litigated issue, evidence thereon would have been admissible, and the court would have been called upon to make a decision expressly upon that issue. While the admissions in the answers rendered evidence to establish the fact that the deed was valid unnecessary, yet they did not affect the validity of the deed as an issue made by the bill, except to place it beyond the necessity of proof to support it. It remained an issue comprehended and involved in the decree of the court, notwithstanding it is not specially mentioned therein: Bigelow on Estoppel, p. 145; Wells on Res Adjudicata, sec. 217; Wood v. Wood, 134 Ala. 557, 33 South. 347. Although the present suit is ejectment, yet, the validity of the deed having been necessarily an issue involved in the chancery court proceedings, the decree of that court was binding on W. W. Wilkinson and his privies in estate until reversed on appeal or set aside by direct attack thereon, unless (as is insisted by the plaintiffs) he was insane, and unless insanity in a party to a cause exempts him from the application of the doctrine of res adjudicata: 1 Black on Judgments, sec. 245; Smith v. Kernochen, 7 How. (U. S.) 198, 12 L. ed. 666; McGrantt v. Baggett, 128 Ala. 483, 29 South. 199; Wood v. Wood, 134 Ala. 557, 33 South. 347.

Conceding that Wilkinson was insane when the bill was filed, will that fact be available to set aside and hold for naught the decree of the chancery court on a collateral attack? "Where a judicial record is fair on its face, it cannot be shown collaterally that any party was insane at the time the proceedings were commenced or judgment rendered, because that will contradict the record": Van Fleet's Collateral Attack, p. 654, sec. 616; Freeman on Judgments, sec. 205. In *Allison v. Taylor*, 6 Dana (Ky.), 87, 32 Am. Dec. 68, it is held that a judgment against a lunatic, on process served on him alone and not on his guardian, though erroneous, is not void; and it is said in the note to the case as reported in 32 Am. Dec. 68, that "unless set aside in chancery, or by some other appropriate remedy, a judgment against a <sup>469</sup> lunatic is of questionable validity." This case is cited by our court approvingly in the case of *Walker v. Clay*, 21 Ala. 797. The same doctrine obtains in many of the states, as will be seen by reference to the cases cited in notes to the section of Van Fleet quoted above. Some of these we here cite: *Brittain v. Mull*, 99 N. C. 483, 6 S. E. 382; *Speck v. Pullman Car Co.*, 121 Ill. 33, 12 N. E. 213; *Foster v. Jones*, 23 Ga. 168; *Denni v. Elliott*, 60 Tex. 337; *Johnson v. Pomeroy*, 31 Ohio St. 247. Following the texts and authorities cited supra, we hold that, even if it is true that W. W. Wilkinson was insane, it not appearing to have been suggested during the proceedings and there being no suggestion of it on the face of the record, the decree is binding on the plaintiffs as privies to W. W. Wilkinson, and is not subject to collateral attack, as was attempted in the trial of the cause below. On these considerations it follows that the trial court properly gave the general charge as requested by the defendant.

There are many rulings of the court on the admissibility of evidence, reserved in the bill of exceptions and assigned here as error; but as the defendant was entitled to the affirmative charge, irrespective of these rulings, we need not consider them.

Affirmed.

Tyson, C. J., and Haralson and Simpson, JJ., concur.

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*A Judgment of One Court is Conclusive* in another in an action between the same parties not only as to the same cause of action, but as to other causes involving the right or title asserted and the defenses interposed in the previous action; and not only as to those matters expressly determined, but also as to those matters collaterally involved and necessarily determined in reaching the final judgment:

*Bew v. Independent School District*, 125 Iowa, 23, 106 Am. St. Rep. 282.

A *Judgment Against an Insane Person* is not void, and hence cannot be attacked in a collateral proceeding: *Pollock v. Horn*, 13 Wash. 626, 52 Am. St. Rep. 66.

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## EX PARTE STATE.

[150 Ala. 489, 43 South. 490.]

**PROHIBITION** is an Extraordinary Legal Remedy, and can be Resorted to only in cases of usurpation of power or jurisdiction by the inferior court, or when, in the exercise of jurisdiction in handling matters clearly not within its cognizance, that court transgresses the bounds prescribed to it by law. (p. 81.)

**PROHIBITION** cannot be Resorted to because of errors committed in the progress of the cause for which an appeal will lie. (p. 81.)

**PROHIBITION and Habeas Corpus.**—If the Want of Jurisdiction is Disclosed on the Face of the Petition, prohibition may be awarded notwithstanding relief may also be had on habeas corpus. (p. 81.)

**HABEAS CORPUS to Take Person Under Sentence of Death Out of the Jurisdiction of the Court Sentencing Him.**—If an accused has been tried, found guilty of murder and sentenced to death, and an appeal has been taken from the judgment resulting in an affirmance, and the defendant is confined for safekeeping in the jail of a county other than that in which he was convicted and sentenced, the court of the county where he is so confined has not jurisdiction to issue a writ of habeas corpus to take possession of the prisoner and thereby prevent the execution of the judgment against him in the county where he was so sentenced, on the ground that he has become insane. (pp. 81, 82.)

**PROHIBITION will Issue to Prevent a Court from Hearing and Determining Habeas Corpus Proceedings of which it has no jurisdiction.** (p. 82.)

**HABEAS CORPUS—Conflict of Jurisdiction not to be Permitted by.**—If a court had a right to the custody of a person under sentence of death for the purpose of carrying out the sentence, another court has not jurisdiction to take such person out of the custody of such court to inquire whether the sentence should not be suspended because of his alleged insanity. (p. 82.)

**INSANITY of a Person Under Sentence of Death, How to be Inquired into.**—If a person has been convicted of murder and sentenced to death, and the sentence affirmed on appeal, the court wherein the conviction was had has power to stay the execution for the purpose of instituting an inquiry as to the sanity of the prisoner, and if it is conceded that such trial court has lost jurisdiction to stay execution because of such affirmance, then the appellate court has power to stay the execution until the trial court can inquire into the sanity. (pp. 82, 83.)

Application to the supreme court on the relation of the attorney general for a writ prohibiting one of the judges of

the Jefferson criminal court from hearing and determining habeas corpus proceedings. John Williams, on whose behalf the writ of habeas corpus was applied for, had been convicted in the circuit court of Cullman county for murder and sentenced to be hanged, and the sentence on appeal to the supreme court had been affirmed. He was confined in the jail of Jefferson county for safekeeping, and while so confined, and just previous to the day fixed for his execution, a writ of habeas corpus was sued out alleging the insanity of the prisoner since convicted and that he was illegally restrained of his liberty by the jailer of Jefferson county, and should be in the custody of the State Asylum for the Insane. Judge Weaver, of the Jefferson county criminal court, to whom the petition for the writ was addressed, issued it returnable before him on a day specified. On application to the supreme court, a writ of prohibition was granted, requiring the judge not to hear the application for habeas corpus until the appellate court could inquire into its authority to do so.

Massey Wilson, attorney general, George H. Parker and John A. Lusk, for the application.

Erle Pettus, Zell Gaston and F. E. St. John, for the appellee.

495 TYSON, C. J. The petition in this case is for a writ of prohibition and was exhibited to Hon. S. D. Weakley, the then chief justice of this court, in vacation, who issued a rule nisi returnable to this term of this court. In obedience to the rule issued, the judge to whom it was directed answered, admitting all the material averments of the petition, but denied that his acts as judge constituted a usurpation of jurisdiction or power, or that the power conferred upon him by law was abused, or that his jurisdiction had been exceeded in any particular. This matter of controversy arises over the right, or rather the jurisdiction of the respondent, as judge of the criminal court of Jefferson county, to hear and determine a petition for a writ of habeas corpus in behalf of one Williams, who was confined in the jail of that county for safekeeping, to abide the execution of a judgment of conviction of murder in the first degree, in which he was sentenced to death, rendered by the circuit court in and for the county of Cullman, under an order of that court, upon the alleged ground that Williams, since his conviction, had become insane, and was insane at the time

of the filing of the petition. The foregoing facts are shown by the petition for the writ of habeas corpus. The motion to dismiss that petition for want of jurisdiction was denied.

<sup>496</sup> It is undoubtedly true that prohibition is an extraordinary legal remedy, and can only be resorted to in cases of usurpation of jurisdiction or power by an inferior court, or when, in the exercise of jurisdiction in handling matters clearly within its cognizance, the inferior court transgresses the bounds prescribed to it by the law: 2 Brickell's Digest, 389, sec. 1 et seq. It is also true that this remedy cannot be resorted to when an appeal will lie for the correction of errors committed upon the hearing of a cause. But, if the want of jurisdiction is disclosed on the face of the petition, then the writ of prohibition will be awarded, notwithstanding the respondent may have jurisdiction to issue writs of habeas corpus in proper cases: *Ex parte Walker*, 25 Ala. 81; *Ex parte Smith*, 23 Ala. 94. In other words, when it clearly appears that the inferior court has no jurisdiction of the subject matter or of parties to the legal controversy, a writ of prohibition is the remedy: 16 Ency. of Pl. & Pr. 1110 and note 2. And obviously, when this is the case, if the proceedings should be permitted to go to judgment, such judgment would not support an appeal, because it would be *coram non iudice*: *Ex parte Lyon*, 60 Ala. 650; *Pettus v. McKinney*, 56 Ala. 41; *David's Admr. v. David*, 56 Ala. 49.

On the facts averred in the petition, did the respondent have jurisdiction to entertain it? Section 4959 of the Criminal Code of 1896 expressly confers upon the court in which Williams was convicted authority to commit him for safe-keeping to the jail of Jefferson county. By that order the court did not surrender its custody of him necessary to the execution of the sentence of death pronounced against him. Nor did his appeal to this court from the judgment of conviction, and an affirmance of that judgment, impair the right of the circuit court to his custody for the purpose of enforcing its judgment and sentence: Criminal Code of 1896, sec. 5439. That court having custody of him for the purpose of enforcing its judgment, could the respondent legally entertain the petition for habeas corpus, and thereby deprive the circuit court of its custody of him, to the end, it may be, of defeating its right to enforce <sup>497</sup> the judgment? We think not. There is clearly no statute which authorizes such a proceeding. In *Ex parte Johnson*, 167 U. S. 120, 17 Sup. Ct. Rep. 735, 42 L. ed. 103, on petition for habeas corpus after conviction and sentence of death by the district court

of the United States, the court said: "We know of no reason why the rule so frequently applied in cases of conflicting jurisdiction between federal and state courts should not determine this question. Ever since the case of *Ableman v. Booth*, 21 How. 506, 16 L. ed. 169, it has been the settled doctrine of this court that a court having possession of a person or property cannot be deprived of the right to deal with such person or property until its jurisdiction is exhausted, and that no other court has the right to interfere with such custody or possession." In *Ex parte Roberson*, 123 Ala. 103, 82 Am. St. Rep. 107, 26 South. 645, Roberson renewed to this court his application for writ of habeas corpus after conviction, alleging his unlawful confinement in the county jail by virtue of a void judgment. This court, after ascertaining that the judgment of conviction was valid, said: "The defendant being legally held in custody under proceedings in a court having jurisdiction of his person and of the offense with which he was charged and has been convicted, the circuit judge properly refused to issue the writ, and here also it will be denied": See, also, *Ex parte Chandler*, 114 Ala. 8, 22 South. 285; *State v. Humphrey*, 125 Ala. 110, 27 South. 969; *Hall v. State*, 130 Ala. 139, 30 South. 502. This principle, it seems to us, is decisive of the question that the respondent had no jurisdiction to hear and determine the petition for writ of habeas corpus; for it will certainly not be disputed that the custody or possession of Williams by the court that tried him was essential to the enforcement of the judgment of conviction. Any other rule would produce a conflict of jurisdiction over the right to the custody of the person of the condemned prisoner, and lead to inextricable confusion, resulting in a defeat of the due administration of the law.

<sup>498</sup> But it is said that, if the right to prosecute the petition for the writ is denied, Williams will be deprived of all recourse to have his insanity vel non inquired into; that if insane, he should not be executed while in that condition. Every court has the inherent power to control the execution of its orders or processes, to the end of preventing an abuse of them: *Hoffman v. Sewell*, 148 Ala. 378, 42 South. 556; *Larkin v. Mason*, 71 Ala. 227. We do not doubt the power of the judge of the circuit court upon proper application to order a stay of the execution of Williams for the purpose of instituting an inquiry as to his sanity, and, if found to be insane, then to stay his execution until a recovery: 4 Blackstone's Commentaries, 24; *Nobles v. Georgia*, 168 U. S.



398, 18 Sup. Ct. Rep. 87, 42 L. ed. 515. But it may be said that this court, upon the appeal from the judgment of conviction, in affirming that judgment, fixed the day for Williams' execution, and therefore the circuit court was without authority to stay his execution on that day. If this be conceded, this court has the power to stay the execution until the judge of the circuit court can make the inquiry into his sanity.

Let the writ of prohibition be awarded.

Dowdell, Anderson and McClellan, JJ., concur.

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*The Writ of Prohibition* is the subject of a note to State v. Superior Court, 111 Am. St. Rep. 929.

*The Release of a Prisoner on Habeas Corpus* after judgment and sentence is the subject of a note to Keopke v. Hill, 87 Am. St. Rep. 167; and the release of a prisoner on habeas corpus after commitment and before trial is the subject of a note to State v. Smith, 100 Am. St. Rep. 29.

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## GALLIHER v. STATE MUTUAL LIFE INSURANCE COMPANY.

[150 Ala. 543, 43 South. 833.]

**CONFLICT OF LAWS—Foreign Law Affecting the Remedy Only.**—If the law of a state wherein a contract was made affects only the remedy to enforce it, such law is not available in an action on the contract brought in another state. (p. 85.)

**LIMITATION OF ACTIONS, Effect of Statute.**—The limitation, even when the bar is perfected, does not annul the contract itself, but only takes away the remedy provided by law for its enforcement. (p. 85.)

**CONTRACTS, Limitations Therein upon the Time to Sue, When not Available in Another State.**—If a provision in a contract of insurance fixes a limitation upon the time when suit may be brought, such limitation is not available in an action commenced in a state whose code makes void all agreements whereby the time for the bringing of actions is fixed at a period less than that prescribed by law. (p. 86.)

**INSURANCE—Waiver of Forfeiture.**—Even though the provisions of a policy of insurance providing for forfeiture are automatic, they may be waived by the parties, and such waiver may be indicated by conduct as well as by express language. (p. 88.)

**INSURANCE, Waiver of Forfeiture Caused by Nonpayment of Premium Notes.**—Notwithstanding notes are given in payment or part payment of a premium, and the policy provides that on default in the payment of the notes, the policy shall become ipso facto null and void, the forfeiture can be waived by the insurer, and is waived, if, after such default, the insurer continues to assert liability on the part of the insured to pay such notes in full. (pp. 87, 89, 90.)

**INSURANCE, Forfeiture, Consent of the Assured to the Waiver of.**—Conceding that the consent of the assured is necessary to the waiver of a forfeiture and the keeping alive of the liability to pay premium or premium notes, his assent may be inferred when demand after forfeiture is made for the payment of the premium note, and is met by its partial payment and the promise to pay the balance as soon as able. (p. 89.)

Action by Laura Galliher against a life insurance company on a policy on the life of James W. Galliher. He died on the thirteenth day of August, 1904. The defendant pleaded that the policy had been forfeited by a failure to pay the premium for the year 1903-4, and also set up as a defense that the contract was a Georgia contract, which the statute of limitations of that state governed, and that the suit was barred by its laws. The plaintiff, in replication, alleged the waiver of the stipulations of the note. The cause was tried without a jury, judgment entered for the defendant, and the plaintiff appealed.

Section 2802 of the Code of Alabama, referred to in the opinion, provides that "any agreement or stipulation, verbal or written, whereby the time for the bringing of any action is limited to a time less than that prescribed by law for the bringing of such action, is void."

Blackwell & Agge, for the appellant.

Matthews & Matthews, Dean & Dean and Cabaniss & Bowie, for the appellee.

<sup>545</sup> ANDERSON, J. Conceding that the policy, which is the foundation of this suit, is a Georgia contract, and that the clause shortening the statute of limitations would be binding in the state of Georgia, it is expressly prohibited by section 2802 of the Code of 1896. In the well-considered case of *Jones v. Jones*, 18 Ala. 248, wherein the case of *Goodman v. Munks*, 8 Port. 84, was overruled, the court, through Dargan, C. J., said: "It is a principle of law, admitted by all courts, that the *lex loci contractus* must govern as to the validity, interpretation and construction of the contract; but the remedy to enforce it, or to recover damages for its breach, must be pursued according to the law of the forum where the suit is brought: *Peake v. Yeldell*, 17 Ala. 636; *Carnegie v. Morrison*, 2 Met. (Mass.) 381; *Le Roy v. Crowninshield*, 2 Mason (U. S.), 151, Fed. Cas. No. 8269; Story on <sup>546</sup> Conflict of Laws, secs. 275, 276. Guided by these plain rules, which can be denied by no one, to my mind it seems plain that, where a law of another state is relied

on as a defense to a suit brought in this state, it must be shown that according to the *lex loci contractus* the contract was invalid, or, if once valid, that it has become extinguished, and therefore is not in legal contemplation a contract. If the foreign law does not affect the contract itself, but only the remedy to enforce it, we cannot regard it; for all remedies on contracts, whether made in or out of this state, must be governed by our own laws, when the suit is brought here, without regard to the remedies afforded by the laws of other countries. Applying this test to the question, there can be but one answer given, if we are to be guided by the settled principles of law; for all the authorities agree that the statute of limitations, even when the bar is perfected, does not annul the contract itself, but only takes away the remedy provided by law for its enforcement. Now, if the contract itself is not discharged, but the remedy alone is taken away, how can we refuse to allow a remedy, the contract being valid, merely because there is no remedy in the state where the contract is made? To refuse a remedy on such a contract would not be to interpret the contract by the *lex loci* only, but it would be to govern ourselves by the laws of other countries in regard to the remedies allowed for the purpose of enforcing contracts. In the case of *Williams v. Jones*, 13 East, 439, the parties entered into a contract in India, and there remained until by the law of that country the remedy was barred. Suit was afterward brought in England, and the foreign statute of limitations was relied on as a bar; but the court held that it was no defense. It was admitted by the court in that case that, if by the law of India the contract was extinguished, then no remedy could be allowed upon it in England; but as the law only took away the remedy, and did not affect the contract itself, the courts of England must enforce it. In the case of *Le Roy v. Crowninshield*, 2 Mason (U. S.), 151, Fed. Cas. No. 547 8269, the suit was brought in Massachusetts, and the defense was that the action was barred by the laws of New York, where the contract was made. Judge Story, after an elaborate examination of the question, finally yielded to the weight of authority, and held, contrary to his own inclination, that the statute of limitations of New York was no defense. In the case of *Medbury v. Hopkins*, 3 Conn. 427, the question was whether the statute of limitations of New York was a good defense to a suit brought in Connecticut; it appearing that the contract was made in the state of New York, and that if suit had been brought there, the statute of that state would

have been a good defense. The court said it was well settled that contracts were to be construed according to the law of the place in reference to which they were made, but that the *lex loci* was applicable only as to the validity and the interpretation of contracts, not as to the time, mode or extent of the remedy, and upon that principle held that the statute of New York was no defense. In the case of *Lincoln v. Battelle*, 6 Wend. 475, the supreme court of New York held that the statute of limitations of the state where the contract was made was no bar to an action brought in the courts of New York. Savage, C. J., in delivering the opinion, said the distinction between the *lex loci* and the *lex fori* is well settled. The laws of the *lex loci* are to govern all questions affecting the validity, nature and construction of the contract, but the law of the place where the contract is sought to be enforced must govern as to the remedy. To the same effect, see *Ruggles v. Keeler*, 3 Johns. 263, 3 Am. Dec. 42; *Decouche v. Savetier*, 3 Johns. Ch. 190. In the case of *Bryne v. Crowninshield*, 17 Mass. 55, the supreme court of that state held the same doctrine. The court said the principle has often been recognized that the laws of the country where the contract is made must govern in its construction. Those of the country where remedy is sought must prescribe the remedy: See, also, *Pearsall v. Dwight*, 2 Mass. 84, 3 Am. Dec. 35, in which Chief Justice Parsons held the same doctrine. In the case of *Egberts v. Dibble*, 3 McLean (U. S.), 86, Fed. Cas. No. 548 4307, it was held that the statute of limitations of the state where the suit was brought alone could be pleaded, and not the statute of limitations of any other state: See, also, *Harper v. Hampton*, 1 Har. & J. (Md.) 622. Opposed, however, to these authorities, is the case of *Goodman v. Munks*, 8 Port. 84." See, also, on this subject, *Seay v. Palmer*, 93 Ala. 381, 30 Am. St. Rep. 57, 9 South. 601. It is true the rule in the *Jones* case (18 Ala. 248) was modified by our statute (section 2808 of the Code of 1896) so far as it applies to the statute of limitations of other states; but the defendant does not plead the statute of limitations of Georgia, but one fixed by the contract. Moreover, if the limitation is an inherent part of the contract, and should not merely apply to the remedy for its enforcement, then it would be contrary to our statute (section 2802 of the Code of 1896), and would not be upheld in this state: 9 Cyc. 675; *Donovan v. Pitcher*, 53 Ala. 411, 25 Am. Rep. 634.

This brings us to the determination of the question of a forfeiture by the insured before his death, which seems to have been the decisive point in the case as indicated by the opinion of the learned trial judge. It appears that the premium covering the period from July 25, 1903, to July 25, 1904, became due and payable in advance—that is, July 25, 1903—and that Galliher, not being able to pay the same, gave the company his two notes, executed July 25, 1903, each for fifty-nine dollars and seventy-six cents, and one note payable January 1, 1904, and the other one May 1, 1904; each note containing the following clause: "I understand and agree that in consideration hereof said policy is extended until default is made in the payment of this note, when all rights and benefits secured thereby shall cease and determine without notice, and said policy shall be ipso facto null and void. I hereby agree that this note shall not be deemed a payment of life insurance, but only an extension of time for the payment of the same, and the nonpayment of this note when due, and the termination of said insurance by reason thereof, shall not impair the validity of this note, but the same shall become due and payable for the proportion of its face and interest that the time the insurance <sup>549</sup> has been extended for bears to the whole time covered by said premium." It will be observed that, upon default in the payment of the note, the policy became "ipso facto null and void"; but there can be little or no doubt but that the forfeiture could be waived by the company. Did the company by its subsequent conduct treat the forfeiture as waived and treat the insurance as still existing? "It has been frequently said that forfeitures for the nonpayment of premiums are not favored in law, and the courts are always prompt to seize hold of any circumstances that indicate an election to waive the forfeiture, or an agreement to do so, on which the party has relied and acted: *Washburn v. Union Cent. Co.*, 143 Ala. 485, 38 South. 1011; *United States Ins. Co. v. Lesser*, 126 Ala. 568, 28 South. 646; *New York L. Ins. Co. v. Eggleston*, 96 U. S. 572, 24 L. ed. 841; *Phoenix Mut. L. Ins. Co. v. Doster*, 106 U. S. 30, 1 Sup. Ct. Rep. 18, 27 L. ed. 65; *Travelers' Ins. Co. v. Brown*, 138 Ala. 526, 35 South. 463. The mere retention of the notes would not amount to a waiver of the forfeiture; but it would seem that an insistence upon the payment of both notes in full would operate as a waiver of the forfeiture, because by attempting to collect the notes in full the company sought to

get the premium covering the period from July 25, 1903, to July 25, 1904, as the amount due under the terms of the note was less than the face thereof, in a case of forfeiture. The Kentucky court, in a well-considered opinion and in a case wherein the facts were in a measure similar to the one involved in the case at bar, which is reported in *Union Central Life Ins. Co. v. Spinks*, 119 Ky. 261, 83 S. W. 615, 84 S. W. 1160, 69 L. R. A. 264, said: "It is well-settled law in this state that, if an insurer desires to avail itself of conditions in its policy to declare it forfeited for the nonpayment of a premium note, it must unequivocally elect to so treat it, and in fact then and thereafter so treat it. It will not be allowed, though, to claim, both that it is not bound on the policy, but that the insured is bound to pay the note. Its action must be consistent. While it may retain the note as evidence of its nonpayment, it must not retain it, or treat <sup>550</sup> it as an evidence of that much indebtedness: *Moreland v. Union Cent. L. Ins. Co.*, 104 Ky. 129, 46 S. W. 516; *Union Cent. L. Ins. Co. v. Duvall*, 46 S. W. 518, 20 Ky. Law Rep. 441; *Johnson v. Southern Mut. L. Ins. Co.*, 79 Ky. 403; *Walls v. Home Ins. Co.*, 24 Ky. Law Rep. 1452, 71 S. W. 650. In the case at bar appellant not only retained the note after its maturity, but repeatedly endeavored to collect it in full thereafter. It thereby claimed that the insured owed to it three hundred and ninety-six dollars and eighty cents as an enforceable debt. If he did, then appellant was bound to him, as the consideration for it, upon the policy of insurance. Even though such provisions in policies of insurance are automatic, they may be waived by the parties, and this waiver may be indicated by conduct, as well as by express language. The fact that the insured marked on its private books that the policy was canceled, did not cancel it, if thereafter it continued to assert the note as an enforceable obligation against the insured, thereby evincing to him that it was not canceled. Upon principle and authority we hold that the evidence here shows a waiver by the insurer of the conditions of forfeiture in the policy."

If the policy was forfeited on January 1, 1904, then the insured (Galliher) did not owe the company the full amount of the first note, but only about fifty-two dollars. If the policy became forfeited, and was so treated upon the nonpayment of the second note, then he still owed less than the amount of both notes, yet we find the company retaining both notes and attempting to collect them in full. If the forfeiture of January 1st was not waived, why did the company not demand

what was really due on the first note, about fifty-two dollars, and offer to surrender both notes, instead of attempting to collect the full amount of the first one and retaining the other one? Or, if the company did not waive the forfeiture of May 1st, when the second note matured, why did it subsequently attempt to collect both notes in full, when, under the terms of the second forfeiture, there was only due the proportionate part of the premium up to May 1st, and not the full amount of both notes? Again, we find a letter addressed to Galliher, dated August 25, <sup>551</sup> 1904, treating the policy as still in existence if it had "thirty days of grace clause." It is true Porter testified that this letter was not written by anyone who had the authority to waive the forfeiture for the company, and it might be, with the letter standing alone, it could not have that effect; but the letter was sent out by an employé of the company whose authority to make out and mail notices was not questioned, and the fact that this notice was mailed is an inference that the company's records did not show a forfeiture of the policy (no entry to that effect being upon lists or books), notwithstanding the company claimed, in a letter of August 19th, that the policy was forfeited the preceding January. If this forfeiture was not waived, and the company took advantage of the January default, it stands to reason that there would have been some entry or memorandum on the books or list from which Griffin, who sent out the July notice, would have been deterred from doing so.

Conceding that the consent of Galliher to a waiver of the forfeiture was necessary, and that after the forfeiture was made the company could not collect the full amount of premium instead of the proportionate amount due until the forfeiture, which may or may not have been necessary, we think his assent can be readily inferred from the facts. He knew that the policy would become "ipso facto null and void" upon a default of the January note, and, further, that he would only owe them so much of the premium as was due from July 25th to January 1st, about fifty-two dollars, and less than the face of the note. Consequently, when the company demanded of him payment in full of the note after the forfeiture period, and retained the second note, its act led to the natural conclusion that they were treating the policy as still in force, and were seeking to collect the premium, rather than the proportionate amount due in case of forfeiture. He made a partial payment of the note, a promise to pay it (not the proportion) as soon as he was able.

The policy being in existence up to July 25, 1904, and containing a thirty days of grace clause, and Galliher having died within said thirty days, the defendant <sup>552</sup> became liable to the plaintiff, the beneficiary, for the amount due under the terms of the policy, less any unpaid premiums, with interest thereon since maturity.

The judge of the city court erred in rendering judgment for the defendant, and its judgment is reversed, and under the terms of the act regulating appeals from that court we will here render such judgment as should have been rendered.

Tyson, C. J., and Dowdell and McClellan, JJ., concur.

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*In Case of a Conflict of Laws*, the statute of limitations of the forum governs, unless the statute is regarded as extinguishing the debt and not merely barring the remedy: *Gross v. Watts*, 206 Mo. 373, 121 Am. St. Rep. 662; *Arp v. Allis-Chalmers Co.*, 130 Wis. 454, 118 Am. St. Rep. 1036. And the general rule is that the statute of limitations affects the remedy without extinguishing the right: See the note to *Menzel v. Hinton*, 95 Am. St. Rep. 658.

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## SINGER MANUFACTURING COMPANY v. TAYLOR.

[150 Ala. 574, 43 South. 210.]

**A CORPORATION is Liable for Slander as Well as for Other Torts.** (p. 91.)

**SLANDER, Liability to Joint Action for.**—A slander must be regarded as an individual act for which two or more persons cannot be held liable in a single action. (p. 91.)

**PRINCIPAL AND AGENT, Liability of the Former for the Torts of the Latter.**—It is essential to the liability of a principal for the tort of his agent that the tortious act be either authorized or ratified by the principal, or committed by the agent in the course of the business of the principal and of the agent's employment. (p. 92.)

**PRINCIPAL AND AGENT, Slander, When Imputable to the Latter.**—Evidence of slanderous words must be ascribed to the personal malice of the agent rather than to an act performed in the course of his employment and in aid of the interests of his employer, unless authorized or ratified by the principal. (p. 92.)

**CORPORATION—Slander.**—A Corporation and Its Agent cannot be held liable in a single action for slander uttered by such agent. (p. 92.)

**CORPORATION, Liability for Slander Uttered by Agent.**—If the agent of a sewing-machine company at his office calls a person a thief in the presence of others, his principal cannot be held liable, in the absence of evidence of a previous authorization or a subsequent ratification. (p. 92.)

Action by Julia E. Taylor against the Singer Manufacturing Company and its agent for slander. The case was tried



upon counts 5, 6, 7, and 8 of the complaint, which, in substance, alleged that the plaintiff, having occasion to do so, went to the office of the agent of the corporation then in charge of its business, who, acting in the line and scope of his employment and within his authority, said to plaintiff, "You are a thief. I know you. I cannot be mistaken." Some of the counts alleged that Allen in using these words was acting in the scope and authority of his employment and in behalf and in the interest of the corporation. Other of the counts stated that the agent's acts had been ratified and approved by the corporation. Demurrers filed by the defendant raised the question of nonjoinder of parties defendant and of the liability of the corporation to answer for the acts of its agent in this character of action. These questions were also presented by objections to the testimony and by requests in writing to charge the jury. The cause was submitted upon the general issue and the plea of the statute of limitations of one year. Verdict and judgment against both defendants, and they appealed.

Ward & Drennen, for the appellant.

B. M. Allen, for the appellee.

577 TYSON, C. J. This action was brought against a corporation and its agent for slander. It is alleged in the complaint that the agent, "while acting as agent for the defendant company, and in line of his duty as such agent, falsely and maliciously charged the plaintiff with larceny, by speaking of and concerning her, in the presence of divers persons: 'You are a thief. I know you.' " "The current of authority now is that corporations are responsible civilly, the same as natural persons, for wrongs committed by their officers or agents in the course of their employment, or which are authorized or subsequently ratified": *Jordan v. Alabama etc. R. R. Co.*, 74 Ala. 85, 49 Am. Rep. 800. Accordingly, actions have been maintained against corporations for malicious prosecutions and libel, as well as other torts too numerous to be mentioned. The offense of slander is essentially single, differing in this respect from libel. In *Cooley on Torts*, page 124, it is said: "Some wrongs are in their nature necessarily individual, because it is impossible that two or more should together commit them. The case of the oral utterance of defamatory words is an instance. This is an individual act, because there can be no joint utterance. He alone can be liable who spoke the words; and, if two or more

utter the slander at the same time, still the utterance of each is individual, and must be the subject of a separate proceeding for redress": See, also, 13 Ency. of Pl. & Pr. 30.

The liability of the principal for the torts of the agent, when not based upon a breach of duty arising out of contract, as in the case of common carriers, is based upon principles of public policy. It is essential <sup>578</sup> to such liability that the tort of the agent, if not authorized or ratified by the principal, should be committed by the agent in the course of the business of the principal and of the agent's employment. By reason of the fact that the offense of slander is the voluntary and tortious act of the speaker, and is more likely to be the expression of momentary passion or excitement of the agent, it is, we think, rightly held that the utterance of slanderous words must be ascribed "to the personal malice of the agent, rather than to an act performed in the course of his employment and in aid of the interest of his employer, and exonerating the company unless it authorized or approved or ratified the act of the agent in uttering the particular slander": 10 Cyc. 12, 216. Mr. Odgers, in his work on Libel and Slander (star page 368), states the doctrine in this language: "A corporation will not, it is submitted, be liable for any slander uttered by an officer, even though he be acting honestly for the benefit of the company and within the scope of his duties, unless it be proved that the corporation expressly ordered and directed that officer to say those very words; for a slander is the voluntary and tortious act of the speaker." Common carriers are held liable in certain instances for the slander by their agents, but their liability in such cases is based upon the breach of duty arising out of the contract—"the duty of protecting each passenger from avoidable discomfort, and from insults, indignities and personal violence": Birmingham R. & Elec. Co. v. Baird, 130 Ala. 334, 89 Am. St. Rep. 43, 30 South. 456, 54 L. R. A. 752. It was where the relation of passenger and carrier existed, and the duty was owing by the agent of the company to the plaintiff, that a recovery was allowed in *Lafitte v. New Orleans City & Lake R. Co.*, 43 La. Ann. 34, 8 South. 701, 12 L. R. A. 337, and *Palmeri v. Manhattan R. R. Co.*, 133 N. Y. 261, 28 Am. St. Rep. 632, 30 N. E. 1001, 16 L. R. A. 136, relied on by appellee. These cases are distinguishable from the one under consideration, and clearly have no application here.

Reversed and remanded.

Haralson, Simpson and Denson, JJ., concur.

*A Corporation may Become Liable for the Publication of a Libel;* Pattison v. Gulf Bag Co., 116 La. 963, 114 Am. Rep. 570; Peterson v. Western Union Tel. Co., 75 Minn. 368, 74 Am. St. Rep. 502; Hoboken Printing etc. Co. v. Kahn, 59 N. J. L. 218, 59 Am. St. Rep. 585. On the other hand, a corporation may maintain an action for slander and libel upon it in the way of its business or trade: Gross Coal Co. v. Rose, 126 Wis. 24, 110 Am. St. Rep. 894.

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### HAYES v. MILLER.

[150 Ala. 621, 43 South. 818.]

**THE OWNER OF ANIMALS** *Ferae Naturae* is, as a general rule, liable for injuries done by them without any evidence of knowledge of their vicious nature or that he was negligent in permitting them to be at large. He is bound to take notice of their nature and also to secure them at his peril. (p. 94.)

**ANIMALS FERAE NATURAE, Liability of Possessor of.**—One who is in possession and control of a ferocious animal *ferae naturae* is liable for injuries inflicted by it upon a person in the public streets, irrespective of whether such possessor is the owner or not. (p. 94.)

**PLEADING—Demurrer, When not a Proper Remedy.**—If a complaint makes out a recoverable right, but contains a claim for non-recoverable damages, the defect may be urged by a motion to strike out, objections to evidence, or by asking special instructions to the jury, but not by demurrer. (p. 94.)

**ANIMALS FERAE NATURAE, Want by Possessor of Knowledge of Ferocious Character of.**—In an action to recover damages for injuries received in the public streets from a wolf in the possession of the defendant, the plea that the animal was not known to be ferre or dangerous, and had been so domesticated as to lead persons acquainted with it to believe that it was harmless, does not present a plea in defense, but the facts so alleged are admissible in reduction of damages. (p. 94.)

**JUDGMENT IN TORT When One of the Defendants Dies During the Pendency of the Action.**—If, in an action against two for a tort, one of them dies, judgment may be rendered against the survivor without any revivor. (p. 95.)

Action to recover damages resulting from the bite of a ferocious wolf. The sixth, seventh, eighth and ninth counts of the plaintiff's complaint alleged, in substance, that while he was attending to his own business in the streets of Attalla, the defendants then having in their possession, tied with a chain, a wolf, a wild and ferocious animal, negligently allowed it to bite and wound plaintiff. There was also a claim in the ninth count for ten dollars additional damages for expenditures in obtaining the services of a physician. Demurrers were interposed and overruled. There was a plea by one of the defendants that he did not own, nor was he in

possession or in control when the plaintiff received the injury complained of, and that the animal was not known to be fierce or dangerous, but had been domesticated to such an extent as to lead those acquainted with its habits to believe that no harm would come from contact with it. The plaintiff moved to strike out from plea 8 all the words relating to want of knowledge of the character of the animal. The action was brought against Hayes and Kelly. During its progress the former died, and the latter objected to judgment being entered against him alone. Judgment for the plaintiff against the defendant Hayes, from which he appealed.

Boykin & Brindley, for the appellant.

Cato D. Glover, for the appellee.

<sup>623</sup> ANDERSON, J. There is, and properly so, a recognized distinction between the liability of the owner for damage done by wild animals, or animals *ferae naturae*, and by those classed as domestic animals. The gist of the action as to damage done by the latter is the keeping of the animal with knowledge of its vicious propensities. <sup>624</sup> On the other hand, the owner of wild animals *ferae naturae* is, as a general rule, liable for injuries done by them. It is not necessary to prove that the owner had knowledge of the vicious nature of a wild animal causing injury, as he is conclusively presumed to have such knowledge. Neither is it necessary to show that the owner was negligent in permitting the animal to be at large, for he is bound to keep it secure at his peril: 2 Am. & Eng. Ency. of Law 351; 2 Cyc. 367, and authorities cited in note; Congress & E. Spring Co. v. Edgar, 99 U. S. 645, 25 L. ed. 487; Parsons v. Manser, 119 Iowa, 88, 97 Am. St. Rep. 283, 93 N. W. 86, 62 L. R. A. 132. For a full discussion, see note on page 287 of 97 Am. St. Rep.

Each count of the complaint avers that the plaintiff was bitten while upon the streets of Attalla by "a wolf of a canine species, a ferocious wild animal." The defendant was liable, whether the actual owner or not, if in his possession and control at the time the plaintiff was injured. The trial court did not err in overruling the demurrers to amended counts 6, 7, 8 and 9.

Nor was there any merit in the demurrer relating to the claim of damages for services of a physician. If a complaint makes out a recoverable right, but contains a claim for non-recoverable damages, the way to reach the defect is by motion to strike, objection to the evidence, or special instructions to

the jury, and not by demurrer: *Woodstock Iron Works v. Stockdale*, 143 Ala. 550, 39 South. 335.

So much of plea 8 as was stricken was no defense to the action, but the facts there set out might go in reduction of the damages: *Besozzi v. Harris*, 1 Fost. & F. 92 (English). It is unnecessary, however, for us to decide this point; for, if the facts therein averred could be received in reduction of the damages they could have been shown under the general issue, and, if the court erred in striking them from the plea, it was error without injury.

While the evidence shows that Kelly was actually leading the wolf, the defendant Hayes was with him, and they were acting in concert. Moreover, there was some evidence that Hayes was the owner of the wolf. The <sup>625</sup> trial judge had the witnesses before him, and his judgment was like unto the verdict of a jury, and we are not disposed to disturb his conclusion on the facts.

The judgment could have been rendered against Hayes without a revivor caused by the death of his codefendant, Kelly: Code 1896, sec. 43; *Garrett v. Lynch*, 44 Ala. 324.

The judgment of the city court is affirmed.

Tyson, C. J., and Dowdell and McClellan, JJ., concur.

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*The Owner or Keeper of Wild Animals* is usually regarded as absolutely liable for the harm or damage they do, regardless of notice of their vicious propensities or of negligence in their keeping: See the note to *Parsons v. Mauser*, 97 Am. St. Rep. 288. It has been held, however, that if a gentle bear is being led along a public street, without making any noise or demonstration and simply following his owner, when a gentle horse takes fright at the bear and injury results to another, the owner of the bear is not guilty of negligence, nor liable for such injury: *Bostock-Ferari Amusement Co. v. Brocksmith*, 34 Ind. App. 566, 107 Am. St. Rep. 260.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**COLORADO.**

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**KLIPFEL v. KLIPFEL.**

[41 Colo. 40, 92 Pac. 26.]

**COMMON-LAW MARRIAGE.**—A Marriage Simply by Agreement of the Parties, followed by cohabitation as husband and wife, and such other attendant circumstances as are necessary to constitute what is termed a common-law marriage, is valid in Colorado. (p. 99.)

**COMMON-LAW MARRIAGE**—Cohabitation and General Reputation.—Where contract of marriage is denied and cannot otherwise be shown, its existence may be proved by, and presumed from, evidence of cohabitation as husband and wife and general reputation. Cohabitation as here used means something more than sexual intercourse. (p. 99.)

**COMMON-LAW MARRIAGE**—What Constitutes Cohabitation. Cohabitation is not a sojourn, nor a habit of visiting nor even remaining with for a time. None of these fall within the true idea of cohabitation as a fact presumptive of marriage. To cohabit is to live or dwell together, to have the same habitation, so that where one lives and dwells there does the other live and dwell with him. (p. 99.)

**COMMON-LAW MARRIAGE.**—By General Reputation and Repute, as these terms are used in defining common-law marriages, is meant the understanding among neighbors and acquaintances with whom the parties associate in their daily life that they are living together as husband and wife and not in meretricious intercourse. In its application to the fact of marriage it is more than mere hearsay. It involves and is made up of social conduct and recognition, giving character to an admitted and unconcealed cohabitation. (pp. 99, 100.)

**COMMON-LAW MARRIAGE**—Cohabitation and Reputation.—To Establish Common-law Marriage, It is Necessary that there be evidence both of cohabitation and reputation before such a marriage can be presumed. Proof of one alone is not sufficient to sustain the presumption. (p. 100.)

**COMMON-LAW MARRIAGE.**—Cohabitation Attendant with Other Facts is Merely a Circumstance from Which Marriage in Fact may be Presumed, but where facts are proved from which a con-

trary presumption arises, all former evidence falls or at least is neutralized. (p. 100.)

**COMMON-LAW MARRIAGE.**—One of the Essential Obligations of a Valid Marriage Contract is, that it binds the parties to keep themselves separate and apart from all others and cleave to each other during their joint lives. (p. 100.)

**COMMON-LAW MARRIAGE.**—Presumption of Illicit Intercourse.—Where intercourse between a man and woman is in its inception not only meretricious but intentionally criminal, the continuance of like intercourse must be presumed; and the marriage contract, where it is sought to establish the presumption of marriage by cohabitation and repute, must be established by convincing and positive evidence. (p. 101.)

**COMMON-LAW MARRIAGE.**—Cohabitation with Two Women. Where the evidence shows that a man cohabited with two women, the presumed innocence of either cohabitation must fall, for it is impossible for two marriages to exist together, and neither is by such evidence established. (p. 102.)

**COMMON-LAW MARRIAGE.**—Intention of Parties.—Where a woman alleges that she is the wife of a man by virtue of a common-law marriage, evidence that at the time of their alleged marriage he also cohabited with another woman, and was reputed to be married to her, shows that he had no intention to live in matrimonial union with the first. (p. 103.)

**COMMON-LAW MARRIAGE.**—Consent of Parties.—A Marriage is a Contract Based upon Consent, and hence the consent of both parties is essential to its validity. (p. 103.)

John Rush and Fred Parks, for the plaintiff in error.

Ward & Ward, for the defendant in error.

<sup>42</sup> CASWELL, J. On June 21, 1901, Marie Klipfel filed a petition for letters of administration of the estate of Louis Klipfel, deceased, in the county court of the city and county of Denver, claiming to be his widow.

On June 22, 1901, Minnie Klipfel filed her petition for letters of administration of the estate of said Louis Klipfel, deceased, in said county court, also claiming to be his widow.

On July 5, 1901, both parties with others, presumably heirs, waived their claims to be appointed administrator of the estate, in favor of Frank Klipfel. On September 17, 1901, Frank Klipfel resigned and Henry J. Ott, plaintiff in error herein, was appointed administrator de bonis non of the said estate.

Further proceedings in this case in the county court were had, as shown by the abstract of record, upon a verbal statement of the attorney for Minnie Klipfel, defendant in error, named in the record as petitioner in the court below, against the plaintiff in error who is named as respondent, the statement being as follows:

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"So that we may have a record of what this proceeding is, this is a preliminary matter to enable the court to determine whether or not the petitioner <sup>44</sup> herein was or was not the wife of Louis Klipfel, deceased. That is the only question to be tried before the jury at this time. There are no pleadings in the matter."

We infer that the claim of petitioner that she was the widow of the deceased was considered to have been denied, and that the statement with such denial makes up the issue in the case upon which the testimony was received. Trial was had to a jury. There was a verdict and decree for petitioner, and respondent brings the case to this court by writ of error.

It appears from the testimony that the petitioner claimed to be the common-law wife of Louis Klipfel in his lifetime. There was no marriage ceremony or any express contract of marriage shown by the record, and petitioner apparently relies upon an implied contract.

It is established by the record, and undisputed by the defendant in error, that prior to 1889 Louis Klipfel came to Denver with his then wife, with whom he lived at 25th and Gilpin streets in said city until her death, September 7, 1893; that in 1889 the petitioner, then known as Minnie Kimmel, came from Germany and entered the home of Louis Klipfel as a servant girl, where she remained as such until the death of Mrs. Klipfel in 1893; that in 1892, and prior to the death of Mrs. Klipfel, a child was born to this servant girl as a result of her illicit and immoral relations with Louis Klipfel, and that the child was recognized by Louis Klipfel as his own, and that he cared for and supported her. It is clearly shown by the record that at the origin of such intercourse Minnie Klipfel well knew that the same could not have been carried on between herself and Louis Klipfel with any intention of marriage or under <sup>45</sup> promise of marriage relations, Klipfel's wife then and for a long time thereafter being alive.

Louis Klipfel died in 1901 in the city of Denver. Considerable testimony was introduced at the trial to show his relations with the petitioner between the date of the death of his wife in 1893, and of his own death in 1901. There was also much testimony introduced to show his relations with Marie Klipfel, so called, during the same years. This evidence as stated by respondent was offered to show a divided reputation, while the court instructed the jury that it was received to show the residence of Klipfel during that



time. The respondent contends that the testimony as a whole does not prove, or tend to prove, that either of the women mentioned was the wife of deceased, and that neither of them can participate in the estate. We think this contention is correct, and fully sustained by the testimony, but the rights of Marie Klipfel, so called, are not involved in this decision, and the testimony concerning her relations with deceased is only considered to disprove the claim of petitioner.

Defendant in error claims that the jury passed upon the merits of the testimony and found as a fact, under proper instructions, that the petitioner was the common-law wife of deceased and that the verdict should not be disturbed.

In *Taylor v. Taylor*, 10 Colo. App. 303, 50 Pac. 1049, the court had under consideration a case involving a question similar to the one in hand. We think the rule laid down in that case is supported by the weight of authority and is a correct statement of the law. The court in that case says:

"By the statutes of Colorado, marriage is declared to be a civil contract, and there is only one essential requirement to its validity between parties capable of contracting, viz.: consent of the parties. <sup>46</sup> . . . . It follows, therefore, that a marriage contract between parties of contracting capacity which possesses the one essential prerequisite may be valid, although no provision of the statute as to its solemnization may have been followed or attempted. In other words, in this state a marriage simply by agreement of the parties, followed by cohabitation as husband and wife, and such other attendant circumstances as are necessary to constitute what is termed a common-law marriage, may be valid and binding. . . . .

"It is also agreed that in cases where the contract or agreement is denied and cannot be shown, its existence may be proven by, and presumed from, evidence of cohabitation as husband and wife and general repute. Cohabitation as here used means something more than sexual intercourse."

Quoting from *Yardley's Estate*, 75 Pa. 207, the court further says: "It is not a sojourn, nor a habit of visiting nor even remaining with for a time. None of these fall within the true idea of cohabitation as a fact presumptive of marriage. To cohabit is to live or dwell together, to have the same habitation, so that where one lives and dwells, there does the other live and dwell with him."

By general reputation and repute is meant the understanding among the neighbors and acquaintances with whom the parties associate in their daily life that they are living to-

gether as husband and wife and not in meretricious intercourse. "In its application to the fact of marriage it is more than mere hearsay. It involves and is made up of social conduct and recognition, giving character to an admitted and unconcealed cohabitation": *Badger v. Badger*, 88 N. Y. 546. 42 Am. Rep. 263. "It is necessary that there be evidence both of cohabitation and reputation before <sup>47</sup> such a marriage can be presumed. Proof of one alone is not sufficient to sustain the presumption": *Commonwealth v. Stump*, 53 Pa. 132, 91 Am. Dec. 198.

In *Case v. Case*, 17 Cal. 598, the court said: "Cohabitation attended with other facts is merely a circumstance from which marriage in fact may be presumed, but where facts are proved from which a contrary presumption arises, all former evidence falls or at least is neutralized."

In *Riddle v. Riddle*, 26 Utah, 268, 72 Pac. 1081, the court said: "One of the essential obligations of a valid marriage contract is that it binds the parties to keep themselves separate and apart from all others, and cleave to each other during their joint lives."

Tested by the foregoing rules the evidence for petitioner was wholly insufficient to support the presumption of a marriage contract. Much of the evidence adduced to support her claim negatives such presumption. It is not our purpose to review this testimony at length, nor would such action be valuable in other cases. Some of the witnesses testify that Klipfel was accustomed to go to the house where petitioner lived from time to time during the day; that he took her to ride with the child, and sometimes called while his horse was held by some person who came in the buggy with him. None of the witnesses testify, nor does all the evidence tend to show, that this was his habitation day and night, and that it was ostensibly constant and regular and of the character from which the general reputation follows that they were husband and wife and that a marriage contract existed between them.

Further than this, it is very clearly shown, and the evidence is not disputed, that during (and practically all) the time from the death of his wife until his own death he lived more or less with Marie <sup>48</sup> Klipfel, so called, at divers places but mainly at 20th and Market streets. It seems that he claimed this last place as his voting residence, and that he was sick at this place and called his attorney there to do business. About twenty witnesses testify to the fact of his residence there with Marie; that he introduced her as his

wife repeatedly, and apparently treated her and lived with her as such. The evidence of his cohabitation and reputation of marriage with Marie is much stronger than the evidence of his cohabitation with Minnie, and we cannot escape the conclusion that his relations with both these women were meretricious, illicit and immoral. There could not be two common-law wives existing at the same time.

At section 1026 of 1 Bishop on Marriage, Divorce and Separation, page 444, it is said: "If, on an issue of marriage or no marriage, the parties are shown to have cohabited as husband and wife under the repute of being married, as explained in a preceding chapter, and if also one of them is proved to have been simultaneously cohabiting with a third person under the like repute, the presumed innocence of either cohabitation is equivalent to the same of the other, and as it is impossible for two marriages to subsist together, neither is by this evidence established": See, also, *Cartwright v. McGowan*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; *Riddle v. Riddle*, 26 Utah, 268, 72 Pac. 1081; 1 Bishop on Marriage, Divorce and Separation, p. 445, sec. 1028; *Jenkins v. Jenkins*, 83 Ga. 283, 20 Am. St. Rep. 316, 9 S. E. 541.

The above rule is especially applicable to this case, it appearing that deceased maintained improper and immoral relations with both parties during the same period of time.

The court below erred in giving its instruction No. 4, especially in instructing the jury that "slight circumstances may be sufficient to establish a change from an illicit to a legal relation, and the proof of its <sup>49</sup> time and place is not indispensable." While such an instruction might be correct in some cases, it is, we think, erroneous under the circumstances and testimony in this case. The great weight of authority is to the effect that where the intercourse between the parties is, as in this case, in its inception not only meretricious but intentionally criminal, the continuance of like intercourse must be presumed until the contrary is shown; and the marriage contract, where, as here, it is sought to establish the presumption of marriage by cohabitation and repute, must be established by convincing and positive evidence: *United States v. Maxwell*, 26 Misc. Rep. 276, 57 N. Y. Supp. 53; *Williams v. Williams*, 46 Wis. 464, 32 Am. Rep. 722, 1 N. W. 98; *Rose v. Rose*, 67 Mich. 619, 35 N. W. 802; *Arnold v. Chesbrough*, 58 Fed. 833, 7 C. C. A. 508; *Appeal of Reading Ina Co.*, 113 Pa. 204, 57 Am. Rep. 448, 6 Atl. 60.

The respondent further requested by its fourth instruction, which was refused, that the jury be advised if it was proven that the deceased was cohabiting with a third person, known as Marie Klipfel, under like repute, the presumed innocence of either cohabitation must fall, for it is impossible for two marriages to exist together, and neither is by such evidence established. It was error not to give this or a like instruction, and the court did not instruct upon this point as it should have done under the testimony in this case. Many other errors are assigned and discussed at length, but as the above rulings dispose of this case, it is unnecessary to consider them.

We have considered the cases presented by the defendant in error with some care, and do not think them applicable to the conditions existing in the case in hand. The case of *Adger v. Ackerman*, 115 Fed. 124, 52 C. C. A. 568, is the strongest case presented, and includes the doctrines established by the others cited here, and <sup>50</sup> also includes them in its list of citations. We have no reason to disagree with the conclusions of the very able jurist, Mr. Justice Sanborn, who wrote the opinion, but an analysis of the case discloses that the facts and principles involved are entirely different. In that case one Dr. Fleming and a certain woman named had illicit relations prior to the time of the divorce of the doctor from his first wife. After the divorce he continued to live with the woman, and sometime after the said divorce a marriage ceremony was duly performed pronouncing them husband and wife. It was held in that case that the great weight of authority was to the effect that "slight circumstances may be sufficient to establish a change from an illicit to a legal relation, and the proof of its time and place are not indispensable." It further holds that "from a review of the facts in the case there is nothing that imperatively forbids a finding that there was a valid marriage between these parties subsequent to the divorce and prior to the time that the ceremony was performed." The decision further says:

"Yet if the case rested here, this question might be grave and its answer difficult. Fortunately, there is an established principle of law and a class of evidence in this record to which it applies, which removes this doubt and difficulty. The principle of law is that where parties are incompetent to marry and enter an illicit relation with a manifest desire and intention to live in a matrimonial union rather than in

a state of concubinage, and the obstacle of their marriage is subsequently removed, their continued cohabitation raises a presumption of an actual marriage immediately after the removal of the obstacle, and warrants a finding to that effect."

There are many decisions cited in support of this principle, but we cannot see how the decisions are <sup>51</sup> applicable to the case at bar. As we have said, the facts in this case clearly show that the relations between the petitioner and respondent were not entered into with any apparently manifest desire and intention to live in a matrimonial union. It is further claimed that they cohabited and were reputed to be man and wife for about eight years after the obstacle to their marriage was removed, and yet no step seems ever to have been taken to have a statutory ceremony performed, whereby the proof of their marriage would have been completely established. But, on the other hand, the deceased is shown to have also cohabited with a second party during the same period, and that he was reputed by equally competent and undisputed testimony to be married to Marie Klipfel, so called. While this may not be conclusive proof, it is certainly the strongest kind of evidence to show that he at least had no intention to live in a matrimonial union with the petitioner.

As marriage is a contract based upon consent, it requires the consent of both parties to the contract, and we are very clearly of the opinion that the evidence in this case does not support the presumption of such a contract.

The testimony introduced, both upon the part of the petitioner and of Marie Klipfel, as we have seen, was undisputed. The same character of testimony was received as to the claim of each. The verdict arrived at by the jury was not upon conflicting evidence, and is not such a verdict as is binding upon this court. On the contrary, the testimony is insufficient to meet the requirements of the law to support a contract of marriage. The case should not have been submitted to a jury at all, but we think that at the close of the testimony the proceedings should have been dismissed and the court should have directed a verdict for the respondent.

<sup>52</sup> The judgment is reversed and the cause remanded, with instructions to the county court to dismiss the proceedings of the petitioner herein.

Chief Justice Steele and Mr. Justice Maxwell concur.

## COMMON-LAW MARRIAGE.

- I. General Nature of Marriage Relation.
  - a. Marriage as a Civil Contract, 104.
  - b. Marriage as a Status, 105.
- II. General Features of Common-Law Marriage.
  - a. Essentials of Marriage, 105.
  - b. Proof of Contract, 106.
  - c. Conflict of Laws, 106.
  - d. Effect of Common-law Marriage, 107.
- III. Contract of Marriage.
  - a. Necessity for Agreement, 107.
  - b. Form of Agreement, 107.
  - c. Implied Contracts, 108.
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## I. General Nature of Marriage Relation.

a. **Marriage as a Civil Contract.**—Marriage is a civil contract, depending for its validity upon the free consent of parties not laboring under any legal disability, and upon nothing else in the absence of positive statutory declarations to the contrary: *Brisbin v. Huntington*, 128 Iowa, 166, 103 N. W. 144; *Floyd County v. Wolfe* (Iowa), 117 N. W. 32; *Hulett v. Carey*, 66 Minn. 327, 61 Am. St. Rep. 419, 69 N. W. 31, 34 L. R. A. 384; *Keen v. Keen*, 184 Mo. 358, 83 S. W. 526; *Voorhees v. Voorhees' Exrs.*, 46 N. J. Eq. 411, 19 Am. St. Rep. 404, 19 Atl. 172; *Di Lorenzo v. Di Lorenzo*, 174 N. Y. 467, 95 Am. St. Rep. 609, 67 N. E. 63, 63 L. R. A. 92; *Commonwealth v. Haylow*, 17 Pa. Super. Ct. 541. To quote from *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737: "A marriage is a civil

contract, made in due form, by which a man and woman agree to take each other for husband and wife, during their joint lives, unless it is annulled by law, and to discharge toward each other the duties imposed by law upon such relation. Each must be capable of assenting, and must in fact consent, to form this new relation."

b. **Marriage as a Status.**—But while the law defines marriage as a civil contract, and such indeed it is, it is something more than a mere contract, for it creates a status or relation as much as that of parent and child, which the parties of themselves cannot dissolve: *Willits v. Willits*, 76 Neb. 228, 107 N. W. 379, 5 L. R. A., N. S., 767; *Hilton v. Roylance*, 25 Utah, 129, 95 Am. St. Rep. 821, 69 Pac. 660, 58 L. R. A. 723; *Holmes v. Holmes*, Fed. Cas. No. 6638, 1 Saw. 99. "Marriage is more than a mere civil contract for the establishment and maintenance by the parties to it of certain relations to each other. It involves, except in so far as it has been modified by statute, an intimate personal union of those participating in it of a character unknown to any other human relation, and it creates a civil status, the maintenance of which in its full integrity is vital to the moral welfare of society": *Taylor v. Taylor* (Md.), 69 Atl. 632. Said the supreme court of Missouri: "Marriage is considered in law as a civil contract, to which the consent of the parties capable in law of contracting is essential. While it is here declared to be a civil contract, it is almost universally held to be something more than an ordinary contract. Marriage is a status, created by contract, and we formulate the definition of it as follows: Marriage is the civil status of one man and one woman, capable of contracting, united by contract and mutual consent for life, for the discharge, to each other and to the community, of the duties legally incumbent on those whose association is founded on the distinction of sex": *State v. Bittick*, 103 Mo. 183, 23 Am. St. Rep. 869, 15 S. W. 325, 11 L. R. A. 587. "What persons establish by entering into matrimony is not a contractual relation, but a social status; and the only essential features of the transaction are that the participants are of legal capacity to assume that status, and freely consent to do so": *University of Michigan v. McGuckin*, 64 Neb. 300, 89 N. W. 778, 57 L. R. A. 917.

## II. General Features of Common-law Marriage.

a. **Essentials of Marriage.**—The mutual agreement to be husband and wife in praesenti by a man and woman capable of assuming that relation, especially if followed by matrimonial cohabitation, constitutes a common-law marriage, without any necessity for a solemnization or formal ceremony of any kind: *Blanchard v. Lambert*, 43 Iowa, 228, 22 Am. Rep. 245; *Smith v. Fuller* (Iowa), 108 N. W. 765; *Laurence v. Laurence*, 164 Ill. 367, 45 N. E. 1071; *McKenna v. McKenna*, 73 Ill. App. 64; *Hutchinson v. Hutchinson*, 96 Ill. App. 52, 196 Ill. 432, 63 N. E. 1023; *Porter v. United States* (Ind. Ter.), 104 S. W. 855; *State v. Walker*, 36 Kan. 297, 59 Am. Rep. 556, 13 Pac.

279; *Matney v. Linn*, 59 Kan. 613, 54 Pac. 668; *Williams v. Kilburn*, 88 Mich. 279, 50 N. W. 293; *State v. Worthingham*, 23 Minn. 528; *Dickerson v. Brown*, 49 Miss. 357; *Floyd v. Calvert*, 53 Miss. 37; *Dyer v. Brannock*, 66 Mo. 391, 27 Am. Rep. 359; *Eaton v. Eaton*, 66 Neb. 676, 92 N. W. 995, 60 L. R. A. 605; *Voorhees v. Voorhees' Exrs.*, 46 N. J. Eq. 411, 19 Am. St. Rep. 404, 19 Atl. 172; *Carmichael v. State*, 12 Ohio St. 553; *Ingersol v. McWillie*, 9 Tex. Civ. App. 543, 30 S. W. 56; *Overseers of Poor of Town of Newbury v. Overseers of Poor of Town of Brunswick*, 2 Vt. 151, 19 Am. Dec. 703; *Mathewson v. Phoenix Iron Foundry*, 20 Fed. 281; *United States v. Route*, 33 Fed. 246; *Holabird v. Atlantic Mut. Life Ins. Co.*, Fed. Cas. No. 6587, 2 Dill. 166.

b. **Proof of Contract.**—A marriage contract may, like other contracts, be proved by the signature of the parties or by witnesses who were present when it was made: *In re Imboden's Estate*, 111 Mo. App. 220, 86 S. W. 263; *Commonwealth v. Stump*, 53 Pa. 132, 91 Am. Dec. 198. If such evidence is wanting, then marriage may be proved from cohabitation, reputation, conduct and other circumstances (*Smith v. Fuller* (Iowa), 108 N. W. 765; *Pourier v. McKenzie*, 147 Fed. 287), of which more will be said hereafter. While the evidence to establish a common-law marriage should be clear, consistent and convincing (*In re Rossiquot's Will*, 112 N. Y. Supp. 353), still each fact and circumstance relied upon need not be so conclusively proved that no other reasonable conclusion from the evidence can be drawn; it is enough that all the facts and circumstances are fairly sufficient to justify a finding in favor of the marriage: *Edelstein v. Brown* (Tex. Civ. App.), 95 S. W. 1126.

c. **Conflict of Laws.**—The rule that a marriage, valid in the state or country where entered into is valid in every other state or country, unless there prohibited by some positive rule of law or public policy (*Succession of Gabisso*, 119 La. 704, 121 Am. St. Rep. 529, 44 South. 438, 11 L. R. A., N. S., 1082; *Commonwealth v. Graham*, 157 Mass. 73, 34 Am. St. Rep. 255, 31 N. E. 706, 16 L. R. A. 578; *Pennegar & Haney v. State*, 87 Tenn. 244, 10 Am. St. Rep. 648; *State v. Shattuck*, 69 Vt. 403, 60 Am. St. Rep. 936, 38 Atl. 81, 40 L. R. A. 428; *Willey v. Willey*, 22 Wash. 115, 79 Am. St. Rep. 923, 60 Pac. 145), applies to common-law marriages: *Darling v. Dent*, 82 Ark. 76, 100 S. W. 747; *Smith v. Smith*, 52 N. J. L. 207, 19 Atl. 255; *Estate of McCausland*, 213 Pa. 189, 110 Am. St. Rep. 540, 62 Atl. 780. Hence, a common-law marriage contracted in a state where such marriages are valid may be recognized in another state where such marriages cannot be entered into: *Nelson v. Carlson* (Wash.), 94 Pac. 477.

A marriage by contract in one state, followed by cohabitation in another state, was held valid in *Gibson v. Gibson*, 24 Neb. 294, 39 N. W. 450. And where the question as to the validity of a common-law marriage arose in Alabama after there had been cohabitation in Kentucky and in Ohio, the supreme court of Alabama said: "Although the statutes of Kentucky declare every marriage void unless



solemnized in the manner provided therein, and a common-law marriage cannot be contracted in that state, yet evidence was properly admitted to show that the cohabitation, which began and continued for ten years in Ohio, where the common law is presumed to prevail, and where a common-law marriage is valid, in the absence of a statute expressly prohibiting such marriage, was continued for two years longer in Kentucky. Such evidence was not admissible to prove that the marriage relation grew out of the cohabitation in Kentucky, or that the cohabitation became lawful in Kentucky by the parties agreeing in that state to be man and wife; but it was clearly admissible to strengthen the presumption that the cohabitation in Ohio was lawful. It is always competent, on an issue of marriage vel non, to show the duration of the cohabitation": *Moore v. Heineke*, 119 Ala. 627, 24 South. 374.

**d. Effect of Common-law Marriage.**—A common-law marriage confers upon the parties all the rights and subjects them to all the duties and obligations usually incident to the marriage relation when entered into in accordance with the written law: *Steves v. Smith* (Tex. Civ. App.), 107 S. W. 141; *Davis v. Pryor*, 112 Fed. 274, 50 C. C. A. 579. If the father and mother of a child, soon after its birth, agreed with each other in one state to become, and live together as, husband and wife until parted by death, thereafter continuing to live together as, and holding themselves out to the world to be, husband and wife, such contract of marriage legitimates their child, not only in that state, but also in another state where a common-law marriage is recognized as valid: *McCausland's Estate*, 213 Pa. 189, 110 Am. St. Rep. 540, 62 Atl. 780. And in case of the wrongful death of a man, his wife and children by a common-law marriage may recover damages therefor: *Galveston, H. & S. A. Ry. Co. v. Cody*, 20 Tex. Civ. App. 520, 50 S. W. 135.

### III. Contract of Marriage.

**a. Necessity for Agreement.**—It is essential to a common-law marriage that there shall be a mutual agreement between the parties to assume toward each other the relation of husband and wife. Cohabitation without such an agreement does not constitute marriage: *Compton v. Benham* (Ind. App.), 85 N. E. 365; *Commonwealth v. Stevens*, 196 Mass. 280, 82 N. E. 33; and an agreement to live together is not marriage, if there is no agreement to live as husband and wife: *Soper v. Halsey*, 85 Hun, 464, 33 N. Y. Supp. 105.

**b. Form of Agreement.**—No particular words, however, are necessary to constitute a valid marriage by mutual agreement; if enough is said and done to evidence an intention by the parties to assume a marital relation, this is sufficient whatever may be the form of expression employed. But enough must be said and done to show such intention: *Mickle v. State* (Ala.), 21 South. 66; *Heymann v. Heymann*, 218 Ill. 636, 75 N. E. 1079; *Bowman v. Bowman*, 24 Ill. App. 165; *Marks v. Marks*, 108 Ill. App. 371; *Clancy v. Clancy*, 66

Mich. 202, 33 N. W. 889; *State v. Hansbrough*, 181 Mo. 348, 80 S. W. 900; *In re Hines' Estate*, 7 Pa. Dist. Ct. 89. The intention of the parties is to be gathered from the circumstances attending the contract, rather than from mutual reservations or secret intentions of either party: *In re Imboden's Estate*, 111 Mo. App. 220, 86 S. W. 263. If there is an agreement, followed by cohabitation, a marriage is established, regardless of what the parties consider the legal effect of the contract: *Tarrrt v. Negus*, 127 Ala. 301, 28 South. 713.

c. **Implied Contracts.**—While some doubt has been expressed on the question, still it would seem clear that to constitute a common-law marriage, an express agreement is not essential, but a contract to live together as husband and wife may be implied from the acts and conduct of the parties; and that a contract so implied has all the force and effect of a contract expressed in written or spoken words: *Hilton v. Roylance*, 25 Utah, 129, 95 Am. St. Rep. 821, 69 Pac. 660, 58 L. R. A. 723; *Adger v. Ackerman*, 115 Fed. 124, 52 C. C. A. 568. "If a marriage contract need not be evidenced by writing, and of course it need not be, we can conceive of no reason why it may not, like many other civil contracts, be evidenced by acts and conduct from which its making ore *tenus* may be presumed": *Renfrow v. Renfrow*, 60 Kan. 277, 72 Am. St. Rep. 350, 56 Pac. 534. "We must start, therefore, in the examination of this case," said the New York court, "with the fact that the living together of these two people, so far as they did live together, was not preceded by any ceremonial marriage, or by any express agreement that they should live together as man and wife. No ceremony is necessary to create the relation of man and wife in this state. The contract of marriage, so far as its inception goes, is regarded as is any other contract, and it may be begun by an agreement between the two interested parties that they assume toward each other the relation of husband and wife. That agreement, if it is not proven in express terms by competent evidence, may be established by the facts of cohabitation and reputation among their friends and neighbors, and of recognition of each other as holding that relation: *Gall v. Gall*, 114 N. Y. 109, 21 N. E. 106; *Hynes v. McDermott*, 10 Daly, 423, affirmed 91 N. Y. 451, 43 Am. Rep. 677. But these facts, of themselves, do not constitute a marriage. They are simply evidence from which, if sufficiently strong, the courts are at liberty to infer that the cohabitation was the result of a previous agreement to become man and wife, and from that fact to infer further that a marriage actually existed between the parties: *Gall v. Gall*, 114 N. Y. 109, 21 N. E. 106. It is quite true that it has been said that the presumption of marriage arising from cohabitation, apparently matrimonial, is one of the strongest known to the law. In many cases this is undoubtedly the fact. But this presumption is indulged in in the interest of decency and clean living, and because of the preference which the law has for orderly and decent conduct as against licentiousness. The inference is not made for the benefit of either

party to the alleged contract": In re Brush, 25 App. Div. 610, 49 N. Y. Supp. 803.

**d. Agreement in Words of Present Tense.**—There is no doubt, in the absence of a positive statutory declaration to the contrary, that where a man and woman agree in words of the present tense to take each other as husband and wife, and then in pursuance of the agreement assume marital relations, a valid marriage is accomplished. This is the usual form of a common-law marriage; and technically is styled marriage per verba de praesenti: *Hutchinson v. Hutchinson*, 196 Ill. 432, 63 N. E. 1023; *Shorten v. Judd*, 60 Kan. 73, 55 Pac. 236; *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164; *Dyer v. Brannock*, 66 Mo. 391, 27 Am. Rep. 359; *Atlantic City R. Co. v. Goodin*, 62 N. J. L. 394, 72 Am. St. Rep. 652, 42 Atl. 333, 45 L. R. A. 671; *Travers v. Reinhardt*, 205 U. S. 423, 27 Sup. Ct. Rep. 563, 51 L. ed. 865.

**e. Agreement to Marry in Future.**—An agreement to marry in the future, followed by cohabitation, does not constitute marriage. In other words, a man and woman, engaged to be married in the future, who live together as husband and wife when they do not understand themselves to be such, and are looking forward to a marriage in the future, are not husband and wife in the eye of the law: *Robertson v. State*, 42 Ala. 509; *Farley v. Farley*, 94 Ala. 501, 33 Am. St. Rep. 141, 10 South. 646; *Port v. Port*, 70 Ill. 484; *Hebblethwaite v. Hepworth*, 98 Ill. 126; *Stoltz v. Doering*, 112 Ill. 234; *Judson v. Judson*, 147 Mich. 518, 111 N. W. 78; *Sorensen v. Sorensen*, 68 Neb. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455; *Cheney v. Arnold*, 15 N. Y. 345, 69 Am. Dec. 609, and note; *Duncan v. Duncan*, 10 Ohio St. 181; *Estate of Grimm*, 131 Pa. 199, 17 Am. St. Rep. 796, 18 Atl. 1061, 6 L. R. A. 717; *Peck v. Peck*, 12 R. I. 485, 34 Am. Rep. 702. Nevertheless, when cohabitation follows an agreement to marry in the future, it is presumed to be in fulfillment of such agreement and in consummation of actual marriage. A matrimonial union thus effected is a valid common-law marriage, and is denominated a marriage per verba futuro cum copula. But this rule that the copula or cohabitation is presumed to be in fulfillment of the previous promise to marry and hence to convert the executory agreement into an actual present marriage, is merely a rule of evidence, and may always be overthrown by evidence that the fact is otherwise: *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; *Hiler v. People*, 156 Ill. 511, 47 Am. St. Rep. 221, 41 N. E. 181; *McKenna v. McKenna*, 180 Ill. 577, 54 N. E. 641; *Marks v. Marks*, 108 Ill. App. 371; *Hulett v. Carey*, 66 Minn. 327, 61 Am. St. Rep. 419, 69 N. W. 31, 34 L. R. A. 384; *Topper v. Perry*, 197 Mo. 531, 114 Am. St. Rep. 777, 95 S. W. 203. "To constitute a marriage legal at common law the contract and consent must be per verba de praesenti, or if made per verba de futuro cum copula, the copula is presumed to have been allowed on the faith of the marriage promise, and that so the parties, at the time of the copula, accepted of each

other as man and wife. It is not sufficient to agree to present cohabitation and a future marriage when more convenient. Where parties have contracted a common-law marriage, without any solemnization or other formality apart from the agreement itself, it is not requisite that the agreement should be made before witnesses. But such a marriage is to be distinguished from cases of seduction or sexual intercourse followed by a promise of marriage, and cases where the intercourse in its inception is illicit and is known to be such by both parties": *In re Maher's Estate*, 204 Ill. 25, 68 N. E. 159.

Said the supreme court of Nebraska in a recent decision: "In states where no marriage celebration is necessary, and when such contract is followed by sexual intercourse between the parties, the law, so as not to presume fornication, presumes that parties who have promised to marry mean sexual intercourse following such promise to be the consummation of such agreement. But this presumption may be rebutted by any facts which show that the parties knew or intended their intercourse to be illicit, as where at the time they were looking forward to being married with a ceremony: *Peck v. Peck*, 12 B. L. 485, 34 Am. Rep. 702; *Fryer v. Fryer*, Rich. Eq. Cas. 85. In *Stoltz v. Doering*, 112 Ill. 234, it is said: "At common law the fact of sexual intercourse after an agreement to marry at a future day does not constitute marriage. The copula must have been in fulfillment of the agreement to marry. From these authorities it appears that the law, in the absence of evidence, raises the presumption that by the act of copula the parties then and there intended to consummate their existing agreement to marry—i. e., to convert the future agreement into a present consummation. This is the whole doctrine of marriages *de futuro cum copula*. There is no difference in the basic principles of the marriage contract from any other. The minds of the parties must meet, and the agreement to marry must be made. The time when the marriage shall take place may be the present, or may be in the future. If in the future, there is not a present marriage, but an agreement to marry, and the mere act of copula does not change the agreement. The law presumes, in the absence of evidence, that the parties themselves changed the terms of the contract from the future to the then present. When, however, the evidence establishes, as in this case, that during the period of the sexual intercourse between the parties they had set the day in the future, and were making preparations for and intending to solemnize their marriage rites in accordance with the statute of this state, there is no ground for this presumption, and the law will not indulge it": *Sorensen v. Sorensen*, 68 Neb. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455.

#### IV. Consent of Parties.

There can be no such thing as marriage without the consent of the parties. Contracts of marriage do not differ from other contracts in this respect; the first essential to their validity is the mutual

assent of the parties: *McKenna v. McKenna*, 180 Ill. 577, 54 N. E. 641; *Hooper v. McCaffery*, 83 Ill. App. 341; *Roszel v. Roszel*, 73 Mich. 133, 16 Am. St. Rep. 569, 40 N. W. 858; *University of Michigan v. McGuckin*, 64 Neb. 300, 89 N. W. 778, 57 L. R. A. 917; *Keyes v. Keyes*, 22 N. H. 553; *Hynes v. McDermott*, 91 N. Y. 451, 43 Am. Rep. 677; *Jaques v. Public Admr.*, 1 Bradf. Sur. 499; *Town of Mountbolly v. Town of Andover*, 11 Vt. 226, 34 Am. Dec. 685. "It is well established in this state," remarks the supreme court of Missouri, "that a marriage without observing the statutory regulations, if made according to the common law, is a valid marriage, and that, by the common law, if the contract be made *verba de praesenti*, it is sufficient evidence of a marriage, or if made *per verba de futuro cum copula*, the cohabitation is presumed to be on the faith of the marriage promise. That is, however, merely a rule of evidence, and it is always competent, in such cases, to show by proof that the facts are otherwise. Under our law marriage is a civil contract, by which a man and a woman agree to take each other for husband and wife during their joint lives, unless it is annulled by law, and to discharge toward each other the duties imposed by law upon such relation. Each must be capable of assenting and must, in fact, consent to form this new relation": *Topper v. Perry*, 197 Mo. 531, 114 Am. St. Rep. 777, 95 S. W. 203.

#### V. Cohabitation as Husband and Wife.

a. **Necessity of Cohabitation.**—The statement is sometimes met with that an assumption of the marriage status is essential to a common-law marriage, that an agreement presently to be husband and wife is not sufficient to constitute marriage until it is acted upon by the parties: *McKenna v. McKenna*, 180 Ill. 577, 54 N. E. 641; *Robinson v. Robinson*, 188 Ill. 371, 58 N. E. 906; *Lorimer v. Lorimer*, 124 Mich. 631, 83 N. W. 609; *Topper v. Perry*, 197 Mo. 531, 114 Am. St. Rep. 777, 95 S. W. 203; *Sorensen v. Sorensen*, 68 Neb. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455. See, too, *Hawkins v. Hawkins*, 142 Ala. 571, 110 Am. St. Rep. 53, 38 South. 640. The statutes of California declare that "consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights, duties or obligations." This assumption of the marital relation means cohabitation as husband and wife; mere copulation without such cohabitation is not enough: *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131; *People v. Lehmann*, 104 Cal. 631, 38 Pac. 422. Some of the decisions state that a present assumption of marital relations is necessary: *McKenna v. McKenna*, 180 Ill. 577, 54 N. E. 641; *Topper v. Perry*, 197 Mo. 531, 114 Am. St. Rep. 777, 95 S. W. 203. But in California, if any length of time thereafter they assume the rights and duties of the marital relation, both understanding thereby to consummate the marriage covenant, a lawful marriage will result under the statute: *In re Ruffino's Estate*, 116 Cal. 304, 48 Pac. 127.

The true rule, however, is that a marriage is complete when the parties agree, in words of the present tense, to take each other as husband and wife. Cohabitation or copulation following such agreement may be evidence of the existence of the agreement, but it adds nothing to the agreement and is not essential to the validity of the marriage: *Dumaresly v. Fishly*, 10 Ky. (3 A. K. Marsh.) 368; *Jackson v. Winne*, 7 Wend. 47, 22 Am. Dec. 563. Said the supreme court of Minnesota in the leading case of *Hulett v. Carey*, 66 Minn. 327, 61 Am. St. Rep. 419, 69 N. W. 31, 34 L. R. A. 384: "Upon this state of facts the contention of the appellants is, that there was no marriage, notwithstanding the execution by them of the written contract; that, in order to constitute a valid common-law marriage, the contract, although *per verba de praesenti*, must be followed by habit or reputation of marriage—that is, as we understand counsel, by the public assumption of marital relations. We do not so understand the law. The law views marriage as being merely a civil contract, not differing from any other contract, except that it is not revocable or dissoluble at the will of the parties. The essence of the contract of marriage is the consent of the parties, as in the case of any other contract; and, whenever there is a present, perfect consent to be husband and wife, the contract of marriage is completed. The authorities are practically unanimous to this effect. Marriage is a civil contract *jure gentium*, to the validity of which the consent of parties able to contract is all that is required by natural or public law. If the contract is made *per verba de praesenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, in the absence of any civil regulations to the contrary. The maxim of the civil law was, '*Consensus non concubitus facit matrimonium*.' The whole law on the subject is that, to render competent parties husband and wife, they must and need only agree in the present tense to be such, no time being contemplated to elapse before the assumption of the status. If cohabitation follows it adds nothing in law, although it may be evidence of marriage. It is mutual, present consent, lawfully expressed, which makes the marriage: 1 Bishop on Marriage, Divorce and Separation, secs. 239, 313, 315, 317. See, also, the leading case of *Dalrymple v. Dalrymple*, 2 Hagg. Const. 54, which is the foundation of much of the law on the subject." To the same effect is the recent case of *Davis v. Stouffer* (Mo. App.), 112 S. W. 282.

A mere agreement to be husband and wife, said the supreme court of Iowa, in *Pegg v. Pegg* (Iowa), 115 N. W. 1027, without a present intention to assume that relation, does not constitute marriage.

#### b. Requisites of Cohabitation.

1. Cohabitation Without Agreement.—While marriage may be consummated without cohabitation, there can be no marriage without an agreement between the parties to be husband and wife. Cohabitation, in the absence of such agreement, does not amount to marriage.

Cohabitation is evidence of marriage, but it does not of itself constitute marriage: *Hawkins v. Hawkins*, 142 Ala. 571, 110 Am. St. Rep. 53, 38 South. 640; *Kilburn v. Kilburn*, 89 Cal. 46, 23 Am. St. Rep. 447, 26 Pac. 636; *Compton v. Benham* (Ind. App.), 85 N. E. 365; *Randlett v. Rice*, 141 Mass. 385, 6 N. E. 238; *Norcross v. Norcross*, 155 Mass. 425, 29 N. E. 506; *Commonwealth v. Stevens*, 196 Mass. 230, 82 N. E. 33; *State v. Kennedy*, 207 Mo. 528, 106 S. W. 57; *Goldbeck v. Goldbeck*, 18 N. J. Eq. 42; *Voorhees v. Voorhees' Exrs.*, 46 N. J. Eq. 411, 19 Am. St. Rep. 404, 19 Atl. 172; *Dunbarton v. Franklin*, 19 N. H. 257; *Riddle v. Riddle*, 26 Utah, 268, 72 Pac. 1081; *Holmes v. Holmes*, 1 Saw. 99, Fed. Cas. No. 6638.

**2 Cohabitation not Matrimonial in Character.**—Cohabitation which will sustain a common-law marriage must be matrimonial in its character; and a matrimonial cohabitation is the living together of a man and a woman, ostensibly as husband and wife, with or without sexual intercourse between them. Cohabitation consists of a living or dwelling together in the same habitation as husband and wife, and not merely sojourning or visiting or remaining together for a time. Sexual intimacy or illicit living together is not enough: *Cox v. State*, 117 Ala. 103, 67 Am. St. Rep. 166, 23 South. 806, 41 L. R. A. 760; *Letters v. Cady*, 10 Cal. 533; *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131; *Kilburn v. Kilburn*, 89 Cal. 46, 23 Am. St. Rep. 447, 26 Pac. 636; *Taylor v. Taylor*, 10 Colo. App. 303, 50 Pac. 1049; *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; *McKenna v. McKenna*, 73 Ill. App. 64; *In re Imboden's Estate*, 111 Mo. App. 220, 86 S. W. 263; *Voorhees v. Voorhees' Exrs.*, 46 N. J. Eq. 411, 19 Am. St. Rep. 404, 19 Atl. 172; *Haley v. Goodheart*, 58 N. J. Eq. 368, 44 Atl. 193; *In re Brush*, 25 App. Div. 610, 49 N. Y. Supp. 803; *Lee v. State*, 44 Tex. Cr. 354, 72 S. W. 1005, 61 L. R. A. 904; *Eldred v. Eldred*, 97 Va. 606, 34 S. E. 477; *Spencer v. Pollock*, 83 Wis. 215, 53 N. W. 490, 17 L. R. A. 848. The essentials of cohabitation are well stated by the Colorado court in the principal case.

To quote from *In re Wallace*, 49 N. J. Eq. 530, 25 Atl. 260: "Where a man and woman constantly live together, ostensibly as man and wife, demeaning themselves toward each other as such, and are received into society and treated by their friends and relations as having and being entitled to that status, the law will, in favor of morality and decency, presume that they have been legally married. Such cohabitation and repute is said to be matrimonial, in distinction from that occasional, hidden and limited cohabitation and repute which marks the meretricious relation. It is always a question whether the cohabitation proved is of the character which will raise a presumption and make prima facie proof of marriage. At best it can do no more, for the presumption may be rebutted."

### c. Cohabitation Illicit in Its Inception.

**1. Presumption of Its Continuance.**—A cohabitation between a man and woman, illicit in its inception, and so understood by them, Am. St. Rep., Vol. 124—8

is presumed to continue illicit until some proof is made of its change to a matrimonial cohabitation; therefore no presumption of marriage arises from it: *Clark v. Cassidy*, 64 Ga. 662; *Marks v. Marks*, 108 Ill. App. 371; *Pike v. Pike*, 112 Ill. App. 243; *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; *Cram v. Burnham*, 5 Me. 213, 17 Am. Dec. 218; *Cargile v. Wood*, 63 Mo. 501; *Clayton v. Wardell*, 4 N. Y. 230; *Harbeck v. Harbeck*, 102 N. Y. 714, 7 N. E. 408; *Ahlberg v. Ahlberg*, 24 N. Y. Supp. 919; *Bates v. Bates*, 7 Misc. Rep. 547, 27 N. Y. Supp. 872; *United States Trust Co. v. Maxwell*, 26 Misc. Rep. 276, 57 N. Y. Supp. 53; *Bell v. Clarke*, 45 Misc. Rep. 272, 92 N. Y. Supp. 163; *McBean v. McBean*, 37 Or. 195, 61 Pac. 418; *Appeal of Hunt*, 86 Pa. 294; *Appeal of Reading Fire etc. Ins. Co.*, 113 Pa. 204, 57 Am. Rep. 448, 6 Atl. 60; *Henry v. Taylor*, 16 S. D. 424, 93 N. W. 641, *Cuneo v. De Cuneo*, 24 Tex. Civ. App. 436, 59 S. W. 284; *Town of Northfield v. Town of Plymouth*, 20 Vt. 582; *Eldred v. Eldred*, 97 Va. 606, 34 S. E. 477; *Spencer v. Pollock*, 83 Wis. 215, 53 N. W. 490, 17 L. R. A. 848; *Weidenhoft v. Primm* (Wyo.), 94 Pac. 453.

Of course the fact that a cohabitation is meretricious in its inception does not preclude the parties from subsequently entering into a valid marriage contract and effecting a lawful marital union: *Elzas v. Elzas*, 171 Ill. 632, 49 N. E. 717; *Foss v. Brown*, 151 Mich. 119, 114 N. W. 873; *Swartz v. State*, 7 Ohio Dec. 43, 13 Ohio C. C. 62; *Travers v. Reinhardt*, 25 App. D. C. 567. That their relations were originally illicit is immaterial so long as their minds subsequently meet in the formation of an actual marriage contract: *University of Mich. v. McGockin*, 62 Neb. 489, 87 N. W. 180, 57 L. R. A. 917. In other words, the presumption that a cohabitation adulterous in its origin continues to be of that character may be rebutted and proved to have become matrimonial, and a lawful common-law marriage established; this fact, that the evil intent of the parties has changed and become matrimonial, may be established by direct or circumstantial evidence: *Drawdy v. Hesters*, 130 Ga. 161, 60 S. E. 451, 15 L. R. A., N. S., 190; *Potter v. Clapp*, 203 Ill. 592, 96 Am. St. Rep. 322, 68 N. E. 81; *Hynes v. McDermott*, 91 N. Y. 451, 43 Am. Rep. 677; *Roberson v. McCauley*, 61 S. C. 411, 39 S. E. 570; *Edelstein v. Brown* (Tex. Civ. App.), 95 S. W. 1126. And inasmuch as the law itself and all its presumptions deprecate illegal and favor lawful relations, slight circumstances may be sufficient to establish a change from an illicit to a legal relation; and no proof of its time or place is indispensable: *Adger v. Ackerman*, 115 Fed. 124, 52 C. C. A. 568. Evidence of marriage is strengthened, however, by the fact that previously the parties had no illicit relations: *Heymann v. Heymann*, 218 Ill. 636, 75 N. E. 1079.

Said the court in *Badger v. Badger*, 88 N. Y. 546, 42 Am. Rep. 263: "The rule that a connection, confessedly illicit in its origin, or shown to have been such, will be presumed to retain that character until some change is established, is both logical and just. The



force and effect of such a fact is always very great and we are not disposed in the least degree to weaken or disregard it: *Brinkley v. Brinkley*, 50 N. Y. 198, 10 Am. Rep. 460. Very often the changed character of the cohabitation is indicated by facts and circumstances which explain the cause and locate the period of the change, so that in spite of the illicit origin the subsequent intercourse is deemed matrimonial: *Fenton v. Reed*, 4 Johns. 52, 4 Am. Dec. 244; *Rose v. Clark*, 8 Paige, 574; *Starr v. Peck*, 1 Hill, 270; *Jackson v. Claw*, 18 Johns. 346. But a change may occur, and be satisfactorily established, although the precise time or occasion cannot be clearly ascertained. If the facts show that there was or must have been a change, that the illicit beginning has become transformed into a cohabitation matrimonial in its character, it is not imperative that we should be able to say precisely when or exactly why the change occurred: *Caujolle v. Ferrie*, 23 N. Y. 90. While we have no hesitation about the rule, and shall be prompt to apply it in a case which demands such application, we do not see that the facts before us require it, since they fail to establish an illicit origin of the cohabitation as a separate and independent fact."

And in *Darling v. Dent*, 82 Ark. 76, 100 S. W. 747, it is said: "While it is true that, if it be shown that the relations between *Darling* and *Mrs. Williams* were illicit in the beginning, the burden is upon those asserting a valid marriage agreement to show that such an agreement was afterward entered into, still there is no presumption that the relationship continued to be illicit. It is a matter of proof, and not of presumption, whether the relationship continued to be illicit, or whether it was changed to a legal and moral status. Whatever presumptions are indulged are in favor of the legitimacy of such relationship."

A somewhat stricter rule may be inferred from the following extract: "The general rule upon the question of proof of marriage by proof of cohabitation, conduct and declaration of the parties is stated by a learned judge as follows: The general and ordinary presumption of the law is in favor of innocence, in questions of marriage, and of legitimacy where children are concerned. Cohabitation is presumed to be lawful till the contrary appears. Where, however, the connection between the parties is shown to have had an illicit origin, and to be criminal in its nature, the law raises no presumption of marriage: 2 Kent, 87; *Jackson v. Claw*, 18 Johns. 346; 2 Greenleaf on Evidence, sec. 464; *Physick's Estate*, 2 Phila. 278. The presumption against marriage, where the connection between the parties is shown to have been illicit in origin, may, however, be overcome by proofs showing that the original connection has changed in its character, and a subsequent marriage may be established by circumstances, without actual proof of a marriage in fact. The cases cited by the learned counsel for the respondent in their brief in this case fully establish this point. The following cases also illustrate the same subject: *Starr v. Peck*, 1 Hill, 270; *Clayton v. Wardell*, 4

N. Y. 230; *Caujolle v. Ferrie*, 23 N. Y. 90; *O'Gara v. Eisenlohr*, 38 N. Y. 296; *Foster v. Hawley*, 8 Hun, 68. The rule laid down in the last case cited is stated as follows: A cohabitation illicit in its origin is presumed to be of that character, unless the contrary be proved, and cannot be transformed into matrimony by evidence which falls short of establishing the fact of an actual contract of marriage. Such contract may be proved by circumstances, but they must be such as to exclude the inference or presumption that the former relation continued, and satisfactorily prove that it had been changed into that of actual matrimony by mutual consent": *Williams v. Williams*, 46 Wis. 464, 32 Am. Rep. 722, 1 N. W. 98.

## 2. Removal of Impediment to Marriage, Followed by Cohabitation.

Some authorities take the view that where a man and woman commence cohabitation when there is a known impediment to their legal marriage, such as the existence of a prior undissolved marriage of one of them, that their continued cohabitation after the removal of the impediment raises no presumption of a subsequent marriage: *Edelstein v. Brown*, 35 Tex. Civ. App. 625, 80 S. W. 1027. Thus, it has been affirmed that a valid marriage will not be presumed to have taken place between parties who lived together as husband and wife under a ceremony of marriage, when the man intended to deceive the wife by a pretended marriage, and knew that he was not competent to marry, because the decrees purporting to divorce him from his wife was a nullity, although the parties to the second marriage continued to live together as husband and wife after the first wife had procured a valid divorce from the husband, and therefore after he had capacity to contract a valid marriage: *Collins v. Voorhees*, 47 N. J. Eq. 315, 555, 24 Am. St. Rep. 412, 20 Atl. 676, 22 Atl. 1054, 14 L. R. A. 364. The fact that a negro woman continues to cohabit with a white man after her emancipation from slavery, as she had done before, raises no presumption of marriage if they subsequently separate and if their marriage would offend the criminal statutes: *Keen v. Keen*, 184 Mo. 358, 83 S. W. 526.

Some authorities declare that where an attempted marriage is void by reason of the disability of one of the parties, a subsequent marriage will be presumed after the disability has been removed, where the matrimonial relationship is continued, and the parties hold themselves out, and are regarded and treated by their relatives and friends, as husband and wife: *Blanchard v. Lambert*, 43 Iowa, 228, 22 Am. Rep. 245; *Barker v. Valentine*, 125 Mich. 336, 84 Am. St. Rep. 578, 84 N. W. 297, 51 N. W. 787; *Bechtel v. Barton*, 147 Mich. 318, 110 N. W. 935.

There appears to be no doubt that if parties in good faith marry when in fact a legal impediment exists to their marriage, and they continue to cohabit as man and wife after the removal of the impediment to their lawful union, the law presumes a common-law marriage: *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; *Land v. Land*, 206 Ill. 288, 99 Am. St. Rep. 171, 68 N. E.

1109; *Teter v. Teter*, 88 Ind. 494; *Busch v. Supreme Tent of Knights of Maccabees of the World*, 81 Mo. App. 562; *Bull v. Bull*, 29 Tex. Civ. App. 364, 68 S. W. 727; *United States v. Hays*, 20 Fed. 710. The presumption arises immediately after the obstacle is removed: *Adger v. Ackerman*, 115 Fed. 124, 52 C. C. A. 568. And even though the removal is unknown, continued cohabitation thereafter evidences consent to live in wedlock: *Eaton v. Eaton*, 66 Neb. 676, 92 N. W. 995, 60 L. R. A. 605.

In other words, when a man and woman in good faith do what they can to render their union matrimonial, but the marriage is ineffectual because one of them is under a legal disability on account of a prior marriage supposed to be (but not) dissolved; and they live together as husband and wife after the disability is removed, supposing and intending themselves to be such, they are husband and wife from the date of the removal of the disability: *Poole v. People*, 24 Colo. 510, 65 Am. St. Rep. 245, 52 Pac. 1025; *Manning v. Spureck*, 199 Ill. 447, 65 N. E. 342; *Schuchart v. Schuchart*, 61 Kan. 597, 78 Am. St. Rep. 342, 60 Pac. 311, 50 L. R. A. 180; *Chamberlain v. Chamberlain*, 68 N. J. Eq. 414, 736, 111 Am. St. Rep. 658, 59 Atl. 813, 62 Atl. 680, 3 L. R. A., N. S., 244; *Taylor v. Taylor*, 71 N. Y. Supp. 411, 63 App. Div. 231.

If the woman is in good faith, while the man conceals an impediment to his marriage, then it would seem that a marriage will be presumed in her favor from cohabitation after the removal of the impediment: *Robinson v. Ruprecht*, 191 Ill. 424, 61 N. E. 631; *Flanagan v. Flanagan*, 122 Mich. 386, 81 N. W. 258; *Barker v. Valentine*, 125 Mich. 336, 84 Am. St. Rep. 578, 84 N. W. 297, 51 L. R. A. 787. "There is a well-defined distinction between illicit relations, forbidden because of an undisclosed disability on the part of one of the parties thereto, and such relations as are mutually meretricious, involving on the part of the woman knowledge that its character is not, and is not intended to be, matrimonial": *In re Schmidt*, 42 Misc. Rep. 463, 87 N. Y. Supp. 428. "The rule ought to be that where one person is free to enter into the matrimonial relation and does so in good faith, but the other party is incapable of entering into such relation because of a former wife or husband living, or other impediment, when such impediment is removed, if the parties continue matrimonial cohabitation, continue to introduce and recognize each other as husband and wife, and are so recognized by their relatives, friends, and by society, it ought to be held that from such moment they are actually husband and wife, and that, under such circumstances, it is of no importance that a formal agreement to live together as husband and wife was not entered into, or that either did not know that the impediment to such an agreement had been removed, when, in fact, it had been so removed, and both parties were competent to enter into the matrimonial state": *In re Wells' Estate*, 108 N. Y. Supp. 164, 123 App. Div. 79.

Manifestly, an express agreement to marry, followed by cohabitation in pursuance thereof, does not constitute a common-law marriage

so long as there exists a prior valid marriage between one of the parties and a third person: *Blanks v. Southern Ry. Co.*, 82 Miss. 703, 35 South. 570.

**d. Cohabitation not Exclusive in Its Character.**—Cohabitation, in order to form the basis of marriage, must be exclusive in its character. It is one of the essential obligations of a valid marriage contract that it binds the parties to keep themselves separate and apart from all others and cleave to each other during their joint lives. Where the evidence shows that a man cohabited with two women, the presumed innocence of either cohabitation must fall, for it is impossible for two marriages to exist together, and neither is by such evidence established: *Klipfel v. Klipfel*, 41 Colo. 40, ante, p. 96, 92 Pac. 26; *Riddle v. Riddle*, 26 Utah, 268, 72 Pac. 1081.

## VI. Reputation of Marriage.

**a. As Evidence of Marriage.**—Where a man and woman have held themselves out to the world as husband and wife, this is strong, persuasive evidence that they are married: *Drawdy v. Hesters*, 130 Ga. 161, 60 S. E. 451, 15 L. R. A., N. S., 190; *Alden v. Church*, 106 Ill. App. 347; *Pegg v. Pegg* (Iowa), 115 N. W. 1027; *Hoffman v. Simpson*, 110 Mich. 133, 67 N. W. 1107; *State of Maryland v. Baldwin*, 112 U. S. 490, 5 Sup. Ct. Rep. 278, 28 L. ed. 822; *Adger v. Ackerman*, 115 Fed. 124, 52 C. C. A. 568. Indeed, the reputation of the parties as married in the community in which they live may be one of the essentials of a common-law marriage, for cohabitation without a contract of marriage or without a general reputation of marriage can hardly amount to a common-law marriage: *Sharon v. Sharon*, 75 Cal. 1, 16 Pac. 345; *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131; *In re Terry's Estate*, 58 Minn. 268, 59 N. W. 1013; *Hulett v. Carey*, 66 Minn. 327, 61 Am. St. Rep. 419, 69 N. W. 31, 34 L. R. A. 334; *Heminway v. Miller*, 87 Minn. 123, 91 N. W. 428. "Where parties live together ostensibly as man and wife, demeaning themselves toward each other as such, and are received into society and treated by their friends and relations as having and being entitled to that status, the law will, in favor of morality and decency, presume that they have been legally married. Indeed, the most usual way of proving marriage, except in actions for criminal conversation and in prosecutions for bigamy, is by general reputation, cohabitation, and acknowledgment": *Travers v. Reinhardt*, 205 U. S. 423, 27 Sup. Ct. Rep. 563, 51 L. ed. 865.

**b. What Constitutes Reputation.**—When a marriage contract is kept secret, this does not invalidate it; there may be an assumption of marital relations without their being made public. But secrecy in an alleged marriage is a circumstance to be considered in determining whether such a marriage in fact exists: *Cargile v. Wood*, 63 Mo. 501; *Rose v. Clark*, 8 Paige, 574; *Commonwealth v. Stump*, 53 Pa. 132, 91 Am. Dec. 198; *Stans v. Baitey*, 9 Wash. 115, 37 Pac. 316.

"In order to constitute evidence from which a marriage may be inferred the origin of the cohabitation must have been consistent with a matrimonial intent, and the cohabitation must have been of such a character, and the conduct of the parties such, as to lead to the belief in the community that a marriage existed, and thereby to create the reputation of a marriage": *Williams v. Herriek*, 21 R. I. 401, 79 Am. St. Rep. 809, 43 Atl. 1036. "A marriage is a civil contract, and may be made per verba de praesenti, that is, by words in the present tense, without attending ceremonies, religious or civil. Such is the law of many states in the absence of statutory regulation. It is the doctrine of the common law. But, where no such ceremonies are required and no record is made to attest the marriage, some public recognition of it is necessary as evidence of its existence. The protection of the parties and their children and considerations of public policy require this public recognition; and it may be made in any way which can be seen and known by men, such as living together as man and wife, treating each other and speaking of each other in the presence of third parties as being in that relation, and declaring the relation in documents executed by them whilst living together, such as deeds, wills and other formal instruments. From such recognition the reputation of being married will obtain among friends, associates and acquaintances, which is of itself evidence of a persuasive character": *Maryland v. Baldwin*, 112 U. S. 490, 5 Sup. Ct. Rep. 278, 28 L. ed. 822.

But reputation to prove marriage must be general and uniform in the community where the parties live: it cannot be founded on divided or singular opinion: *Powers v. Charbmury's Exrs.*, 35 La. Ann. 630; *Ashford v. Metropolitan Life Ins. Co.*, 80 Mo. App. 638; *In re Yardley's Estate*, 75 Pa. 207; *Williams v. Herrick*, 21 R. I. 401, 79 Am. St. Rep. 809, 43 Atl. 1036; *Eldred v. Eldred*, 97 Va. 606, 34 S. E. 477. To quote from the supreme court of Wyoming: "The general reputation in the community where the parties reside as to whether or not they are husband and wife is competent evidence as tending to prove marriage. It is in the nature of a verdict of the community upon their relations, arrived at from observing their conduct, their manner of life, their deportment toward each other and the community, and their declarations. It is the general impression or belief created in the minds of the people from these things which constitutes the general reputation, which may be shown in evidence as tending to raise the presumption of marriage or the contrary. To be of any value as evidence such reputation must be general and uniform": *Weidenhoft v. Primm* (Wyo.), 94 Pac. 453, citing *White v. White*, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799; *Jackson v. Jackson*, 82 Md. 17, 33 Atl. 317, 34 L. R. A. 773; *Arnold v. Chesebrough*, 46 Fed. 700.

"Reputation consists of the belief and speech of the people who have an opportunity to know the parties and have heard of and observed their manner of living": *Cargyle v. Wood*, 63 Mo. 501. "By

general reputation and repute is meant the understanding among the neighbors and acquaintances with whom the parties associate in their daily life, that they are living together as husband and wife and not in meretricious intercourse. In its application to the fact of marriage it is more than mere hearsay. It involves and is made up of social conduct and recognition, giving character to an admitted and unconcealed cohabitation": *Klipfel v. Klipfel*, 41 Colo. 40, ante, p. 96, 92 Pac. 26; *Badger v. Badger*, 88 N. Y. 546, 42 Am. Rep. 263.

#### VII. Presumption from Cohabitation and Reputation.

a. *When Arises.*—Where a man and woman live together as husband and wife, and so acknowledge themselves to and are so reputed among relatives and acquaintances, these facts are sufficient prima facie to establish a marriage, although there is an entire failure of evidence of a formal ceremony. In other words, a presumption of marriage arises from cohabitation as husband and wife and reputation of marriage in the community: *Bynon v. State*, 117 Ala. 80, 67 Am. St. Rep. 163, 23 South. 640; *Moore v. Heineke*, 119 Ala. 627, 24 South. 374; *Tarrrt v. Negus*, 127 Ala. 301, 28 South. 713; *Klipfel v. Klipfel*, 41 Colo. 40, ante, p. 96, 92 Pac. 26; *State v. Wilson*, 5 Penne. (Del.) 77, 62 Atl. 227; *Myatt v. Myatt*, 44 Ill. 473; *Nossaman v. Nossaman*, 4 Ind. 648; *Smith v. Fuller* (Iowa), 108 N. W. 765; *Bartee v. Edmunds*, 29 Ky. Law Rep. 872, 96 S. W. 535; *Holmes v. Holmes*, 6 La. 463, 26 Am. Dec. 482; *Jones v. Jones*, 45 Md. 144; *Inhabitants of Newburyport v. Inhabitants of Boothbay*, 9 Mass. 414; *Sorensen v. Sorensen*, 68 Neb. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455; *Cramsey v. Sterling*, 97 N. Y. Supp. 1082, 111 App. Div. 568; *Thompson v. Nims*, 83 Wis. 2, 53 N. W. 502, 17 L. R. A. 847. And this presumption is one of the strongest known to the law; it can be overcome only by cogent proof: *Plattner v. Plattner*, 116 Mo. App. 405, 91 S. W. 457; *Hynes v. McDermott*, 91 N. Y. 451, 43 Am. Rep. 677; *Stevens v. Stevens*, 56 N. J. Eq. 488, 38 Atl. 460; note to *Pittinger v. Pittinger*, 89 Am. St. Rep. 198.

b. *When Overcome.*—Nevertheless cohabitation and reputation do not constitute marriage, but simply are evidence thereof. The presumption of marriage which arises from them, however strongly favored by the law, is rebuttable: *Myatt v. Myatt*, 44 Ill. 473; *Marks v. Marks*, 108 Ill. App. 371; *Boone v. Purnell*, 28 Md. 607, 92 Am. Dec. 713; *Adair v. Mette*, 156 Mo. 496, 57 S. W. 551; *State v. St. John*, 94 Mo. App. 158, 68 S. W. 374; *Olsen v. Peterson*, 33 Neb. 358, 50 N. W. 155; *Peck v. Peck*, 12 R. I. 485, 34 Am. Rep. 702; *Allen v. Hall*, 2 Nott. & McC. 114, 10 Am. Dec. 578; *Eldred v. Eldred*, 97 Va. 606, 34 S. E. 477.

c. *Separation of Parties.*—The presumption of marriage which arises from cohabitation and reputation is rebutted where the parties separate and one of them, while the other is known to be alive, marries or cohabits with a third person: *Weatherford v. Weatherford*,

20 Ala. 548, 56 Am. Dec. 206; Moore v. Heineke, 119 Ala. 627, 24 South. 374; In re Beverson's Estate, 47 Cal. 621; In re Maher's Estate, 183 Ill. 61, 56 N. E. 124; Jones v. Jones, 45 Md. 144; Jones v. Jones, 48 Md. 391, 30 Am. Rep. 466. But where a common-law marriage is almost conclusively established by the evidence, the fact that subsequently both parties again marry without having obtained a divorce, the marriage of the woman being after the man had been absent and unheard of for over seven years, is not conclusive against the common-law marriage: Smith v. Fuller (Iowa), 108 N. W. 765.

d. **Subsequent Ceremonial Marriage.**—A subsequent ceremonial marriage between the parties is not inconsistent with a prior common-law marriage between them, and does not necessarily overcome the presumption thereof from matrimonial cohabitation, repute, and the declarations and acts of the parties: Simmons v. Simmons (Tex. Civ. App.), 39 S. W. 639; Shank v. Wilson, 33 Wash. 612, 74 Pac. 812; Adger v. Ackerman, 115 Fed. 124, 52 C. C. A. 568. But the fact that a ceremonial marriage is performed, after many years of cohabitation, on the advice of a friend who deems it necessary, is evidence that a general and uniform reputation of marriage is lacking: Williams v. Herrick, 21 E. I. 401, 79 Am. St. Rep. 809, 43 Atl. 1036.

#### VIII. Statutes Prescribing Formalities of Marriage.

a. **When Directory Merely.**—Statutes prescribing the procurement of a license and other formalities to be observed in the solemnization of marriage, do not render invalid a marriage entered into according to the common law, but not in conformity with the statutory formalities, unless the statutes themselves expressly declare such marriages invalid, and this although the statutes prescribe penalties for ignoring their provisions. Such statutes have uniformly been held directory merely: See the note to State v. Lowell, 79 Am. St. Rep. 361; Campbell's Admr. v. Gullatt, 43 Ala. 57; Askew v. Dupree, 30 Ga. 173; Renfrow v. Renfrow, 60 Kan. 277, 72 Am. St. Rep. 350, 56 Pac. 534; Dumaresly v. Fishly, 10 Ky. (3 A. K. Marsh.) 368; State v. Bittick, 103 Mo. 183, 23 Am. St. Rep. 869, 15 S. W. 325, 11 L. R. A. 587; Snuffer v. Karr, 197 Mo. 182, 94 S. W. 983; State v. Ziehfeld, 23 Nev. 304, 62 Am. St. Rep. 800, 46 Pac. 802, 34 L. R. A. 784; Reaves v. Reaves, 15 Okl. 240, 82 Pac. 490, 2 L. R. A., N. S., 353; Rodebaugh v. Sanks, 2 Watts, 9; Burnett v. Burnett (Tex. Civ. App.), 83 S. W. 238; Burks v. State (Tex. Civ. App.), 94 S. W. 1040; Meister v. Moore, 96 U. S. 76, 24 L. ed. 826; Mathewson v. Phoenix Iron Foundry, 20 Fed. 281.

b. **When Mandatory.**—In some states, however, the statutes have expressly taken away the right to contract a common-law marriage, and have made a substantial compliance with the statutory formalities essential to a valid marriage: See the authorities cited in the second succeeding paragraph.

### IX. Validity of Common-law Marriages in Various States.

**a. Jurisdictions Where Validity Recognized.**—The validity of common-law marriages has been recognized in the jurisdictions indicated by the following citations: *Tarrit v. Negus*, 127 Ala. 301, 28 South. 713; *Darling v. Dent*, 82 Ark. 76, 100 S. W. 747; *Klipfel v. Klipfel*, 41 Colo. 40, ante, p. 96, 92 Pac. 26; *Askew v. Dupree*, 30 Ga. 173; *Drawdy v. Hesters*, 130 Ga. 161, 60 S. E. 451, 15 L. R. A., N. S., 193; *Hiler v. People* 156 Ill. 511, 47 Am. St. Rep. 221, 41 N. E. 181; *Franklin v. Lee*, 30 Ind. App. 31, 62 N. E. 78; *Davis v. Pryor*, 3 Ind. Ter. 396, 58 S. W. 660; *Porter v. United States (Ind. Ter.)*, 104 S. W. 105; *Smith v. Fuller (Iowa)*, 108 N. W. 765; *People v. Mendenhall*, 119 Mich. 404, 75 Am. St. Rep. 408, 78 N. W. 325; *Supreme Tent etc. v. McAllister*, 132 Mich. 69, 102 Am. St. Rep. 382, 92 N. W. 770; *Hulett v. Carey*, 66 Minn. 327, 61 Am. St. Rep. 419, 69 N. W. 31, 34 L. R. A. 384; *Hargroves v. Thompson*, 31 Miss. 211; *Floyd v. Calvert*, 53 Miss. 37; *In re Imboden's Estate*, 128 Mo. App. 555, 107 S. W. 400; *Eaton v. Eaton*, 66 Neb. 676, 92 N. W. 995, 60 L. R. A. 605; *State v. Zichfeld*, 23 Nev. 304, 62 Am. St. Rep. 800, 46 Pac. 802, 34 L. R. A. 784; *Town of Londonderry v. Town of Chester*, 2 N. H. 268, 9 Am. Dec. 61; *Voorhees v. Voorhees' Exrs.*, 46 N. J. Eq. 411, 19 Am. St. Rep. 404, 19 Atl. 172; *Clark v. Clark*, 52 N. J. Eq. 650, 30 Atl. 81; *Mullaney v. Mullaney*, 65 N. J. Eq. 384, 54 Atl. 1086; *Atlantic City R. R. Co. v. Goodin*, 62 N. J. L. 394, 73 Am. St. Rep. 652, 42 Atl. 333, 45 L. R. A. 671; *Tummalty v. Tummalty*, 3 Bradf. Sur. 369; *Hicks v. Cochran*, 4 Edw. Ch. 107; *Geiger v. Ryan*, 108 N. Y. Supp. 13, 123 App. Div. 722; *In re Wells' Estate*, 108 N. Y. Supp. 164, 123 App. Div. 79; *Carmichael v. State*, 12 Ohio St. 553; *Reaves v. Reaves*, 15 Okl. 240, 82 Pac. 490, 2 L. R. A., N. S., 353; *Estate of McCausland*, 213 Pa. 189, 110 Am. St. Rep. 540, 62 Atl. 780; *Williams v. Herrick*, 21 R. I. 401, 79 Am. St. Rep. 809, 43 Atl. 1036; *Ex parte Romans*, 78 S. C. 210, 58 S. E. 614; *Jackson v. Banister (Tex. Civ. App.)*, 105 S. W. 66; *Burks v. State (Tex. Civ. App.)*, 94 S. W. 1040; *Riddle v. Riddle*, 26 Utah, 268, 72 Pac. 1081; *Hilton v. Roylance*, 25 Utah, 129, 95 Am. St. Rep. 821, 69 Pac. 660, 58 L. R. A. 723; *Travers v. Reinhardt*, 25 App. D. C. 567.

**b. Jurisdictions Where Validity not Recognized.**—The validity of common-law marriages has been denied in the jurisdictions indicated by the following citations: *Norman v. Norman*, 121 Cal. 620, 66 Am. St. Rep. 74, 54 Pac. 143, 42 L. R. A. 343; *Estill v. Rogers*, 64 Ky. (1 Bush) 62; *Robinson v. Redd's Admr. (Ky.)*, 43 S. W. 435; *Johnson's Heirs v. Raphael*, 117 La. 967, 42 South. 470; *Denison v. Denison*, 35 Md. 361; *Norcross v. Norcross*, 155 Mass. 425, 29 N. E. 506; *Dunbarton v. Franklin*, 19 N. H. 257; *Holmes v. Holmes*, 1 Saw. 99, Fed. Cas. No. 6638; *Smith v. North Memphis Sav. Bank*, 115 Tenn. 12, 89 S. W. 392; *Offield v. Davis*, 100 Va. 250, 40 S. E. 910; *Morrill v. Palmer*, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411; *In re McLaughlin's Estate*, 4 Wash. 570, 30 Pac. 651, 16 L. R. A. 699; *Nelson v. Carlson*, 48 Wash. 651, 94 Pac. 477; *Beverlin v. Beverlin*, 29 W. Va. 732, 3 S. E. 36.



## PAXTON v. HERON.

[41 Colo. 147, 92 Pac. 15.]

**CORPORATION.—A Director Who is a Claimant against the corporation cannot, either in person or by proxy, be counted as one of a quorum in passing upon the claim. (p. 125.)**

**CORPORATION.—A Director Who is a Claimant is Disqualified to Accept the Resignation of Other Directors and to fill the vacancies when the purpose thereof is to effect the allowance of his claim. (pp. 125, 126.)**

**CORPORATION.—Where Directors are Disqualified to Act, the fact that their names are affixed to the minutes adds nothing to the efficacy of their official action. (p. 126.)**

**EXECUTION.—The Legal Title to Property Remains in the Judgment Debtor until the execution and delivery of the sheriff's deed. (pp. 126, 127.)**

**CORPORATION—Suit by Minority Stockholders.—The interest of the stockholders in a corporation entitles them to maintain a suit for relief against a fraudulent judgment rendered against it; and they are not precluded from maintaining such suit by the fact that one of them has taken an assignment of a certificate of sale of corporate property at execution under another judgment, for the benefit of the company. (p. 127.)**

C. H. Pierce, for the appellants.

Charles R. Bill and S. D. Walling, for the appellees.

<sup>148</sup> CAMPBELL, J. This action was brought by the plaintiffs, appellees here, as minority stockholders of the Canterbury Mining Company, in behalf of themselves and other stockholders similarly situated, against the defendant company and its managing officers, appellants here, to enjoin a threatened sale of mining property belonging to the defendant company under an execution issued on a judgment rendered against it in favor of one of the defendants, Paxton, as assignee of defendant Saunders, and which, it was <sup>149</sup> alleged by the plaintiffs, was obtained through the collusion and fraudulent conduct of the judgment creditor, who was president of defendant company, and other controlling officers and directors thereof upon a pretended and unauthorized confession of judgment; and that such conspiracy and fraudulent plan, so entered into by the defendant, had for its object the wrecking of the company and the injury of the minority stockholders. No question is raised by defendants as to the right of plaintiffs, as contradistinguished from the right of the corporation, to bring this suit, since the wrongs charged are against its controlling officers.

In the answer of the individual defendants, as well as in the separate answer of the defendant company, the alleged

frauds are denied, and as a separate and affirmative defense it is set up that plaintiffs are not entitled to maintain the action as stockholders, because title to the property threatened to be sold had passed from the company before the Paxton judgment was obtained, and at the time of the institution of this action; hence the stockholders, as such, had no rights in or to the property levied upon which could be enforced in equity.

The trial court found the facts in favor of the plaintiffs and enjoined the sale. The defendants appeal.

The principal grounds relied upon for reversal are thus summarized by appellants: (1) There is at least grave doubt that the Paxton judgment upon which the execution issued was regular and valid, and injunctive relief, therefore, should have been denied; (2) the property of the defendant company had been lost to that corporation by a prior execution levy and sale; (3) the rights of plaintiffs are not such as to give them any standing in equity.

<sup>150</sup> 1. So far as concerns our present inquiry, the validity of the Paxton judgment depends altogether upon the regularity and validity of an alleged meeting of the board of directors of defendant company on August 22, 1902, at which, it is said, was passed a motion allowing one of its directors, Saunders, the sum of ten thousand dollars for services as general manager for two years, and a resolution authorizing the attorney of the company to enter its appearance and confess judgment upon such claim in a contemplated action thereon, which claim, assigned by Saunders to Paxton, was afterward reduced to the judgment complained of.

There were five directors of the company, and at the time of the alleged meeting the board consisted of Hahnwalt, Paxton, Connors, Cook and Saunders. The minutes, as spread upon the books of the company, recite that there were present at this meeting of the board Connors, Cook and Saunders, and that Hahnwalt and Paxton were absent. There was also a recital that Pierce and Harris, stockholders of the company, were present, and after the meeting was called to order Hahnwalt and Paxton resigned as directors, their resignations were accepted to take effect at once, and Pierce and Harris elected to fill the two vacancies thus created. The record further recites that Saunders stated that he had a claim for services against the company as general manager for two years past, and wished the board to fix compensation therefor, and to take action which would enable him to realize upon the same, and after a consultation, in which the newly

elected directors assumed their duties, it was agreed that the sum of ten thousand dollars should be allowed Saunders for his services, and upon a ballot taken the motion was carried to pay him this sum. Upon the further suggestion that the company had no available funds, <sup>151</sup> the record recites that a motion was made and upon ballot taken was carried, authorizing the attorney of the company to confess judgment in its behalf for the sum of ten thousand dollars allowed Saunders. Affixed to these minutes as spread upon the records were the signatures of five persons purporting to be directors.

There is a by-law of the company that three directors, present in person or by proxy, shall constitute a quorum for the transaction of business. The testimony produced before the trial court tended to show, and from it it is apparent that the court found, that no such meeting of the board ever took place at any time. Neither Pierce nor Harris was present in person at the alleged meeting, either as director or stockholder, and no claim is made that they were. Connors testified positively that he was not present. Saunders was not present in person, but says that Cook held his proxy as director. So there could have been only two directors present—Cook and Saunders, the latter by Cook as proxy—had any such meeting been held.

But if there had been a meeting of the board of directors at the time mentioned, with Cook and Saunders both present, all its acts are clearly void. Saunders, as a claimant for services due him, could not, as a director, either in person or by proxy, be counted as one of a quorum in passing upon it. It is a case where duty to the company and self-interest conflicted, and he was disqualified to act, even if it was competent for Cook to act for him by proxy. It is not necessary in this case to determine whether or not a by-law is valid which permits one director to act for another in the transaction of business of the company which is intrusted by its charter to the directors as a body. It has been held by respectable authority that such a by-law is unreasonable and <sup>152</sup> void: *Craig Medicine Co. v. Merchants' Bank*, 59 Hun, 561, 14 N. Y. Supp. 16; 3 *Clark & Marshall on Corporations*, 2074, 2088; 3 *Thompson on Corporations*, sec. 3909; *Green's Brice's Ultra Vires*, 2d Am. ed., 490 et seq.

But if this by-law should be held valid, certainly Saunders was disqualified to act as a director either in the allowance of his own claim, or in accepting the alleged resignations of two of the directors, and in voting to fill the vacancies, be-

cause each and all of such acts were necessary, and a part of the evident scheme on his part and that of other officers of the company in allowing this claim and reducing it to judgment: *Morgan v. King*, 27 Colo. 539, 63 Pac. 416; *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854; 3 *Clark & Marshall on Corporations*, 2086 et seq., 2296 et seq.

The fact that the names of five persons, purporting to be the five directors, are affixed to this minute, adds nothing whatever to the efficacy of the supposed official action. Saunders could not act, for the reasons already stated. Connors' name was so written as the result of fraud, and is to be disregarded. This leaves Cook as the only director who could have acted had there been a meeting. He did not constitute a quorum of the board, hence neither Harris nor Pierce was elected as a director, and their signatures on the record are worthless.

The findings of the trial court that Saunders' claim for services was extortionate may, for our present purpose, be laid aside, because the evidence conclusively shows either one (or both) of two things: that the pretended board meeting never occurred, or, if so, it was illegal and void. The confession of judgment by the attorney of the company was, therefore, without due, or any, authority.

2. It is, however, argued by counsel for appellants that even if the judgment is void, this action cannot be maintained because the title of the defendant <sup>153</sup> company to the seized property had been divested before this action was begun. The allegation of the affirmative defense in that behalf is, in substance: When the Paxton judgment was entered, and prior thereto and ever since, the defendant company was insolvent and unable to pay its debts, and that more than six months before the beginning of this action its property was sold under an execution upon a prior judgment at the instance of one Neil McCullom, the sheriff's certificate of sale being assigned to, and held by, plaintiff J. H. Heron, and by virtue of that sale the defendant company lost all its right to the property described in the complaint at the expiration of six months from the date of sale.

Manifestly this defense, if true, is insufficient to defeat the present action. There is no allegation that the McCullom execution was issued upon a judgment that was rendered against the defendant company, or that a sheriff's deed was issued upon the certificate of sale, or that the defendant company, or some one in its behalf, had not made a legal redemption therefrom. It is the law in this state, and has been

ever since the decision in *Hayes v. New York Gold Min. Co.*, 2 Colo. 273, that the legal title remains in the judgment debtor until the execution and delivery of the sheriff's deed: *Manning v. Strehlow*, 11 Colo. 451, 18 Pac. 625.

Besides this, the defendants themselves, as the controlling officers of the defendant company, were the ones to act for it in redeeming from the prior execution sale, and the complaint alleges, and the court found, that if there was a failure to do so, it was due to their wrong. It would be inequitable to allow them to defeat the present action by taking advantage of their wrongful conduct.

3. The argument that plaintiffs' rights as stockholders are not such as to give them standing <sup>154</sup> in a court of equity, as we understand it, is that the controversy here is not between minority stockholders and offending directors, but, in reality, between rival judgment creditors. It appears from the evidence that Mr. Heron, one of the plaintiffs, is the assignee of J. S. Sandusky, who held the certificate of sale under the McCullom judgment, and defendants claim that Heron, under the guise of a minority stockholder, is really conducting the present litigation in his own behalf as the assignee of the purchaser at the sale under the McCullom, with which he seeks to defeat the Paxton, judgment. The court found against defendants, and there is abundant evidence in support of this finding. The evidence discloses that Heron took an assignment of the certificate of sale under the McCullom judgment for the protection of himself and other stockholders similarly situated, and that he holds it for such purpose does not prevent him and other minority stockholders, for the benefit of the company, from assailing the validity of the Paxton judgment, as under the evidence, they will be required, as they declare their intention to be, to share the fruits of the former judgment with other stockholders similarly situated to themselves. Besides, as stockholders, their interest in the company entitles them to relief against a fraudulent judgment rendered against it, for it may have other property that could be seized.

It appearing that the findings of the court are sustained by sufficient legal evidence, and that the equities are with plaintiffs, the judgment in their favor is affirmed.

Chief Justice Steele and Mr. Justice Gabbert concur.

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<sup>154</sup> An Officer of a Corporation is not qualified to act for his company in any transaction wherein it is dealing with him: *Pacific Vinegar*

etc. *Works v. Smith*, 145 Cal. 352, 104 Am. St. Rep. 42; *Scott v. Farmers' and Merchants' Nat. Bank*, 97 Tex. 31, 104 Am. St. Rep. 835.

*Actions by Stockholders* on behalf of their corporations are discussed in the note to *Johns v. McLester*, 97 Am. St. Rep. 29.

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### JUDD v. ROBINSON.

[41 Colo. 222, 92 Pac. 724.]

**DEEDS—Condition Against Sale of Liquor, Validity of.**—A condition in a deed against the manufacture or sale of intoxicating liquor on the premises is valid as between the grantor and grantee. (p. 131.)

**DEEDS—Condition Against Sale of Liquor—Subsequent Purchasers.**—A covenant in a deed forbidding the manufacture or sale of intoxicating liquor on the premises is not enforceable against a subsequent purchaser without notice, actual or constructive, of the covenant. In such cases the rule applies that a recorded deed is constructive notice of its contents to all persons claiming what is thereby conveyed, under the same chain of title, from the same grantee, but it is not notice to other persons. (p. 132.)

**DEEDS—Covenant Against Sale of Liquor—Who can Enforce.** The right of grantees from the common grantor to enforce, inter se, covenants against the sale of liquor, entered into by each with the grantor, is confined to cases where there has been proof of a general plan or scheme for the improvement of the property and its consequent benefit, and the covenant has been entered into as part of a general plan to be exacted from all purchasers, and to be for the benefit of each purchaser, and the party has bought with reference to such general plan or scheme, and the covenant has entered into the consideration of his purchase. (pp. 133, 134.)

**COVENANTS.—When a Third Party Claims the Benefit of a** covenant or contract between two other parties, it is incumbent upon him clearly to allege all the facts necessary to establish his claim. (p. 134.)

J. F. Sanford, for the appellants.

Gunnell & Chinn, for the appellees.

**223** MAXWELL, J. The allegations of the amended complaint, so far as necessary to be stated, are, that plaintiffs—appellants and seven others—are residents and **224** owners of real estate in the city of Colorado Springs; that the town of Colorado Springs was platted and laid out as a town, under a general plan or scheme to have the same free from the manufacture, sale or disposition of intoxicating liquors as a beverage in any place of public resort within the town; that to this end the founders of the town, to wit, the Colo-

rado Springs Company, inserted in all the deeds which they executed to lots in said town the following clause, to wit:

"And also for the further consideration of the agreement between the parties hereto, for themselves, their heirs, successors and legal representatives, that intoxicating liquors shall never be manufactured, sold or otherwise disposed of, as a beverage, in any place of public resort in or upon the premises hereby granted, or any part thereof; and it is herein and hereby expressly reserved by the said party of the first part, that in case any of the above conditions concerning intoxicating liquors are broken by said party of the second part, his assigns or legal representatives, then this deed shall become null and void, and all right, title and interest of, in and to the premises hereby conveyed shall revert to the party of the first part, its heirs, successors and assigns; and the said party of the second part, by accepting this deed for himself, his heirs, executors, administrators and assigns, consents and agrees to the reservation and conditions aforesaid."

That the owners of land adjacent to the original town as platted and laid out made deeds to the Colorado Springs Company of such lands, which deeds contained the "liquor clause" above set forth, which was in furtherance of and in accordance with the general plan and scheme to have said town of Colorado Springs free from the manufacture, sale or disposition of intoxicating liquors in any place of public resort within the town; that within two years from the time of the platting and laying out of said town more than four hundred deeds to lots in said town from said company to various parties were recorded in the records of El Paso county, all of said deeds containing said "liquor clause"; that on the fourth day of November, 1872, the recorder's office at El Paso county was furnished with records containing blanks with said "liquor clause" printed therein; that upon information and belief, the Colorado Springs Company advertised said town under the name of "Fountain Colony" as a place where intoxicating liquors should never be manufactured, sold or otherwise disposed of as a beverage in any place of public resort in said town; that in furtherance of said general plan or scheme it has been the practice and custom to insert such "liquor clause" in deeds to lots in said town from the organization thereof, and to insert such "liquor clause" in all deeds to property in all additions to said town up to the present time, except

a few deeds which may have been executed by subsequent grantees, nonresidents of the town; that defendant Robinson is the owner of two lots in said town; that said real estate so owned by defendant Robinson is a part of the original town and was conveyed by the Colorado Springs Company by a deed dated September 5, 1873, filed in the recorder's office of El Paso county, that such deed contained the "liquor clause" above referred to; that the defendant drug company is, and for a long time prior to the filing of the complaint has been, occupying and using a portion of the building erected upon said premises, and is engaged in selling intoxicating liquors to be used as a beverage thereon, and that such drug store is a place of public resort; that defendant drug company is occupying and using said premises as a tenant of and with the knowledge and consent of, defendant <sup>226</sup> Robinson; "that these plaintiffs, and each of them, purchased their respective lots in said city as aforesaid, in good faith, and in the belief that said 'liquor clause' in the deeds to real estate in the said city of Colorado Springs and additions thereto as aforesaid, was and is legal and binding, and that no owner of real estate in said city or the additions thereto could rightfully manufacture, sell or otherwise dispose of intoxicating liquors as a beverage in any place of public resort on any real estate in said city or additions thereto, and that no owner of real estate in said city or additions thereto could rightfully permit any person to manufacture, sell or otherwise dispose of intoxicating liquors as a beverage in any place of public resort on premises owned by such owner in said city or the additions thereto, and that no person could rightfully manufacture, sell or otherwise dispose of intoxicating liquors as a beverage in any place of public resort in said city or the additions thereto; that no person could rightfully permit any person or persons to manufacture, sell or otherwise dispose of intoxicating liquors as a beverage in any drug store in said city or additions thereto, and that no person or persons could rightfully manufacture, sell or dispose of intoxicating liquors as a beverage in any drug store in said city or additions thereto."

The defendants attacked the amended complaint upon the ground, inter alia, that it did not state facts sufficient to constitute a cause of action.

Defendants' demurrers having been sustained, and plaintiffs electing to stand upon their amended complaint, the action was dismissed at plaintiffs' costs; hence this appeal.



The "liquor clause" upon which plaintiffs base their right of action has been held valid by this court <sup>227</sup> in *Cowell v. Colorado Springs Co.*, 3 Colo. 82, and in *Cowell v. Colorado Springs Co.*, 100 U. S. 55, 25 L. ed. 547.

Mr. Justice Field, in the latter case, said: "We have no doubt that the condition in the deed to the defendant here is valid and not repugnant to the estate conveyed. It is a condition subsequent, and upon its breach the company had a right to treat the estate as having reverted to it, and bring ejectment for the premises."

But while the clause under discussion is valid as between the grantor and its grantees, it by no means follows that any owner of lots in Colorado Springs may enforce the clause against any other lot owner.

*De Gray v. Monmouth Beach Club House*, 50 N. J. Eq. 329, 24 Atl. 388, is one of the numerous authorities relied upon by appellants to sustain their right to maintain this action.

The covenant in the deed in this action was: "And the said party of the second part, for himself, his heirs and assigns, doth hereby covenant to and with the said Daniel Dodd and Francis Mackin, their heirs, executors and administrators, that he, the said party of the second part, his heirs or assigns, will not at any time hereafter erect or permit upon any part of the said lot any hotel, drinking saloon, gaming-house, slaughter-house, furnace, manufactory, brewery, distillery, or building for the curing of fish, or for any other uses or purposes *that shall depreciate the value of the neighboring property for dwelling-houses.*"

The opinion reviews the English and American authorities upon the subject here under discussion and sums up the conclusion of the court as follows, at page 340: "The law, deducible from these principles and the authorities applicable to this case, is, that where <sup>228</sup> there is a general scheme or plan, adopted and made public by the owner of a tract, for the development and improvement of the property, by which it is divided into streets, avenues and lots, and contemplating a restriction as to the uses to which buildings or lots may be put, to be secured by a covenant embodying the restriction, to be inserted in each deed to a purchaser; and it appears, by writings or by the circumstances, that such covenants are intended for the benefit of all the lands, and that each purchaser is to be subject to and to have the benefit thereof; and the covenants are actually inserted in all deeds for lots sold in pursuance of the plan; one purchaser and his assigns

may enforce the covenant against any other purchaser and his assigns, if he has bought with knowledge of the scheme, and the covenant has been part of the subject matter of his purchase."

It affirmatively appears from the amended complaint that appellants were not parties to the original covenant contained in the deed under which appellee Robinson derives title to her property.

In such cases it is held that an action is not maintainable (1) in which it does not appear that the covenant was entered into for the benefit of the land of which plaintiff has become the owner, and (2) in which it appears that the covenant has not entered into the consideration of plaintiff's purchase.

From the very nature of the case, a covenant restricting the use of land will not be enforced against a subsequent purchaser without notice, actual or constructive, of the covenant.

Tested by the foregoing principles the amended complaint is fatally defective, in that it does not allege that appellee Robinson had actual or constructive knowledge of the general plan or scheme at the time she purchased her lots.

To overcome this defect it is said that the record <sup>229</sup> in the recorder's office, of the deeds containing the "liquor clause," imputes knowledge to appellee Robinson of the general plan or scheme, evidenced by the "liquor clause" in said deeds.

This is not the law in this state. A recorded deed is constructive notice of its contents to all persons claiming what is thereby conveyed, under the same chain of title, from the same grantor, but is not notice to other persons: *Gillett v. Gaffney*, 3 Colo. 351; *Rose v. Dunklee*, 12 Colo. App. 403, 56 Pac. 342.

It is further contended that appellee Robinson, having accepted the deed containing the "liquor clause," held out to subsequent purchasers that the clause should be observed, and that she is estopped by her actions from denying notice of the general plan or scheme and of the covenant in the deeds. Assuming that this contention is correct, this brings us to a discussion of the covenant itself, its force and effect, and a determination of the question whether it was entered into for the benefit of the premises owned by appellants, or for the benefit of appellees.

By its terms the covenant is limited to the land "hereby granted." In this respect it differs widely from covenants

which in express terms or by reasonable or necessary implication give notice that they are intended for the development or improvement of premises within a designated area, or for adjacent lots or neighboring property, as was the case in the New Jersey case, above cited, as indicated by that portion of the covenant which we have italicized.

Again, the parties to the deed stipulate, "for themselves, their heirs, successors and legal representatives," thereby expressly limiting the covenant to the particular persons named, which intention is further manifested by the condition of the forfeiture clause contained in the covenant, to the effect that <sup>230</sup> upon condition broken, the premises "shall revert to the party of the first part, its heirs, successors and assigns."

In *Cowell v. Colorado Springs Co.*, 100 U. S. 55, 25 L. ed. 547, Mr. Justice Field said that the covenant under consideration was a "condition subsequent" upon the breach of which the company could maintain ejectment, clearly negating the idea that a subsequent grantee could do so, as is insisted by appellants.

In *Mulligan v. Jordan*, 50 N. J. Eq. 363, 24 Atl. 543, it is said: "The right of an owner of a lot to enforce a covenant (to which he is not a party or an assign) restrictive of the use of other lands is dependent on the covenant having been made for the benefit of this lot. . . .

"The right of grantees from the common grantor to enforce, inter se, covenants entered into by each with said grantor is confined to cases where there has been proof of a general plan or scheme for the improvement of the property and its consequent benefit, and the covenant has been entered into as part of a general plan to be exacted from all purchasers, and to be for the benefit of each purchaser, and the party has bought with reference to such general plan or scheme, and the covenant has entered into the consideration of his purchase."

The opinion in the last above cited case was written by Green, V. C., who wrote the opinion in the *De Gray* case (50 N. J. Eq. 329, 24 Atl. 388).

We think the case at bar clearly falls within the principle announced in the case last above quoted.

The allegations in the amended complaint to the effect that plaintiffs bought their property in good faith and in the belief that the "liquor clause" was legal and binding, etc., as hereinbefore set forth, do not fill the requirements of the rule that it must appear <sup>231</sup> that the covenant en-

tered into the consideration of the purchase, especially in view of the fact that there is no allegation in the pleading to the effect that plaintiffs at the time of their purchase had knowledge of or relied upon the general plan or scheme alleged in the pleading, or purchased their premises in view of the fact that the "liquor clause" was inserted in said deed in furtherance of, and in accordance with, such general plan or scheme.

When a third party claims the benefit of a covenant or contract between two other parties, it is certainly incumbent upon him to clearly allege all the facts necessary to establish such claim.

This the appellants have not done in the particulars above pointed out.

We have carefully considered the numerous authorities cited by counsel for appellants, all of which are readily distinguishable from the case at bar. An analysis of them would unnecessarily prolong this opinion.

The court did not err in sustaining the demurrers to the amended complaint.

The judgment will be affirmed.

Chief Justice Steele and Mr. Justice Caswell concurring.

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*A Condition in a Deed* against the manufacture or sale of intoxicating liquors on the premises conveyed is valid. It is not repugnant to the grant, nor against public policy, nor in restraint of trade; and is effective against an assignee or purchaser of the vendee: See the note to *Wakefield v. Van Tassell*, 95 Am. St. Rep. 222.

*The Question Who may Sue* on a contract made for the benefit of a third person is discussed in the note to *Baxter v. Camp*, 71 Am. St. Rep. 176.

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## BOARD OF COUNTY COMMISSIONERS OF EL PASO COUNTY v. ROHDE.

[41 Colo. 258, 95 Pac. 551.]

**OFFICER DE FACTO.**—The Payment to an Officer De Facto of the Salary appertaining to the office releases the municipality from liability to pay it to the officer de jure for the same period. (p. 136.)

R. L. Chambers and Robert Kerr, for the appellant.

No appearance for the appellees.

259 BAILEY, J. Defendant Rohde and one Steinmetz were rival candidates for the office of county treasurer of El

Paso county at the election held in November, 1897. The defendant Rohde was, by the board of canvassers of said county, declared elected for the term beginning January 1, 1898, and received a certificate of election. About the 1st of December, 1897, Steinmetz instituted a contest against Rohde to determine the right to hold such office. Upon the sixth day of January, 1898, the county court of El Paso county, in which the contest proceedings was pending, gave judgment that Steinmetz was elected, and Rohde took an appeal to this court. In July, 1898, this court reversed the judgment of the county court and determined that Rohde was elected instead of Steinmetz (*Rohde v. Steinmetz*, 25 Colo. 308, 55 Pac. 814). After this decision was rendered defendant Rohde came into possession of the office. Steinmetz held the office from the 1st of January until some time in July, and received from plaintiff the salary pertaining to the office for that time, amounting to seventeen hundred and fifty dollars. About the 1st of October defendant Rohde took out of the fees and other emoluments coming into his office the sum of seventeen hundred and fifty dollars as compensation to himself as treasurer during the period from the 1st of January until the 1st of July, and reported his action to the plaintiff. Plaintiff demanded the return of the money to the public funds of the county. Defendant Rohde refused to comply with the demand, and this action was brought against him and his surety, the defendant company. The matter was submitted to the district <sup>260</sup> court for judgment upon the pleadings. The district court rendered judgment in favor of the defendants and plaintiff appeals.

There is only one question presented in the case, and that is as to whether or not an officer *de jure* can recover from a county salary paid by the county to the officer *de facto* during the period that the officer *de jure* was kept from the office. One phase of this question was before the court of appeals in the case of *Henderson v. Glynn*, 2 Colo. App. 303. 30 Pac. 265. In that case Glynn and Allen were rival candidates for the office of district judge. Glynn received the certificate of election, and Allen instituted contest proceedings. Pending these proceedings Henderson, as state auditor, declined to draw warrants for the payment of the salary of Glynn, the purpose of resisting the payment being to protect himself and the state against double payment of the same salary. Glynn brought an action of mandamus against Henderson to compel him to draw the warrants. The court of appeals said: "Under existing facts and the authorities, both

he and the state would be amply protected in paying the salary to the incumbent. That he is judge de facto, in possession of the office and in the discharge of his duties, under color of an election, and holding all the evidence of being there rightfully, is admitted or unquestioned. In *Terhune v. Mayor*, 88 N. Y. 247, it is said: 'It is no longer open to question in this state that payment to a de facto officer, while he is holding the office and discharging its duties, is a defense to an action brought by the de jure officer to recover the same salary.' "

If the state could be compelled to pay the salary of the party holding the office pending the contest proceedings, as was done in the case of *Henderson v. Glynn*, 2 Colo. App. 303, 30 Pac. 265, then it follows as a matter of course that the officer de jure, upon the termination of the <sup>261</sup> contest in his favor, could not recover the salary from the state or county. The people cannot be compelled to pay twice for the same services. To the same effect as the doctrine in *Henderson v. Glynn*, 2 Colo. App. 303, 30 Pac. 265; *In re Havird*, 2 Idaho (Hasb.), 687, 24 Pac. 542; *Commissioners of Saline Co. v. Anderson*, 20 Kan. 298, 27 Am. Rep. 171; *Shaw v. County of Pima*, 2 Ariz. 399, 18 Pac. 273; *McVeany v. Mayor of New York*, 80 N. Y. 185, 36 Am. Rep. 600; *McDonald v. City of Newark*, 58 N. J. L. 12, 32 Atl. 384; *Greeley Co. v. Milne*, 36 Neb. 301, 38 Am. St. Rep. 724, 54 N. W. 521, 19 L. R. A. 689; *County of Wayne v. Benoit*, 20 Mich. 176, 4 Am. Rep. 382; *Michel v. City of New Orleans*, 32 La. Ann. 1094.

The states holding contrary views are California, Pennsylvania, Maine and Tennessee. The great weight of authority is in favor of the doctrine that the county, having paid the officer de facto, cannot be held to pay the officer de jure for the same period, and if defendant Rohde could not recover judgment against the county for his salary during the period when the office was held by Steinmetz, it follows as a matter of course that he had no right to pay himself out of the public funds. Consequently, the judgment of the district court should have been for the plaintiff and not for the defendants. It will therefore be reversed and remanded, with instructions to enter judgment in favor of the plaintiff and against the defendants, according to the prayer of the complaint.

Chief Justice Steele and Mr. Justice Goddard concur.

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*The Holding of the Principal Case to the Effect that a payment to a de facto officer of the salary appertaining to the office relieves*

the municipality from any further liability to pay it is supported by the great weight of authority: See the note to *Andrews v. Portland*, 10 Am. St. Rep. 284; *Brown v. Tama County*, 122 Iowa, 745, 101 Am. St. Rep. 296; *Coughlin v. McElroy*, 74 Conn. 397, 92 Am. St. Rep. 224. That the officer *de facto* may be answerable for such salary to the officer *de jure*, see *Waterman v. Chicago etc. R. R. Co.*, 139 Ill. 658, 32 Am. St. Rep. 228; *Coughlin v. McElroy*, 74 Conn. 397, 92 Am. St. Rep. 224.

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### JENKS v. STUMP.

[41 Colo. 281, 93 Pac. 17.]

**CRUELTY TO ANIMALS.**—The Legislature has Authority to Enact Proper Laws for the prevention of cruelty to animals; and it may designate agents or officers charged with the execution of such laws. (p. 139.)

**CRUELTY TO ANIMALS—Deprivation of Property Without Due Process.**—A statute which provides that an officer of a humane society may take charge of any abandoned or mistreated animals, provide them with food, and detain them until the expenses are paid, without restricting the authority of the officer to cases of emergency or public necessity, and without providing any notice to the owner or opportunity for hearing, is unconstitutional as permitting a deprivation of property without due process. (p. 143.)

Geo. F. Dunklee and O. E. Jackson, for the appellant.

Waldo & Dawson, for the appellee.

<sup>282</sup> **CASWELL, J.** The appellee (as plaintiff below) brought a replevin suit in the district court of Fremont county to recover the possession of three cows from appellant (defendant below). Complaint in the usual form alleging ownership; that he was entitled to the possession of property wrongfully taken; demand for possession and unlawful detention by defendant.

The defendant for answer alleges upon information and belief that the plaintiff was not in possession of the cows described in the complaint at the time alleged, but the same were abandoned, neglected and cruelly treated, and ranging upon a barren range dividing the counties of Fremont and Teller. And the defendant further justifies under sections 111 and 112 of Mills' Annotated Statutes of Colorado, alleging that at the time she took said cattle she was empowered, as officer and agent of the Colorado Humane Society, to detain such animals until the expense of food, care and shelter was fully paid. That her seizure of said cattle at the time same were taken was made solely for the purpose

of providing them with proper food, shelter and care, and to prevent <sup>283</sup> suffering and death of same from hunger, thirst and neglect; and she further alleges that at the time of the seizure she did not know, and had no means of knowing, who were the owners of the cattle.

Plaintiff by his replication denies that the cattle were without food, shelter and care, or that they were suffering greatly, or otherwise, from any cause, and denies that the defendant found them in an abandoned, neglected and cruelly treated condition; and alleges that the cattle were on the range in the usual condition of range cattle, and that at that time, and at all times during the winter, he had provided, and was providing, food and shelter for all of his cattle on the range needing such food and shelter, and had men continually employed to gather all cattle which were in a suffering condition and provide for their wants; and plaintiff further submitted to the court the validity of the law under which defendant justified.

At the trial the plaintiff objected to the introduction of any testimony in support of the allegation of justification in defendant's answer, because the statute relied upon is in conflict with section 25, article 2, of the constitution of Colorado, and the fourteenth amendment to the constitution of the United States, in that it authorizes the taking of property without due process of law, and further claims the statute to be in conflict with section 25 of article 5, constitution of Colorado. The statutes which are discussed in connection with this case are as follows:

Section 111, Mills' Annotated Statutes: "Any officer or agent of the State Humane Society may lawfully take charge of any animal found abandoned, neglected or cruelly treated, and shall thereupon give notice thereof to the owner, if known, and may care <sup>284</sup> and provide for such animal until the owner shall take charge of the same, and the expense of such care and provision shall be a charge against the owner of such animal, and collectible from such owner by said Humane Society in an action therefor.

"Sec. 112. When said Humane Society shall provide neglected and abandoned animals with proper food, shelter and care, it may detain such animals until the expense of such food, shelter and care is paid, and shall have a lien upon such animals therefor."

"Sec. 114. Any person or corporation entitled to a lien under any of the provisions of this act, may enforce the same by selling the animals and other personal property,



upon which such lien is given, at public auction, upon giving written notice to the owner, if he be known, of the time and place of such sale, at least five days previous thereto, and by posting three notices of the time and place of such sale in three public places within the county, at least five days previous thereto; and if the owner be not known, then such notice shall be posted at least ten days previous to such sale."

Counsel on both sides have been diligent in presenting authorities. While we allude to some of them, we think the questions presented have been practically settled by former decisions of this court. In the exercise of the police power of the state, the legislature may undoubtedly enact proper laws for the prevention of cruelty to animals. It may further designate agents or officers who may be charged with the execution of such laws. It is unnecessary, in this case, to determine whether the statute, as it now stands, is obnoxious to clause 23, section 25, article 5, of the constitution of Colorado.

The important question presented, and chiefly relied upon, in the argument, is whether the law as <sup>283</sup> it stands contravenes section 25, article 2, of the constitution of Colorado, and the fourteenth amendment to the constitution of the United States, in that it deprives plaintiff of his property and the possession thereof without due process of law. This phrase has been frequently discussed in this court, and many other courts have defined it in various ways. In *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616, the court says: "There is wisdom, we think, in the ascertaining of the intent and application of such an important phrase (due process of law) in the federal constitution by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning upon which such decisions may be founded."

And further, in the same case, at page 107, Mr. Justice Bradley, says: "If a state, by its laws, should authorize private property to be taken for public use without compensation (except to prevent its falling into the hands of an enemy, or to prevent the spread of conflagration, or in virtue of some other imminent necessity where the property itself is the cause of the public detriment), I think it would be depriving a man of his property without due process of law. . . . In judging what is due process of law, respect must be had to the cause and object of the taking, . . . and if found to be suitable or admissible in the special case, it

will be adjudged to be 'due process of law'; but if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law.' "

In *re Lowrie*, 8 Colo. 499, 54 Am. Rep. 558, 9 Pac. 489, the court says: "It is pretty generally stated by those learned in the law that 'due process of law' and 'law of the land,' although verbally different, express the same <sup>286</sup> thought, and that the meaning is the same in every case": *Cooley's Constitutional Limitations*, 352, 353; *Story on the Constitution*, sec. 1943.

In the same case the court further says, quoting from *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629: "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, his liberty, property and immunities under the protection of the general rules which govern society."

To the same effect is *Wadsworth v. Union Pac. R. R. Co.*, 18 Colo. 600, 36 Am. St. Rep. 309, 33 Pac. 515, 23 L. R. A. 812. In *re Dolph*, 17 Colo. 35, 28 Pac. 470: "Due process of law includes law in its regular course of administration through courts of justice."

In *Brown v. City of Denver*, 7 Colo. 305, 3 Pac. 455, this court, in discussing "due process of law" and its application, says: "The doctrine of the authorities is that whenever it is sought to deprive a person of his property, or to create a charge against it, preliminary to, or which may be made the basis of taking it, the owner must have notice of the proceedings, and be afforded an opportunity to be heard as to the correctness of the assessment or charge. It matters not what the character of the proceeding may be, by virtue of which his property is to be taken, whether administrative, judicial, summary or otherwise; at some stage of it, and before the property is taken or the charge becomes absolute against either the owner or his property, an opportunity for the correction of wrongs and errors which may have been committed must be given. Otherwise the constitutional guaranties above cited are infringed."

<sup>287</sup> The court, in the same case, further says: "A valid assessment cannot be made under an invalid law or ordinance, and its constitutionality is to be tested, not by what has been done under it, but by what it authorizes to be done by virtue of its provisions": *Steuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Thomas v. Gain*, 35 Mich. 155, 24 Am.

Rep. 535; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; San Mateo v. Southern Pac. R. R., 8 Saw. 283, 13 Fed. 722.

In the latter case this court had under consideration the validity of a statute authorizing the construction of sidewalks; but it was held in that case, as in other cases, that an assessment of that character could be upheld as a police regulation, and the court was then discussing the police power of the state. Subsequently this theory of taxation was overruled (Denver v. Knowles, 17 Colo. 204, 30 Pac. 1041, 17 L. R. A. 135); but such later decision in nowise detracts from the force of the argument of the court as to legislative enactments concerning the exercise of police powers.

In Brophy v. Hyatt, 10 Colo. 223, 15 Pac. 399, the court, having under consideration the power of towns, incorporated under the statute, to declare what should be a nuisance, and to abate the same, etc., says: "The ordinance does not, strictly speaking, declare or work a forfeiture of impounded animals, since it provides for the payment of the proceeds of the sale to the owner after deducting the cost of the proceeding." Conversely, it is true that a statute which does not provide for the payment of the balance to the owner after deducting the cost of the proceeding does work a forfeiture. It is not a sufficient answer to this proposition to say that the balance of the proceeds of the sale of animals remaining after deducting the cost for keeping and the cost of the proceedings and sale can be recovered by the owner in an action, because the constitutionality of the statute must be determined <sup>288</sup> by what it authorizes to be done by virtue of its provisions: Brown v. City of Denver, 7 Colo. 305, 3 Pac. 455, and cases cited; Ames v. People, 26 Colo. 83, 56 Pac. 656.

Applying the foregoing well-established principles to the case at bar, we find the statute seeks to clothe the Humane Society and its agents with extraordinary powers. By its terms the agent is the sole judge of whether an animal is neglected, abandoned or ill-treated, and whether it has sufficient food, nourishment and shelter. The truth respecting the matter cannot avail, because the agent is clothed with power to take possession of the animals regardless of their condition. No tribunal or any hearing is provided to determine the facts. The agent may, in his discretion, take possession and create a charge which becomes a lien upon the property without notice or hearing. The owner may have no knowledge that his property is being taken; no provision is made for the payment of any residue over and above the

charges of the agent and the expense of the sale to the owner, and such payment is not required by this law, and this is one of the tests of its constitutionality. There is no penalty for failure to return the proceeds of any sale to the owner, and the only redress is by an action to recover the same, and the party aggrieved must himself initiate the action to have his day in court.

We think such powers are inhibited by the constitution, and must hold that the statute is in contravention of article 2, section 25, of the constitution of Colorado, and the fourteenth amendment to the federal constitution; that it authorizes the taking of property without due process of law, and is not a valid exercise of the police power of the state.

Our attention is called to a line of decisions holding that legislation in the exercise of the police <sup>289</sup> power of the state has been upheld where it was provided that property might be destroyed without notice and without compensation to the owner, to prevent the spread of contagious disease, or in the case of a devastating fire and other exigencies. The rulings in such cases rest more upon the municipal right of self-protection and self-defense than the legal construction of provisions concerning due process of law. Such cases are not in point. In *Munn v. Corbin*, 8 Colo. App. 113, the court, having under consideration the powers of a health commissioner to abate a nuisance, says: "The right to abate public nuisances, whether we regard it as existing in the municipalities, or in the community, or in the land of the individual, is a common-law right, and is derived, in every instance of its exercise, from the same source—that of necessity. It is akin to the right of destroying property for the public safety, in case of the prevalence of a devastating fire or other controlling exigency. But the necessity must be present to justify the exercise of the right, and whether present or not, must be submitted to a jury under the guidance of a court."

The distinction in all such cases seems to be whether public necessity demands summary action, and when it does not, notice must be given to the owner of the property and an opportunity be given, before some competent tribunal, to determine the truth of the allegations in each case, before the same is taken and before any lien is created upon it, and before it can be sold. Many of these questions arise in connection with the right of killing animals; that is, in the manner provided in section 113 of the act under consideration. We do not construe that section, which is not before us, but the principles which control in such cases are analogous and

applicable <sup>290</sup> to those involved herein: 8 Cyc. 1122, and cases cited.

It does not appear from the record that any public necessity existed, nor that the public safety was in any manner conserved by taking these animals from the range, or that any exigency existed which required them to be taken without a notice to the owner and a hearing to determine whether or not they were abandoned or neglected, nor does the statute purport to restrict the powers granted to cases of emergency.

At the trial there was a verdict for the plaintiff directed by the court and judgment thereon, based upon the ruling that the statute is unconstitutional.

We think the judgment is correct, and it is affirmed.

Decision en banc, all the justices concurring.

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*The Constitutionality of Statutes and Ordinances* designed to prevent cruelty to animals has been recognized in a number of cases: Porter v. Vinzant, 49 Fla. 213, 111 Am. St. Rep. 93; Bland v. People, 32 Colo. 319, 105 Am. St. Rep. 80; State v. Neal, 120 N. C. 613, 58 Am. St. Rep. 810.

*The Constitutionality of Statutes and Ordinances* providing for the summary impounding, sale or destruction of animals is discussed in Ross v. Desha Levee Board, 83 Ark. 176, 119 Am. St. Rep. 131; and in the note to Armstrong v. Brown, 90 Am. St. Rep. 211.

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## BURCHER v. PEOPLE.

[41 Colo. 495, 93 Pac. 14.]

**CONSTITUTIONAL LAW—Title to Statute.**—Whether the Subject Matter of an Act is Clearly Expressed in the Title must be determined from its own contents, without regard to the source of the power of which the act is an expression. It makes no difference whether authority for the act is found in an express constitutional provision or in the unwritten police power. (p. 146.)

**CONSTITUTIONAL LAW—Title of Act to Regulate Employment.**—The title, "An act to prescribe and regulate the hours of employment for women and children in mills, factories, manufacturing establishments, shops, stores and any other occupation which may be deemed unhealthful or dangerous," does not embrace a section therein which prohibits the employment of women for more than eight hours a day in a mill, factory or store, for the title relates to employment in dangerous and injurious occupations only. (p. 146.)

**CONSTITUTIONAL LAW—Hours of Employment—Delegation of Power.**—The legislature alone has power to regulate hours of labor, and cannot delegate such power to either of the other co-ordinate departments of government; this is true whether the authority for

such regulations is found in an express constitutional provision or is based upon the police power. (p. 147.)

**CONSTITUTIONAL LAW—Regulation of Hours of Labor in Laundry.**—Under a constitutional provision requiring the legislature to provide an eight-hour day for employes in mines and other unhealthful places, "or other branch of industry or labor that the General Assembly may consider injurious or dangerous to health, life or limb," the legislature must, in attempting to regulate any of the unenumerated branches of industry, first declare the same to be injurious to health, and a mere general prohibition of employment in a healthful occupation, such as the employment of women in a laundry, is not equivalent to such a declaration. (p. 149.)

**CONSTITUTIONAL LAW.—The Right of Contracting for One's Labor** is reserved and guaranteed to every citizen; it is subject to no restraint except where the public safety, health, peace, morals or general welfare demands it, and then only where the legislative department of government, in the exercise of its police power, selects a proper subject for its exercise and prescribes reasonable and appropriate regulations. (p. 149.)

Fred W. Parks, for the plaintiffs in error.

Wm. H. Dickson, attorney general, Samuel Thompson, assistant attorney general, and W. F. Hynes, for the people.

<sup>496</sup> CAMPBELL, J. Defendants were tried and convicted under an <sup>497</sup> information charging them with violating the provisions of section 3 of the so-called "women and children labor act" of 1903 (Sess. Laws 1903, p. 309; 3 Mills (Rev.) Stats. 757). It reads: "No woman of sixteen years of age or more shall be required to work or labor for a greater number than eight hours in the twenty-four hour day, in any mill, factory, manufacturing establishment, shop, or store, for any person, agent, firm, company, copartnership or corporation where such labor, work or occupation, by its nature, requires the woman to stand or be upon her feet, in order to satisfactorily perform her labors, work or duty in such occupation or employment."

The title of the act is: "An act to prescribe and regulate the hours of employment for women and children in mills, factories, manufacturing establishments, shops, stores, and any other occupation which may be deemed unhealthful or dangerous, and to repeal all acts and parts of acts in conflict herewith."

After defendants' motion to quash the information was overruled, they waived a jury, and submitted the case to the court upon an agreed statement of facts, and the court found them guilty of a misdemeanor and sentenced them to pay a fine. The salient facts are that defendants were engaged in operating a steam laundry in the city of Denver, in which

they had a number of machines and employed a large number of men and women; that the building in which the business was carried on consisted of a ground floor and basement, well lighted by windows from side and rear, well ventilated and heated, connected with which were good sewerage and drainage, and no escaping gases or other unhealthy conditions surrounded the work, and the water and soap used were pure. Belle Johnson, a <sup>498</sup> woman over the age of sixteen years, was employed in this laundry by them, and her work consisted in operating a shirt-body ironer, which necessitated her to stand upon her feet; that under the contract of employment she was required to, and did thus work more than eight hours a day, to wit, about fifty-five hours a week, and averaging about nine hours per day in the twenty-four hour day.

On this review, as below, the facts being agreed upon, the only disputed question reserved and argued is one of law: Whether foregoing section 3 is valid. Defendants challenge its validity upon a number of grounds, only two of which we shall consider, as our decision on them makes the section void and compels us to reverse the judgment with instructions to discharge the defendants from custody.

The two grounds may thus be stated: (1) The subject matter of the section is not clearly, or at all, expressed in the title of the act, as section 21 of article 5 of our constitution requires; (2) The General Assembly has not in this act, or elsewhere, declared or considered the laundry business an occupation, or labor therein, injurious or dangerous to health, life or limb, which is an essential condition precedent to the validity of an enactment of this character, whether it is based upon the eight-hour amendment to the constitution adopted in 1902, and now known as section 25a of article 5 of the constitution, or upon the general unwritten police power that resides in the legislative branch of our state government.

As the attorney general in his brief and oral argument gave as the authority of the General Assembly to enact this statute, the so-called eight-hour constitutional amendment, we here insert the same: "The General Assembly shall provide by law, and shall prescribe suitable penalties for the violation <sup>499</sup> thereof, for a period of employment not to exceed eight (8) hours within any twenty-four (24) hours (except in cases of emergency where life or property is in imminent danger), for persons employed in underground mines or other underground workings, blast furnaces, smelters; and any ore-re-

duction works or other branch of industry or labor that the General Assembly may consider injurious or dangerous to health, life or limb": Laws 1901, p. 109.

As affecting the first assignment, it makes no difference whether authority for this act is the foregoing constitutional amendment or the unwritten police power if, in essential character, they differ. Whether the subject matter of section 3 is clearly expressed in the title must be determined by their own contents, and without regard to the source of the power of which the act itself is an expression. This title has to do with a regulation of the hours of employment for women and children in certain enumerated and other indefinite and unnamed occupations, which occupations, in and of themselves, may be deemed unhealthful or dangerous. This the attorney general concedes, but contends that the words of the amendment, "or other branch of industry or labor," make it competent for the General Assembly to regulate the hours of employment, not only where the occupation or branch of industry itself is injurious or dangerous, but also where the "labor" is of that character; that is to say, even though the particular occupation or place of work is perfectly safe and healthful, yet if the labor therein or thereat is injurious or unhealthful, the General Assembly may, nevertheless, limit the number of hours persons shall be employed in that labor. And the attorney general says that it is under the authority conferred by section 25a of article 5 thus to regulate hours of employment <sup>500</sup> where "labor," as contradistinguished from "branch of industry," is dangerous or unhealthful, that section 3 was enacted.

If such be the authority for this section, and if such interpretation thereof be correct (and concerning this and the applicability of the amendment to this statute and this case we express no opinion), it is certainly just as true that in this title there is not a word about regulating employment where labor, as such, is injurious or unhealthful, but only where the occupation or branch of industry is of that character. It seems, therefore, necessarily to follow that the subject matter of section 3, which treats of occupations which, for aught that is said therein to the contrary, are entirely safe and healthful, or which refer only to labor that might inferentially be deemed injurious or unhealthful, is not clearly, or at all, expressed in the title, which purports to regulate hours of employment only in dangerous or injurious occupations: *In re Breene*, 14 Colo. 401, 24 Pac. 3. We hold that the body of section 3 is not clearly expressed in the title.



The second assignment, we think, is well laid; and here again, as to this objection, we also observe that it matters not whether the source of the power of this legislation is to be found in the express command contained in the constitutional amendment, or is inherent in the police power of the state. The question as to whether the General Assembly, by this amendment, is given any greater power in making regulations concerning the unenumerated branches of "industry or labor" than that body theretofore and always has possessed as a part of its general legislative power, and certain other questions argued by counsel, we find it unnecessary to determine upon this review. And upon all questions not included in the two assignments determined, and as to the enforceability, meaning, scope and applicability of <sup>501</sup> this constitutional amendment, we withhold expression of opinion until a cause involving them is before us.

If the power to enact such legislation as this reposes in the amendment, or is inherently a part of the general legislative power belonging to the General Assembly, it is entirely clear that the power itself must be exercised in the first instance, by that law-making body. With the ultimate authority of the courts, as was held *In re Morgan*, 26 Colo. 415, 77 Am. St. Rep. 269, 58 Pac. 1071, 47 L. R. A. 52, to determine as to the validity of the exercise of the police power, both as to the subject selected and reasonableness of the regulation, we are not now concerned. But it is unquestionably true, and cannot be, and is not, controverted, that the legislative branch of government alone has the authority, and is charged with the duty of enacting such regulations, and cannot relinquish or delegate it to either of the other great coordinate departments of government. That this is the correct doctrine is declared by all the cases, and by every author and jurist who has spoken on the subject.

The amendment recognizes this doctrine when, after specifying particular occupations in which the period of employment is prescribed, it adds, "or other branch of industry or labor that the General Assembly may consider injurious or dangerous to health, life or limb." Here we have, as to unnamed branches of industry and labor, the express limitation that regulations concerning hours of employment in them must be restricted to those which the General Assembly may consider injurious or dangerous to health, life or limb. We look in vain to find that the General Assembly in section 3, or in any part of this or any other act, has considered or de-

clared the laundry business, or even labor therein of any kind, either injurious or dangerous. The mere general <sup>502</sup> prohibition of employment in harmless occupations beyond, or in excess of, specified hours is not the equivalent of a solemn finding and declaration of the General Assembly that such occupations are injurious or dangerous. The amendment contemplates that not until after the General Assembly has considered and enacted that they are of that character can regulations of employment therein, and prohibition of labor beyond a certain time, be made effective, or violations thereof punished as a crime or misdemeanor.

In marked contrast with this act is the act of the fifteenth General Assembly, found in Session Laws of 1905, page 284. In that act the General Assembly was evidently intending to carry out the mandate of the constitutional amendment that is here invoked. That title is: "An act to declare certain employments injurious and dangerous to health, life and limb; regulating the hours of employment in underground mines and other underground workings, in smelters and ore-reduction works, in stamp-mills, in chlorination and cyanide mills, and employment about or attending blast furnaces, and providing a penalty for the violation thereof."

The occupations named in section 1 of the act of 1905, which include all of those expressly enumerated in the constitutional amendment, and several others assumed by the General Assembly to be of similar character and hence within the language of the amendment "any other branch of industry or labor," are, by the General Assembly, expressly "declared dangerous and injurious to health, life and limb," and this declaration is immediately followed by a provision that the period of employment for all persons employed in such occupations shall be eight hours per day.

<sup>503</sup> Here we find that the General Assembly conceived that its duty under this amendment was, first, to declare certain occupations to be dangerous or injurious, and then to make the desired regulations concerning the hours of employment. This method was entirely ignored in the act which we are considering.

Reading the act of 1903 in its entirety, it is plain that our General Assembly did not purport to say, and did not intend to declare, what occupations were, in its judgment, dangerous or injurious, and, therefore, occupations of such a character as to justify regulations of hours or labor therein, for in section 2 it said: "All paper-mills, cotton-mills and factories where wearing apparel for men and women is made,

ore-reduction mills or smelters, factories, shops of all kinds and stores may be held to be unhealthful and dangerous occupations within the meaning of this act at the discretion of the court."

It must be borne in mind, as the attorney general must concede, that under our constitution the right of contracting for one's labor is reserved and guaranteed to every citizen; it is subject to no restraint except where the public safety, health, peace, morals or general welfare demands it, and then only where the legislative department of the state government, in the exercise of its police power, selects a proper subject for its exercise and prescribes reasonable and appropriate regulations. In the absence, therefore, of a legitimate exercise by the General Assembly of this power by a declaration to the contrary, the defendants might lawfully by contract require a woman to work more than eight hours per day in their laundry.

Yet here is an attempted relinquishment by the law-making body of that very power of legislation, <sup>504</sup> and a futile effort to confer upon the courts the authority to make such laws, by saying, in their discretion, and in the first instance, and with no previous declaration on the subject by the General Assembly, what occupations are unhealthful and dangerous. This is a palpable evasion of duty, coupled with an abortive attempt to give to the courts legislative power to make crimes and misdemeanors out of acts which are not in violation of any valid legislative enactment.

It is manifest, therefore, that, as to section 3, at least one essential condition precedent to the validity of enactments of this kind is lacking, namely, the considering or finding by the General Assembly that the occupation in question is of a character concerning which only can it, in any event, adopt such regulations as are assumed to be contained in this act.

If this, however, were not so, this judgment must be reversed, for if the courts have the power which section 2 ineffectually tries to give them, the laundry business must be considered healthful; for counsel themselves, in their stipulation of facts, on which the record shows the cause was decided, are in accord that such occupation is healthful. Upon the two grounds discussed, we hold section 3 to be unconstitutional and void.

The judgment must be reversed and the cause remanded, with instructions to quash the information and discharge the defendants from custody.

Decision en banc, all the justices concurring except Chief Justice Steele, who dissents.

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*The Sufficiency of the Title to Statutes* within constitutional requirements is discussed in the notes to *Lewis v. Dunne*, 86 Am. St. Rep. 267; *Crookson v. County Commissioners*, 79 Am. St. Rep. 267; *Bobel v. People*, 64 Am. St. Rep. 70.

*The Right to Labor or to Employ Labor*, guaranteed by the fourteenth amendment, is subject to the power of the states reasonably to regulate callings which affect the public health and welfare. A statute is constitutional which fixes an age limit below which boys shall not be employed: *Lenahan v. Pittston Coal Min. Co.*, 218 Pa. 311, 120 Am. St. Rep. 885. And a statute is constitutional which forbids the employment of females for more than ten hours a day in any factory, laundry or mechanical establishment: *State v. Muller*, 48 Or. 252, 120 Am. St. Rep. 805. But it has been affirmed that a statute prohibiting and making criminal the employment or working of women in any factory before 6 o'clock in the morning or after 9 o'clock in the evening of any day is unconstitutional: *People v. Williams*, 189 N. Y. 131, 121 Am. St. Rep. 854.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**GEORGIA.**

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**ATLANTA AND WEST POINT RAILROAD COMPANY**  
**v. CAMP.**

[130 Ga. 1, 60 S. E. 177.]

**CONTRACTS.—Adequacy or Inadequacy of Consideration** is a subject to be considered by the parties at the time they make the contract. There is no law regulating the amount of consideration necessary to support a particular promise. If the parties have capacity to contract, and there is no fraud or misplaced confidence, and there is any valuable consideration, the courts will enforce the contract according to its terms. (p. 153.)

**RAILROADS—Contract to Locate Station at Certain Point.**—A contract between a railroad company and a prospective purchaser of property along its line, to locate and maintain a station at a certain point, is not void per se. But such person is charged with notice of the character of the corporation with which he is contracting and of the duties which it owes to the public; and it becomes a part of the contract that the maintenance of the station at that particular point is limited, not by the time specified in the contract, but to that time when, consistently with the discharge of the public duties of the company, the station can be maintained in the manner provided in the agreement. (p. 156.)

**PLEADING—Rule as to Paragraph.**—The question whether a pleading complies with the statutory rule requiring all petitions to "set forth the cause of action in orderly and distinct paragraphs numbered consecutively," must be left largely to the discretion of the trial judge. (p. 157.)

Dorsey, Brewster, Howell & Heyman, for the plaintiff in error.

J. F. Golightly, contra.

<sup>2</sup> **ATKINSON, J.** 1. In the plaintiff's petition it is alleged that the defendant was one among a number of competing railroad companies for through travel and local business over its line of railway; that, for the advancement of its interests in that behalf, the defendant entered upon the policy of encouraging settlers along its line of railroad, who would

beautify their homes; that petitioner did not live on the defendant's road, but was in search for a place to settle, and advised the defendant of his object. The defendant then informed petitioner that if petitioner would invest in a home on its line of road and beautify the same, the defendant would offer inducements. Afterward petitioner ascertained that a certain tract of land on the line of defendant's road was for sale; that petitioner then proposed to defendant that he would purchase said tract of land, provided the defendant would locate thereon a permanent station, to continue during the life of the charter of the company. In response, the defendant informed petitioner that if petitioner would purchase the property, defendant would locate the station as suggested, and would commence by causing two trains per day in each direction to stop at the station, and that from time to time thereafter the number of trains would be increased. Upon the faith of the defendant's proposition to locate the station and stop the trains as already recited, petitioner, knowing the effect thereof would be to enhance the value of the property, purchased the property and erected thereon a dwelling-house at a cost of four thousand dollars. The defendant immediately established a station in pursuance of its promise, and called it "Camp's," and put into effect a schedule requiring two of its trains in each <sup>3</sup> direction to stop at the station on each day. This schedule was continued for several years. It was also alleged that, in order to carry out the plaintiff's contract with the defendant, the plaintiff, after building the dwelling-house, made other improvements (which were specified, but are not necessary here to be stated), all of which tended to beautify his home and render the view from the railroad attractive, and to carry out the defendant's policy, to which reference has already been made. After maintaining the station and schedules hereinbefore recited for several years, the defendant wrongfully, without the consent of the plaintiff, abandoned the same. The effect of the abandonment was greatly to depreciate the market value of the plaintiff's property. The suit was for damages for breach of the contract. The plaintiff's entire negotiations were with one alleged to be the industrial agent of the defendant, who, it was alleged, had authority to bind the defendant in making a contract of the character alleged. It was further alleged that after the negotiations between the plaintiff and the defendant, relied upon as showing the agreement which induced the plaintiff to purchase and improve the property, the defendant ratified all of the promises made in its behalf, and, in

pursuance of its promises, established the station and put into effect the schedules for the stop at such station of two trains per day going in each direction, as promised by the agent.

The allegations were sufficient to show an obligation upon the part of the defendant to establish a station at a point near the property purchased by the plaintiff, and to cause as many as two trains per day, going in each direction, to stop at such station after it was established. The point is made that the plaintiff only proposed that he would buy land in which the defendant had no interest if the defendant would establish the station, and that the defendant did not accept the proposition, but submitted a counter-proposition that it would establish the station and maintain a given schedule if the plaintiff would buy the property; in other words, that both parties spoke conditionally, and no agreement to do anything was actually made. The petition as a whole is entitled to a broader interpretation. The allegations are sufficient to show that the parties did more than merely submit the propositions. They understood each other, and, while their propositions were pending, both proceeded to perform in execution of their <sup>4</sup> understanding. Performance by each was acceptance of the other's proposition. Such acceptance eliminated all conditional features connected with the transaction, rendered certain the intention of the parties, introduced the feature of mutuality, showed the presence of consideration moving each party, showed ratification by the railroad company, and rendered it unnecessary to reduce the contract to writing. In connection with these announcements, it may be noted that the facts in *Swan Oil Co. v. Linder*, 123 Ga. 554, 51 S. E. 622, present a different case from that under consideration. The case at bar is more like the case of *McCaw Mfg. Co. v. Felder*, 115 Ga. 408, 41 S. E. 664, and the principles therein announced are applicable here. *McCaw Mfg. Co. v. Felder* was differentiated from the *Swan Oil Co. v. Linder* in the opinion in the latter case.

With regard to the matter of consideration, it may be further said: Adequacy or inadequacy of consideration is a subject to be considered by the parties at the time they make the contract. There is no law regulating the amount of consideration necessary to support a particular promise. If the parties have capacity to contract, and there is no fraud or misplaced confidence, and there is any valuable consideration, the courts will enforce the contract according to its terms. Under the allegations the defendant anticipated an increase of business resulting from the location of settlers along its line

of road. While such increase, resulting from the purchase by the plaintiff of a single tract of land and his settlement thereon, might be inappreciable, it was one of many transactions in contemplation of the defendant, which, if its plan were developed, would tend ultimately to bring about the desired result; that is to say, the increase of its business as a common carrier.

2. It is said, though, that the contract to locate the station and maintain it permanently was contrary to public policy and unenforceable. The question as to how far a railroad company can bind itself in a contract to locate a station at a given point has been the subject of numerous adjudications. There are rulings to the effect that an agreement by a railroad company to locate and maintain a station at a given point is contrary to the policy of the law: *Enid Right of Way & Townsite Co. v. Lile*, 15 Okl. 328, 82 Pac. 810; *Pacific R. R. Co. v. Seely*, 45 Mo. 212, <sup>5</sup> 100 Am. Dec. 369; *Mobile & Ohio R. R. Co. v. People*, 132 Ill. 559, 22 Am. St. Rep. 556, 24 N. E. 643. In these cases, and in others that may be cited, the broad rule is laid down that a railroad company has no authority to bargain away its right to locate stations in such manner as the public interests may require, and that any contract locating a station, being in its nature something which might have the effect to hamper the company in the discharge of its duties to the public, and every contract having for its purpose the permanent location of a station, is by its very terms contrary to the policy of the law and unenforceable. This broad rule, however, has not met with general favor. There are also numerous rulings to the effect that a contract by a railroad company, to locate a station at a given point and not to locate any other stations within a given distance from that point, is contrary to public policy and void: *Marsh v. Fairbury & N. W. Ry. Co.*, 64 Ill. 414, 16 Am. Rep. 564; 26 Am. & Eng. Ency. of Law, 2d ed., 500; *Williamson v. Chicago, R. I. & P. R. Co.*, 53 Iowa, 126, 36 Am. Rep. 206, 4 N. W. 870; *St. Joseph & Denver City R. Co. v. Ryan*, 11 Kan. 602, 15 Am. Rep. 357; *Beasley v. Texas & P. R. Co.*, 115 Fed. 952, 53 C. C. A. 434. The authors of *Elliott on Railroads*, after referring to the decisions which hold that the contracts requiring a railroad company to establish depots at certain points are against public policy and not enforceable, say that there is a conflict of authority upon the question, and complete their discussion of the matter in the following language: "In our opinion such a contract may be made if no public interest is prejudiced. If the contract is made solely,



to promote private interests at the expense of the public welfare, the contract should, as we think, be held to be illegal. But if the public interests are not prejudiced, or the power of the company to do what the public welfare requires is not abridged, we believe the contract should be regarded as valid. Many cases hold that a railroad corporation may contract for the erection and maintenance of a station at a certain point, where its right to maintain stations at other points is not thereby impaired. This we believe to be the sound doctrine": 2 Elliott on Railroads, secs. 362, 386. Sound public policy requires that a railroad company should be left free to establish and re-establish its stations wherever the accommodations or the wants of the public may require. The power to locate stations is from its <sup>e</sup> very nature a continuing one: *Mobile & Ohio R. Co. v. People*, 132 Ill. 559, 22 Am. St. Rep. 556, 24 N. E. 643. The authorities of a railroad have unlimited power to locate their stations for the best interests of the community and the road, even though a money consideration be paid therefor: *Currie v. N. J. & C. R. Co.*, 61 Miss. 725, 20 Am. & Eng. R. Cas. (Old Series) 303. An agreement on the part of a railroad company to establish a station at a particular point is not one to keep it there forever, but is made subject to the general contingencies of business, the public interest, and the large modification and growth of transportation routes as they may affect the requirements of the railroad company's business: *Texas & P. Ry. Co. v. Scott*, 41 U. S. App. 624, 77 Fed. 726, 23 C. C. A. 424, 37 L. R. A. 94. In the case just cited it was held that an agreement by a railroad company, in consideration of a right of way, to establish a depot on the land, is complied with by establishing the station and maintaining it upon the land for thirty-six years, although the depot is then removed on account of the exigencies of business; and in the opinion Judge Newman cites the case of *Texas & P. R. Co. v. Marshall*, 136 U. S. 393, 10 Sup. Ct. Rep. 846, 34 L. ed. 385, where it was held that an agreement to locate and maintain the shops of a railroad company permanently at a given point was complied with by the maintenance of the shops at that point for six years, notwithstanding a subsequent removal growing out of the exigencies of the business of the railroad and the changes necessary to be made to discharge the public duties resting upon it; and it was held that the word "permanent" in the contract was to be construed with reference to the subject matter of the contract, and that under the circumstances the contract with the word "permanent" therein was complied with by

the establishment of the terminus and office and shops contracted for, with no intention of removing or abandoning them at the time when so established. The effect of the rule laid down in the decisions just referred to is that when one contracts with a railroad company in reference to those matters where the public is involved, the contract is made subject to the rights of the public; and when the exigencies of the business of the company are such that the rights of the public come in conflict with the rights of the contracting party under his contract, it is to be presumed that it was the intention of the parties that the private <sup>7</sup> rights under the contract should yield to the public right. In applying what has been said to the present case, it cannot be held that the contract between the railroad company and the plaintiff was void per se; for the company had a right to make a contract with the plaintiff to locate a station at a given point, so long as the location of the station did not interfere with the proper discharge of the duties resting upon the company as a quasi-public corporation. But the plaintiff was charged with notice of the character of the person he was contracting with, and of the duties which that person owed to the public; and also, in reference to the subject matter of the contract, that it was connected intimately and directly with the discharge of the duties the defendant owed the public; and therefore it became a part of the contract between the parties that the maintenance of the station at the point was limited, not by the time specified in the contract, but to that time, and to that time only when, consistently with the discharge of the public duties of the company, the station could be maintained in the manner provided for in the agreement. The petition therefore set forth a cause of action. There is nothing alleged to indicate that the conditions are so changed that the railroad company cannot comply with its contract and at the same time discharge all duties to the public which the law places upon it. If that time has arrived, the railroad company may be allowed to show this by an appropriate plea, supported by competent evidence. This is a matter of defense. The question with which we have dealt in the present case has never been directly passed upon in any case decided by this court; but cases involving contracts for the location of depots, stations, lines of road, etc., have been before this court where other phases of the law were involved, and in some of them contracts of the character above indicated have been tacitly recognized as being valid: See *Atlanta & W. P. R. Co. v. Hodnett*, 36 Ga. 669; *Atlanta & W. P. R. Co. v. Speer*, 32 Ga. 550, 79 Am. Dec. 305; *Atlanta*

& W. P. R. Co. v. Hopson, 33 Ga. 116; Haisten v. Savannah G. & N. A. R. Co., 51 Ga. 199; Georgia S. R. Co. v. Reeves, 64 Ga. 492; Butler v. Tifton etc. Ry. Co., 121 Ga. 817, 49 S. E. 763.

3. The demurrer also raised the objection that the petition was not paragraphed in the manner required by law. While we think that some of the paragraphs of the petition were capable of subdivision,<sup>8</sup> we cannot say that there has been such a disregard of the provisions of the act that the judge erred in upholding the petition as framed. As was said in *Atlanta K. & N. Ry. Co. v. Smith*, 119 Ga. 667, 46 S. E. 853, "It is impossible to satisfactorily define what would be an orderly paragraph, and this matter must be left largely to the discretion of the trial judge": See, also, *Atlantic Coast Line R. Co. v. Taylor*, 125 Ga. 454, 54 S. E. 622.

Judgment affirmed.

All the justices concur, except Holden, J., who did not preside.

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*Contracts to Locate a Railway Depot at a particular place have been held invalid as against public policy; Florida etc. Ry. Co. v. State*, 31 Fla. 482, 34 Am. St. Rep. 30; *Mobile etc. R. R. Co. v. People*, 132 Ill. 559, 22 Am. St. Rep. 555; notes to *Wakefield v. Van Tassell*, 95 Am. St. Rep. 223; *Williamson v. Chicago etc. R. R. Co.*, 36 Am. Rep. 214. It would seem, however, that such contracts are not necessarily invalid: *St. Louis etc. R. R. Co. v. Crandall*, 75 Ark. 89, 112 Am. St. Rep. 42; *Louisville etc. Ry. Co. v. Sumner*, 106 Ind. 55, 55 Am. Rep. 719; *Texas etc. R. R. Co. v. Robards*, 60 Tex. 545, 48 Am. Rep. 268.

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## HARTFORD FIRE INSURANCE COMPANY v. LIDDELL COMPANY.

[130 Ga. 8, 60 S. E. 104.]

**FIRE INSURANCE—Mortgage of Personality.**—Where a policy of insurance is issued to A upon two articles of personal property, loss payable to B and C as their interest may appear, the interest of B being that of a vendor of one of the articles, who has retained title to secure payment, and the interest of C being of a similar character as to the other article, which facts are known to the insurance company, a prohibition in the policy against encumbering the property is violated when A executes to B a mortgage upon his interest in the article purchased from C. (p. 163.)

King, Spalding & Little, for the plaintiff in error.

Pottle & Glessner, contra.

• EVANS, P. J. The Liddell Company brought suit against the Hartford Fire Insurance Company. The petition contained two counts. The first count alleged that the defendant issued to E. S. Collins a fire insurance policy, a copy of which is attached to the petition; that the property insured was totally destroyed by fire, with the exception of a boiler and engine mentioned therein, which were not entirely destroyed; that proofs of loss were duly submitted in accordance with the terms of the policy; that Collins, for a valuable consideration, after the loss had occurred, transferred all <sup>9</sup> of his interest in the policy to the plaintiff. The second alleged that on August 27, 1903, the defendant issued to Collins a policy of fire insurance, which was to run for a term of one year; that attached to the policy was a slip, duly signed by the agent of the company, which provided that a loss under the policy was to be adjusted with Collins, but was to be payable "to the Liddell Company and the R. D. Cole Mnfg. Co., as their interests may appear"; that the interest of the Liddell Company was known to the defendant at the time that the policy was issued, such interest being that it had sold to Collins a gin outfit, being the outfit insured, with the exception of the engine and boiler, and had retained title to the same by an instrument in writing; that on May 3, 1904, the plaintiff approached the defendant, through its authorized agent, and stated to him that the plaintiff desired the policy renewed upon its expiration, whereupon the agent then and there, in writing, agreed that he would renew the policy upon its expiration, the loss on the same to be made payable to the Liddell Company as its interest might appear; that the agent, at the time of this agreement, knew of the interest of the Liddell Company, and that company agreed to pay the premium in the event that Collins failed to do so. On August 27, 1904, the defendant, through its agent, did renew the policy in accordance with the agreement, but without making the loss payable to the Liddell Company as its interest might appear. Collins, on the date that the policy was renewed, was indebted to the Liddell Company, and at the time of the filing of the present suit was still indebted, and title was retained in the Liddell Company as security for the payment of such debt, which fact was known to the defendant at the time that the policy was issued. The premium has been paid. On October 28, 1904, the property insured, being of the value of not less than three thousand dollars, was destroyed by fire, with the exception of the boiler and engine, which were not destroyed. Proofs of loss have been duly furnished in accordance with the

terms of the policy. The prayer of the petition is, that the policy be reformed by adding thereto the loss payable clause above referred to, which was omitted therefrom by mistake; and that judgment be rendered in favor of the plaintiff for the amount of its interest in the subject matter of the policy, which was alleged to be seventeen hundred and forty-nine dollars and twenty-eight cents, besides interest. It is alleged, also, that subsequently to the loss <sup>10</sup> Collins transferred to the plaintiff all his interest in the policy. The defendant filed an answer, admitting some of the averments in the petition and denying others. The only portions of the answer which are now material are those which alleged that the policy contained the stipulation, "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be personal property and be or become encumbered by a chattel mortgage"; that subsequently to the issuance of the policy Collins executed and delivered to the Liddell Company a chattel mortgage as additional security for the debt alleged to be due by Collins to the Liddell Company, such mortgage covering the boiler and engine and appurtenances referred to in the policy as originally written; and that this constituted a breach of the conditions of the policy and rendered the same null and void. At the trial it appeared from the evidence that the policy was issued to Collins to insure him against loss by fire on his ginning outfit, boiler, and engine; and that the policy originally issued had attached to it a loss clause making the same payable to the R. D. Cole Manufacturing Co. and Liddell Company, as their interests might appear. It appears that this clause was, by mistake, omitted from the policy when it was renewed. The evidence discloses that the several interests of the parties named in the policy were derived under the following circumstances: Collins had purchased the gin outfit from the Liddell Company, and that company had retained title to the same until it was paid. Collins had purchased the boiler and engine and appurtenances from the R. D. Cole Manufacturing Company, and that company had retained title to the same until the purchase money was paid. All of these facts were known to the insurance company, through the agent who issued the policy, at the time that the policy was issued. Subsequently to the issuance of the policy Collins, without the knowledge or consent of the company, executed to the Liddell Company a chattel mortgage upon his interest in the boiler and engine purchased

from the R. D. Cole Manufacturing Company, the mortgage stating, in terms, that it was subject to the claim for purchase money secured by the retention of title by the R. D. Cole Manufacturing Company. At the close of the evidence the defendant moved that a verdict be directed in its favor, upon the ground that the execution and delivery of <sup>11</sup> the chattel mortgage upon the boiler and engine, without the knowledge or consent of the defendant, worked a forfeiture of the policy. This motion was overruled, and the court directed a verdict in favor of the plaintiff. The defendant excepted.

The facts of this case may be thus summarized: Collins was the owner of a ginning outfit, as well as a boiler and engine and appurtenances. The ginning outfit had been purchased from the Liddell Company, and that company had retained title to secure the purchase money. The boiler and engine had been purchased from the R. D. Cole Manufacturing Company, and that company had retained title to secure the payment of the purchase money. The policy of insurance was issued with full knowledge on the part of the insurance company that such was the condition of the title. When the first policy was issued there was a provision in the policy that the loss should be payable to the companies above referred to, as their interests might appear. This clause was, by mistake, omitted from the policy when it was renewed. The evidence established the fact that this was due to a mistake, and it is conceded that the case is to be treated as if such clause had been duly attached to the policy. Subsequently to the issuance of the policy Collins gave the Liddell Company a mortgage on his interest in the boiler and engine. The insurance company pleaded that the execution and delivery of this mortgage was a breach of that provision in the policy which declares that the same "shall be void if the subject of insurance be personal property and be or become encumbered by a chattel mortgage."

Policies of fire insurance often contain a stipulation that if there be a sale of the property or a change of interest in the same, or an alteration of the same, the policy will be void. A condition in a policy that the policy "shall be void if the subject of insurance be personal property and be or become encumbered by a chattel mortgage," is a reasonable requirement; and when the insured accepts a policy with this condition in it, and commits a breach of the condition, he cannot recover in case the property is destroyed by fire: *Alston v.*

Phenix Ins. Co., 100 Ga. 287, 27 S. E. 981. It is the contention of the defendant in error that the giving of the mortgage to the Liddell Company on the boiler and <sup>12</sup> engine did not violate this condition, because they and Collins sustained the relation of joint owners of the property to the insurer, and the transaction was but a shifting of their interest, and was not violative of the condition of the policy. By the great preponderance of authority, where the subject of insurance is partnership property, and the insured are partners, a sale by one partner to another is not such an alienation as will work a forfeiture of the policy under a stipulation of this character: 1 May on Insurance, 4th ed., sec. 279; 1 Biddle on Insurance 218; Hoffman v. Aetna Ins. Co., 32 N. Y. 405, 88 Am. Dec. 337; Pierce v. Nashua Ins. Co., 50 N. H. 297, 9 Am. Rep. 235; Allemania Fire Ins. Co. v. Peek, 133 Ill. 220, 23 Am. St. Rep. 610, 24 N. E. 538; German Mut. Fire Ins. Co. v. Fox, 4 Neb. (Unof.) 833, 96 N. W. 652, 63 L. R. A. 334; Powers v. Guardian etc. Ins. Co., 136 Mass. 108, 49 Am. Rep. 20; Lockwood v. Middlesex Assur. Co., 47 Conn. 553. Our own case of Georgia Home Ins. Co. v. Hall, 94 Ga. 630, 21 S. E. 828, is in accord with the current of authority. Likewise a transfer from one joint owner to another, because of their common and undivided ownership of the whole property, will not terminate an insurance policy issued to the joint owners, because of a covenant against alienation or encumbrancing: 2 Cooley's Briefs on Law of Insurance 1726. The underlying principle of the proposition that a covenant against alienation by the insured does not terminate a policy issued to partners on partnership property, because of a transfer of interest by one partner to his copartner, is that each partner is interested in the whole property; and as the insurer contracted to insure the purchasing partner's interest in the whole property, the hazard is not increased because the purchasing partner has acquired a greater interest in the property by a transfer of his copartner's share. The same reasoning which supports this proposition applies to a mortgage by one partner to his copartner upon his interest in the partnership property: Alston v. Phenix Ins. Co., 100 Ga. 287, 27 S. E. 981. A controlling question, therefore, is whether the insured and the mortgagee were joint owners of the property insured, so as to take their transaction out of the operation of the covenant against encumbrancing the property. In the first place, it may be observed that the policy only purported to insure Collins against fire. The loss payable clause was but a power of appointment to pay to

the Liddell Company, the loss incurred by fire as its interest <sup>13</sup> might appear. The insurer did not insure the Liddell Company's property, but that of Collins. The inhibition against encumbrancing had no reference to the Liddell Company transferring its reserved title note. If Liddell Company had relinquished their interest in the property, or its debt had been paid before loss, Collins could have collected the insurance. Again, the reason of the rule allowing joint owners to shift their interests from one to another without violating this condition rests upon their common and undivided ownership of the whole property. Here the Liddell Company had a reserved title note to one article of the property, and the mortgage was taken by it on other articles of property. There was not that community of interest in the whole property which made it a joint owner with Collins, although the different items of personalty were used to operate a single enterprise. When the policy was issued the Liddell Company had no interest, by lien or otherwise, in the property upon which the mortgage was subsequently given. From these considerations it would seem clear that the Liddell Company was neither joint owner with Collins nor insured by the policy, but only held a power of appointment to collect the insurance money due to Collins in case of loss.

But the defendant in error contends that the language of the loss payable clause implies more than a power of appointment to receive the money in case of loss; that it is equivalent to the insurer's assent to subsequent encumbrances to the same appointees. One to whom a policy is thus made payable is not an assignee thereof, and must claim in the right of the party insured, and not in his own: *Bates v. Equitable F. & M. Ins. Co.*, 10 Wall. 38, 19 L. ed. 882; *Hale v. Mechanics' Ins. M. F. Co.*, 6 Gray, 169, and cases cited in note to this case in 66 Am. Dec. 410. The direction as to the payment of the money should loss occur during the existence of the policy contract does not remotely suggest a waiver of any condition in the policy. The insurer only assents to the nomination of another to receive what may be due the insured under the policy. The words "as his interest may appear" only serve to limit the appointee's recovery. If his interest be less than the amount due on the policy, he could not recover from the insurer, over the insured's objection, the excess over his debt. These words will estop the insurance company from insisting that the exact nature or amount of the appointee's interest was not stated in its <sup>14</sup> assent, but cannot be enlarged into



a consent to a subsequent mortgage. A loss payable clause of this nature only means that the insurer has notice that the person to whom payment is to be made in the event of loss has some interest in the property, and, to the extent of that interest as then existing, agrees to pay to such person out of its liability on the policy. If the appointee's interest be that of a mortgagee, a renewal of the mortgage on the same property to secure the original debt, in whole or in part, will not violate the policy provision against a subsequent mortgage: This is so for the reason that it is the same hazard of which the insurer had knowledge when it assented to pay the loss to the insured's appointee: *Koshland v. Home Mut. Ins. Co.*, 31 Or. 321, 49 Pac. 864, 50 Pac. 567; *Kansas Farmers' Fire Ins. Co. v. Saindon*, 52 Kan. 486, 39 Am. St. Rep. 356, 35 Pac. 15; *Weiss v. Am. Fire Ins. Co.*, 148 Pa. 349, 23 Atl. 991. The case in hand is not one where the appointee renewed his debt, but where the insured executed to the appointee a subsequent mortgage on a portion of the insured property not embraced in the appointee's original security. It does not matter that the subsequent mortgage was to secure the same debt, since the policy forbade any subsequent encumbrance by chattel mortgage. The insurer evinced its willingness to pay the loss, if any, to the insured's appointee according to the then existing status, but specially stipulated that the insured should not change that status by a subsequent chattel mortgage. A case much in point is that of *Atlas Reduction Co. v. New Zealand Ins. Co.*, 121 Fed. 929. The insurance company issued its policy to the Atlas Reduction Company. Thirty days thereafter the insured gave a mortgage on certain real estate and also a chattel mortgage to D. and S., and on the same day the company's agent indorsed on the policy a statement that loss, if any, was payable to D. and S. as their interest might appear, subject to the conditions in the policy. The policy contained a clause, that, unless otherwise provided by agreement indorsed thereon, it would become void "if the subject of insurance be personal property, and be or become encumbered by a chattel mortgage." The insurer had no actual knowledge of the mortgage at the time the indorsement was made on the policy, and it was held that this indorsement was not sufficient to show the assent of the insurance company to the chattel mortgage. We think that this contention of the defendant in error is also unsound. <sup>15</sup> The execution of the chattel mortgage violated the condition of the policy against

encumbrance; and it was error to direct a verdict in favor of the plaintiff.

Judgment reversed.

All the justices concur, except Holden, J., who did not preside.

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*A Condition Avoiding a Policy of Insurance* if the property insured shall become encumbered by a chattel mortgage is reasonable and valid: *Olney v. German Ins. Co.*, 88 Mich. 94, 26 Am. St. Rep. 281. However, a condition against an increase of encumbrance on the insured property is not violated by a change, but not an increase of, encumbrances known to the company at the time the insurance was effected: *Kister v. Lebanon Mut. Ins. Co.*, 128 Pa. 553, 15 Am. St. Rep. 696. Conditions against alienation of the property insured, contained in fire insurance policies, are ordinarily intended to provide only against changes in ownership which might supply a motive to destroy the property, or which might weaken the interest of the insured in protecting it. Hence dealings with the property not calculated to produce any such effect do not, by reason of such conditions, avoid the policy: *Schloss v. Westchester Fire Ins. Co.*, 141 Ala. 566, 109 Am. St. Rep. 58.

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### BOWEN & THOMAS v. KELLER.

[130 Ga. 31, 60 S. E. 174.]

**BANKRUPTCY—Discharge Pending Proceedings in Equity.**—Where a creditor holds a debt, not secured by lien, against which all exemption rights have been waived by the debtor, and the creditor, before the debtor's discharge in bankruptcy, files a proceeding in equity to obtain a judgment in rem against property set apart as exempt by the trustee in bankruptcy, in which proceeding a receiver is appointed and an injunction granted, the debtor may, on the trial of such proceeding, interpose his discharge in bankruptcy, obtained pending such proceeding, as a defense to the creditor's right to recover his judgment in rem and subject the exempt property to his debt. (p. 169.)

D. W. Krauss, for the plaintiffs in error.

Bennet & Conyers, contra.

**31 HOLDEN, J.** On the sixth day of February, 1906, the defendant gave to the plaintiffs a note wherein he waived all homestead and exemption rights. On the third day of May, 1906, the defendant filed a petition in bankruptcy, upon which he was adjudicated a bankrupt. The trustee in bankruptcy set apart to the defendant, as an exemption, property to the value of fifty dollars, and a certain amount in cash. Pending the bankruptcy proceedings, the plaintiffs filed a petition

asking for a judgment in rem, subjecting to their debt the property set apart as exempt, obtained an interlocutory injunction against the defendant's interfering with the exemption, and the appointment of a receiver, to whom the property set apart as an exemption was turned over by the trustee. While this equitable proceeding was pending, the defendant was discharged in bankruptcy, and upon the trial of the case the court allowed an amendment offered by the defendant, setting up such discharge. <sup>32</sup> The evidence was as follows: The plaintiffs introduced the note of defendant to them, and proved that unless the fund in court, amounting to about five hundred dollars, was turned over to them, they would lose their claim entirely, as the defendant had no other property. They had notice of the filing of the petition in bankruptcy, but did not attend any meeting of creditors, and did not prove their claim in the bankruptcy court. The defendant introduced a certified copy of his discharge in bankruptcy. At the conclusion of the evidence the court directed a verdict in favor of the defendant, dissolved the restraining order previously granted, discharged the receiver, and ordered that he pay over to the defendant the money which was set apart as an exemption. To these rulings the plaintiffs excepted, and bring the case here for review.

The title to property set apart as exempt does not pass to the trustee in bankruptcy, nor does he administer it as a part of the bankrupt's estate. It is his duty to turn over such property to the debtor, unless some appropriate proceedings are instituted to prevent this. Whenever creditors of a bankrupt seek, by action in a state court, to subject the exempted property to the payment of debts for which they claim it is liable, the bankruptcy court will withhold the granting of a discharge, for the purpose of enabling such creditors to enforce their rights in the state court, when the discharge of the debtor would be a bar to such enforcement: *Collier on Bankruptcy*, 6th ed., 96; *Bell v. Dawson Grocery Co.*, 120 Ga. 628, 48 S. E. 150; *Lockwood v. Exchange Bank*, 190 U. S. 294, 23 Sup. Ct. Rep. 751, 47 L. ed. 1061. Pending the bankruptcy proceedings, a creditor cannot maintain a suit at law against the debtor to obtain a judgment against him in personam; and the plaintiffs in this case properly brought their action on the equity side of the court for the purpose of obtaining a decree in rem subjecting the property to their debt: *Bell v. Dawson Grocery Co.*, 120 Ga. 628, 48 S. E. 150; *Hudson v. Lamar, Taylor & Riley Drug Co.*, 121 Ga. 835, 49 S. E. 735; *Keller v. Bowen & Thomas*, 127 Ga. 584, 56 S. E. 634.

'A discharge in bankruptcy extinguishes the right of a creditor to enforce against the bankrupt the collection of any debt existing at the time of the filing of the petition in bankruptcy, where the debt is provable in bankruptcy and does not fall within the classes excepted by the bankruptcy act as not being dischargeable, and the creditor had notice of the proceedings. By the terms of <sup>33</sup> the act, valid liens existing more than four months prior to the filing of the petition, and acquired in good faith, are not affected. Nor does the bankrupt act prevent the creditor from enforcing a lien superior to the exemption under the state law, if such lien be fastened on the exempt property at any period of the bankruptcy proceedings prior to the final discharge of the debtor: *Jewett v. Huffman*, 14 N. D. 110, 13 Am. Bank. Rep. 738, 103 N. W. 408. But if the debtor succeeds in obtaining his discharge and pleads it prior to the fastening of a specific lien on such property, the effect is to release the debtor from the payment of the debt upon which the proceedings are based, and the creditor's right of action is destroyed: *Loveland on Bankruptcy*, 3d ed., sec. 289, and authorities there cited; *Claster v. Soble*, 22 Pa. Sup. Ct. 631, 10 Am. Bank. Rep. 446. In the case of *Groves v. Osburn*, 46 Or. 173, 79 Pac. 500, decided by the supreme court of Oregon in 1905, it was ruled: "After a debtor has been discharged in bankruptcy, a debt cannot be enforced in equity by a proceeding in rem against the homestead set apart in the proceedings to the bankrupt, though the debt was contracted prior to the adoption of the state homestead exemption act (B. & C. Comp., sec. 221), which applies only to the enforcement of a judgment obtained on liabilities thereafter contracted, and though a judgment so obtained might have been enforced against such homestead before the debtor's discharge in bankruptcy." If no lien be acquired prior to the bankrupt's discharge, proceedings in a state court to obtain a judgment in rem against the exempted property, instituted after the discharge, would be as effectual as proceedings begun prior thereto. If proceedings in a state court, commenced before discharge, in a case in which no lien existed, could proceed to a conclusion after the discharge, because no judgment in personam is sought, but only a judgment in rem against exempted property with which the bankrupt court has no concern other than to set it apart as exempt, and no jurisdiction to interfere with proceedings in the state court to subject it, similar proceedings, begun after discharge, should be permitted for the same reasons. But in both instances the discharge releases the debtor from the pay-

ment of the debt, and the right of action thereon by a creditor is discharged, unless a specific lien has been fastened on the property which can be enforced irrespective of a personal proceeding against the debtor.

<sup>34</sup> Hence, the decision of this case hinges on the question whether the plaintiffs in error had acquired any lien which, after the discharge in bankruptcy of the defendant in error had been obtained and pleaded, was enforceable against the exemption set apart in bankruptcy and held by the receiver of the state court. The fact that the notes upon which the suit was founded contained a waiver of all homestead and exemption rights, of itself, gave them no lien: In re Hopkins, 1 Am. Bank. Rep. 209. They had no lien of any character, either by contract or by statute. The only basis for claiming that a lien was acquired consists in the filing of an equitable petition, obtaining an interlocutory injunction against the defendant interfering with the exemption which the trustee in bankruptcy had set apart, and the appointment of a receiver who secured the custody of the fund. Counsel for plaintiffs in error strenuously contend that these proceedings fastened an equitable lien on the property in custodia legis, for the enforcement of which they were entitled to a decree in rem, notwithstanding the plea of discharge in bankruptcy interposed by the defendant in error. To this contention we are unable to assent. Equitable liens are but little favored in this state. The vendor's equitable lien for the purchase money of land has been abolished: See Civ. Code, sec. 2823. Likewise, the equitable lien which formerly was created by the deposit of title deeds: See Civ. Code, sec. 2956. Nor does the doctrine under which, in some jurisdictions, an equitable lien is accorded a vigilant creditor, who by the prosecution of a creditor's bill has uncovered equitable assets, prevail in this state, since under our law the assets of a debtor when brought into court are administered for the benefit of all creditors alike, pursuant to their legal rights, and the only reward of vigilance consists of the right to reimbursement of expenses incurred in bringing such assets within the reach of creditors. Besides, the exemption sought to be subjected in this case was in no sense an equitable asset, the title thereto being all the while in the debtor. The lien which the plaintiffs in error claim to have acquired does not fall within any of the other classes of equitable liens recognized by the general authorities; as, for instance, where the parties have attempted to create a lien by contract, but have failed to make their intention legally effectual; or, where one has contracted on the

faith of the promise of another to create a specific lien on certain property, <sup>35</sup> and the latter fails or refuses to do so; or where the right and justice of a particular case demand the recognition of an equitable lien, as where one in good faith has made expenditures which benefit the property of the true owner, and upon its recovery by the latter is allowed a lien thereon for his reimbursement. We can conceive of no rule of law, or principle of justice, which could be invoked as sustaining the plaintiffs' contention that a lien in their favor existed against the fund in the possession of the court. With respect thereto they stood in exactly the same position with the other creditors who the record shows also held debts against which the defendant in error had waived all exemption rights, any of which creditors might have become a party to the proceedings instituted by the plaintiffs in error, and against whom the plaintiffs in error would have had no lien, or even priority. The only advantage the plaintiffs in error and other creditors holding waiver notes had over general creditors was to prevail in the collection of their debts as against any claim of homestead or exemption which the defendant in error might assert.

Further, the appointment of a receiver in this case was not a matter of right, and might have been avoided by the defendant giving a bond satisfactory to the court, in which event certainly no lien could have attached to the fund in controversy; and the mere fact that a receiver was appointed and put in charge of the fund to preserve it pending the litigation could not create any lien thereon. What the plaintiffs in error now claim to possess is what in reality they were seeking to obtain by the equitable proceedings—that is, a specific lien on the property which they were endeavoring to subject. They could not obtain such lien until a final trial and a judgment of the court fixing a lien upon this property and subjecting it to their debt, and the judge of the court was without authority to pass any order in interlocutory proceedings to establish a lien in their favor. Even if the seizure of the fund in this case could be deemed an equitable levy, and as such operative to give the plaintiffs in error an inchoate lien thereon, such proceedings would be merely in the nature of a mesne process; and, to avail the plaintiffs, the action would have to be prosecuted to a finality, and a decree in rem obtained subjecting the fund in the custody of the court, before the debtor obtained and pleaded in bar of the action his discharge in bankruptcy: <sup>36</sup> *Rountree v. Ruther-*

ford, 65 Ga. 444; Cosgrove v. Mitchell, 74 Ga. 824; Graham v. Richerson, 115 Ga. 1002, 42 S. E. 374.

Plaintiffs in error contend broadly that, the parties and the subject matter being before a court of equity, it was endowed with plenary power and should have proceeded to administer full justice. While this is one of the leading doctrines of equity, yet its invocation by the plaintiffs in error in this case cannot be sanctioned, for the sufficient reason that they allowed the subject matter upon which the court must operate to be destroyed. Had they made application to the bankruptcy court in the method pointed out in the decisions of our court (Bell v. Dawson Grocery Co., 120 Ga. 628, 48 S. E. 150), and of the United States court (Lockwood v. Exchange Bank, 190 U. S. 294, 23 Sup. Ct. Rep. 751, 47 L. ed. 1061), the discharge of the bankrupt could have been postponed until equity could have effectuated their rights. Their right of admission into a court of equity depended on a debt which the pendency of the bankruptcy proceedings prevented them from enforcing at law; but this debt belonged to a class which is dischargeable in bankruptcy; and having permitted the defendant to secure and plead against it a discharge in bankruptcy, and thus destroy their right of admission, they cannot complain that equity closed its portals against them, when such result was occasioned by their own failure to take the proper steps to insure their remaining open. While it is true that the bankruptcy court does not interfere with the action of state courts in dealing with exemptions of bankrupts, it is likewise true that it is the duty of the state court, when called upon to pronounce the effect of a discharge in bankruptcy, whether dealing with exempt property or otherwise, to give such discharge the legal effect which the bankruptcy act intended it should have; and this is true notwithstanding the proceeding in equity. Equity follows the law. The debt which the plaintiffs in error are seeking to enforce was provable in bankruptcy, belonged to a class dischargeable thereby; the plaintiffs in error had notice of the bankruptcy proceedings; and a discharge having been secured and pleaded by the defendant before the plaintiffs made effectual their proceedings against the exemption in the hands of the receiver by obtaining a decree in rem fastening a lien thereon, such discharge operated to destroy the right of action upon which the proceedings were based. The court below committed no error in the rulings complained of, and its judgment is affirmed.

All the justices concur.

*A Discharge in Bankruptcy* does not dissolve the lien of an attachment, where the property attached is exempt as against the trustee in bankruptcy, but is not exempt from seizure for the debt upon which the attachment is based: *Jewett v. Huffman*, 14 N. D. 110, 103 N. W. 408. And in *Groves v. Osburn*, 46 Or. 173, 79 Pac. 500, it is held that when a debtor has been discharged in bankruptcy the debt cannot be enforced in equity by a proceeding in rem against the homestead set apart in the bankruptcy proceedings.

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PEYTON v. STEPHENS.

[130 Ga. 338, 60 S. E. 563.]

**DISTRIBUTION OF ESTATE—Estoppel Against Heir.**—An heir who, in ignorance of his rights, disclaims to the other heirs his interest in the estate, is not thereby estopped after distribution from asserting title against them, if they were not misled to their injury; nor does an estoppel arise in favor of a grantee of one of the distributees who did not know of the disclaimer and was not deceived or misled. (pp. 173, 174.)

**PRESCRIPTION—Testimony as to Time of Possession, Construction of.**—If a witness testifies that he has been in possession of the land in suit more than seven years, this must be construed as meaning more than seven years prior to the time when he was so testifying, and not seven years prior to the commencement of the action. (p. 174.)

J. O. Edwards, for the plaintiff in error.

<sup>339</sup> **HOLDEN, J.** The record presents the following case: Charley Landers died, leaving eight heirs entitled to receive his estate. Prior to a division of the lands belonging to the estate, a daughter of Landers, who was one of the eight heirs thus entitled, died leaving no children, and her share of the estate was inherited by her husband, Henry R. Schurter, as her sole heir. Schurter was requested to be present and look after a division of the lands belonging to the estate, and in reply wrote one of the heirs the following letter:

“North Decatur, Ga., Oct. 8, 1894.

“Dear Brother Wash.:

“Sanford has informed me that you wish for me to come up to see about dividing the land, and I notice your kind letter reads like I had any part in the land. While I thank you very, very much for your kindness and kind attention, I feel it my duty to tell you that I have no part in the land whatever. Of course if the baby had lived it would have got its part lawfully, but as it is I have nothing to do with the land. Thanking you again for your kindness I close, with love to you and family.

“Your loving brother,

“HENRY.”



The other heirs then proceeded to divide the lands belonging to the estate among themselves, leaving Schurter out of the division. The land involved in this case was conveyed by certain of the heirs to C. S. Landers, as an allotment to him, by deed dated November 5, 1895, and by this grantee to R. D. Stephens by deed dated July 22, 1899. Neither of these deeds was recorded. Henry R. Schurter, on July 3, 1901, conveyed his entire interest in the land belonging to the estate of Charley Landers to J. T. Peyton, the plaintiff in this case, which deed was recorded July 21, 1901. In March, 1905, Peyton made an application for partition of the land conveyed to Stephens by the deed above mentioned, which application was resisted by Stephens, and the issue thus made was tried at the March term, 1906, of Habersham superior court, resulting in a verdict in favor of the defendant. The plaintiff moved for a new trial, and to the judgment of <sup>240</sup> the court below overruling the motion he filed his bill of exceptions in this court.

1. On the trial, the letter from Schurter, which is set out in the statement of facts, was introduced in evidence, and a witness testified that it had been exhibited to the plaintiff prior to his purchase of Schurter's interest in the land in dispute. The plaintiff denied any knowledge of this letter. We do not have to determine whether or not the plaintiff knew the contents of such letter prior to his purchase from Schurter, as that was an issue of fact on which the jury has passed. But the contention of the defendant that this letter was a disclaimer of title on the part of Schurter, upon which the heirs acted to their injury, and constituted an estoppel as against Schurter and the defendant as his privy in title, makes it necessary for us to decide whether or not the contents of the letter in question, under the facts of this case, created in law an estoppel which would prevent the defendant from asserting any rights in the land in controversy under his deed from Schurter. In the case of *Wilkins v. McGehee*, 86 Ga. 764, 13 S. E. 84, a sale was made under a power of attorney contained in a mortgage, after the mortgagor's death, which revoked the power and rendered the sale void. The mortgagor's executors, who were also trustees under her will, brought suit as such executors and trustees and as next friend of a minor beneficiary. These executors were present at the sale, but did or said nothing in regard to the matter, and made no representation as to the title or right of the mortgagee to sell. The purchaser was the mortgagee's son and agent, who had advertised the land for sale and knew as much

about the state of the title as the plaintiffs. All parties acted in good faith and believed the power of sale was still valid when the sale occurred. It was held that the executors were not estopped from recovering the land. The court further said that any doubt about their ruling was removed by considering the difference between the estoppel of one acting as an individual and one acting in a representative capacity. On pages 769-770, the court uses this language: "They were not guilty of any fraud; but, on the contrary, it was admitted in the argument here that all parties acted in perfect good faith under the belief that the power of sale was still valid when the sale took place. It was an honest and mutual mistake of law. The purchaser was as much bound to know the <sup>341</sup> law as the plaintiffs. All of them being equally ignorant, it is now claimed in behalf of the purchaser that the plaintiffs became estopped by not informing him truly of the law. We know of no law requiring one who is present at a sale like this to act as the legal adviser of an adverse party, or else become forever estopped from attacking the validity of the sale." The Civil Code, section 5151, declares: "Where the estoppel relates to the title to real estate, the party claiming to have been influenced by the other's acts or declarations must not only be ignorant of the true title, but also of any convenient means of acquiring such knowledge. Where both parties have equal knowledge or equal means of obtaining the truth, there is no estoppel."

If the heirs of Charley Landers were influenced by Schurter's letter to one of them, were they ignorant of the true title? There is no evidence whatever that they were ignorant of the fact that Schurter had title to a one-eighth interest in the land, except the testimony of one heir, that when the land was divided he did not know that Henry Schurter had any interest therein. In the letter from Schurter he says that the letter to him from one of the heirs reads like he had an interest in the land. This would indicate that the heir who wrote the letter thought Schurter had an interest therein. Regardless of what this expression indicates, with the exception noted above, it does not appear that the heirs were ignorant of the true title, and does not appear that they did not have any convenient means of acquiring knowledge of the title; and the burden was on them to affirmatively establish these facts before they could claim that the plaintiff was estopped because they were influenced by the acts or declaration of Schurter. The latter part of the code section above quoted provides, "Where both parties have equal knowledge

or equal means of obtaining the truth, there is no estoppel." It does not appear that the party to whom Schurter wrote and the other heirs did not have equal means of obtaining the truth about the title, and did not have equal knowledge, with the exception of one heir. In fact it would seem that the knowledge of the party writing the letter to Schurter was greater, as this party wrote as if Schurter had an interest in the land. This is what Schurter says in his reply, and, indeed, we see no motive for writing Schurter unless the writer thought Schurter had an interest in the land. The Civil Code, section 5152, says: "In order <sup>342</sup> for an equitable estoppel to arise, there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence as to amount to constructive fraud by which another has been misled to his injury." There was certainly no intended deception on the part of Schurter. The very nature of the matter and the tone of his letter shows that he did not intend to deceive anyone. He did deceive himself. It is apparent on the face of the letter written by him that he was under the mistaken idea that any rights which the wife might have had devolved on her child and died with it. Was there such gross negligence by Schurter as to amount to fraud by which another was misled to his injury? Was Schurter guilty of any gross negligence amounting to constructive fraud? Suppose he was, this fact alone would not estop him. In order to estop him, the party asserting the estoppel must have been misled by such negligence to his injury. As far as shown by the record, the remaining heirs were not injured, and if misled, they were misled to their benefit by taking Schurter's interest in the land. If deceived at all, they certainly were not misled to their injury when the deception resulted in their getting one more share of land to divide than they were entitled to and got that share from the party misleading them: See *Davis v. Bagley*, 40 Ga. 181, 2 Am. Rep. 570. There is no evidence whatever that the defendant Stephens, who purchased from one of the heirs the land in dispute, was misled or deceived. It does not appear that he ever knew Schurter did or did not have an interest in the land, or ever wrote a letter, or did or said anything in regard to the matter. Schurter did not acquiesce in or encourage the defendant to buy or his vendors to sell to him. Under the facts disclosed in the record before us, we do not think that Schurter himself would be estopped from asserting title to a one-eighth interest in the land in controversy; and it follows that the plain-

tiff is likewise not estopped from claiming such interest as Schurter's grantee, the contention that the plaintiff is estopped being based solely on the grounds that he is the privy in title of Schurter and bought with notice of the letter written by Schurter in which he disclaimed having any interest in the land.

2. The lot of land in controversy was allotted to C. S. Landers in the division, and some of the other heirs made him a deed to this lot. One witness testified that he bought some timber from <sup>343</sup> C. S. Landers and cut and moved it from the premises, but there is no evidence that C. S. Landers was ever in possession of any part of this land. It was not shown that the defendant, who was Landers' grantee, was in possession of this lot, under color of title, more than seven years prior to the commencement of the suit. The defendant testified that he was in possession of the land for more than seven years; but this evidence means that he was in possession for more than seven years prior to the time he was testifying. This could be true, and yet it could also be true that he had not been in possession for more than seven years prior to the filing of the application for partition, as about one year had elapsed between the date the proceedings were instituted and the time he was testifying. Moreover, the deed from C. S. Landers to the defendant was dated July 22, 1899, and the application for partition was filed March 9, 1905. Hence, the defendant could not have been in possession of any part of the land under this deed for seven years prior to the filing of such application.

We do not deal with the question of cotenancy, or any other question, as affecting adverse possession; as the evidence does not show any possession under color of title for seven years prior to the institution of this proceeding.

Judgment reversed.

All the justices concur.

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*Equitable Estoppel* arises only when one, by his words or conduct, willfully causes another to believe in the existence of a state of facts, and induces him to act so as to alter his previous position to his prejudice: *De Berry v. Wheeler*, 128 Mo. 84, 49 Am. St. Rep. 538. See, too, *Priewe v. Wisconsin State Land etc. Co.*, 103 Wis. 537, 74 Am. St. Rep. 384; *Gjerstadengen v. Hartzell*, 9 N. D. 268, 81 Am. St. Rep. 575; *Davidson v. Jennings*, 27 Colo. 187, 83 Am. St. Rep. 49; *Hunt v. Reilly*, 24 R. I. 68, 96 Am. St. Rep. 707; *Supreme Tent v. Stensland*, 206 Ill. 124, 99 Am. St. Rep. 137; *Beechley v. Beechley*, 134 Iowa, 75, 120 Am. St. Rep. 412.

*The General Doctrine is that He Who Acts Inconsistently with the Truth* under such circumstances that, as a reasonable person, he ought

to anticipate that another is likely to change his position in reliance on such conduct, will be estopped to assert the truth to the injury of such other: *Marling v. Noummensen*, 127 Wis. 363, 115 Am. St. Rep. 1017.

*Clear, Precise and Unequivocal Evidence* is requisite to establish an estoppel: *Coal Belt etc. Ry. Co. v. Peabody Coal Co.*, 230 Ill. 164, 120 Am. St. Rep. 282.

## OGLES v. NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY COMPANY.

[130 Ga. 430, 60 S. E. 1048.]

**RAILWAY TICKET—Privity of Contract.**—Where a man pays his own money for a ticket which the railway agent agrees to deliver to the married daughter of the purchaser for her use in coming to his home, there is no privity between her and the railway company, and she cannot recover for injuries due to its failure to deliver the ticket. (p. 177.)

Sharp & Sharp, and W. M. Henry, for the plaintiff.

Dean & Dean, for the defendant.

<sup>430</sup> **ATKINSON, J.** This is a suit for damages. In her petition the plaintiff alleged that the defendant was a railroad company with an agent in Rome, Georgia; that defendant's line of road connected at Marietta with the road of the Louisville and Nashville Railroad Company, which operated a line of railroad through Canton, Georgia; that the two companies were connecting carriers and had traffic arrangements with each other by which each company was authorized to sell tickets and transportation over the entire line between Rome and Canton; that on August 7, 1906, petitioner's husband was in Rome, Georgia, where he had gone to live, and where she intended to go and join him; that petitioner was boarding at the time in Canton, Georgia, and had no money with which to pay her board or to pay her railway fare from Canton to Rome; that she was unwell and unable to work and take care of herself, and for that reason it was necessary that she go to her husband at the home of her father in Rome, Georgia; "that on said date petitioner's father went to the defendant in Rome and stated to this defendant there that he wished to buy a ticket for his daughter, your petitioner, <sup>431</sup> from Canton, Georgia, where she then was, to Rome, Georgia; that then and there the defendant agreed to sell and furnish such ticket for petitioner's transportation from Canton to Marietta, Georgia, by way of said line of Louisville and Nashville

Railroad Company, and from Marietta to Rome over said line of defendant; and said Martin [petitioner's father] then and there paid to the defendant two dollars and forty-two cents in full payment for such ticket and transportation for petitioner and for her use and benefit, and the defendant accepted such payment and then and there agreed with said Martin and undertook, in consideration of such payment, to at once, or within three hours, transmit to Canton, through the agent of the said Louisville and Nashville Railroad Company at that point, such ticket for petitioner, or to secure for her such transportation from Canton to Rome; that the defendant, when it accepted such payment and undertook to furnish said transportation, well knew where petitioner was, as well as for whose benefit said agreement was so made and money was so paid, and to whom such transportation was to be so furnished, and thereupon it owed the petitioner the duty to diligently do as it so agreed and undertook to do for her benefit, and to promptly and diligently transport her from Canton to Rome"; that the defendant failed to transmit the ticket, and on account of such failure, the plaintiff, while in a delicate condition, was obliged to remain in Canton, and on account thereof suffered injury, more at length described in the petition. The defendant demurred to the petition, among other grounds, upon that of the failure to set forth a cause of action. Upon the hearing the demurrer was sustained and the petition dismissed, and the plaintiff excepted, assigning error upon the judgment.

Under the allegation of the petition (which must be construed most strongly against the pleader), Martin, the father of the plaintiff, entered into a contract with the agent of the defendant in Rome, by which the agent undertook to issue a ticket for transportation, and to cause the same, through the railroad agent at Canton, to be delivered to the plaintiff, whose whereabouts in Canton the defendant's agent at Rome knew. Thus far there were but two parties to this agreement—the plaintiff's father and the defendant. It is not alleged that the plaintiff's father was acting as the agent of the plaintiff in making this contract. If it had been intended to make such an allegation, such intention should have <sup>432</sup> been expressed, not left to inference. In this respect the case is different from *Seifert v. Western Union Tel. Co.*, 129 Ga. 181, 121 Am. St. Rep. 210, 58 S. E. 699, 11 L. R. A., N. S., 1148. It is alleged that there was a breach of this contract by failure to issue the ticket and by failure to furnish the plaintiff with transportation. The effect of such allegations was to allege

a breach of the contract between the plaintiff's father and the defendant. Clearly, any right of action thereunder for injury arising from breach of this contract was in the plaintiff's father, who made it. Had the contract been so far executed by the defendant as to issue a ticket and deliver it to the plaintiff, the plaintiff, by virtue of holding the ticket, might have been introduced as a party, and for a breach of duty thereafter occurring might recover, under the ruling in *Georgia etc. Ry. Co. v. Brown*, 120 Ga. 380, 47 S. E. 942, and *Aiken v. Southern Ry. Co.*, 118 Ga. 118, 98 Am. St. Rep. 107, 44 S. E. 828, 62 L. R. A. 666. But, under the allegations, the breach occurred before the establishment of any relation between the plaintiff and the railroad company, and consequently the petition was open to demurrer.

Judgment affirmed.

All the justices concur.

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*Strangers to a Contract* cannot ordinarily maintain an action for its breach: *Roddy v. Missouri Pac. Ry. Co.*, 104 Mo. 234, 24 Am. St. Rep. 333; *Heizer v. Kingsland & Douglass Mfg. Co.*, 110 Mo. 605, 33 Am. St. Rep. 482. As to the right of a third person for whose benefit a contract is made to sue on such contract, see the note to *Baxter v. Camp*, 71 Am. St. Rep. 176. Regret that the rule has been applied as in the principal case is unavoidable, and therefore not unreasonable.

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### SMITH v. SMITH.

[130 Ga. 532, 61 S. E. 114.]

**DEED—Construction of Word "Children."**—In a deed to a person for life, "and on her decease to such child or children, they being heirs of her body, that she may leave in life," the word "children" includes only the first generation of offspring, and hence excludes children of a deceased child of the life tenant. (p. 178.)

**EVIDENCE BY PAROL to Explain a Deed.**—Where a conveyance of real property is to M. J. S., "for the use, benefit, advantage in trust for said M. J. S. for her life, for her sole and separate use, and on her decease to such child or children, they being the heirs of her body, that she may leave in life," the court properly excludes parol evidence to show the intention of the grantor. (p. 179.)

Leon Hood and S. Holderness, for the plaintiffs.

Frank S. Loftin and D. B. Whitaker, for the defendant.

<sup>532</sup> HOLDEN, J. The lot of land involved in the present suit was conveyed by deed in 1874 to Mary J. Smith, "for the

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use benefit <sup>533</sup> advantage in trust for said Mary J. Smith as aforesaid for her life . . . for her sole and separate use and on her decease to such child or children they being heirs of her body that she may leave in life." The habendum clause is as follows: "To have and to hold the above described lands in trust to her, the said Mary J. Smith and her children, the heirs of her body as above specified." The life tenant under the deed referred to had several children, four of whom survived her. The plaintiffs in the present case are her grandchildren and the children of Thomas J. Smith, who died in 1891, during the lifetime of his mother, the life tenant. After the death of the life tenant in 1901, they brought the present action, in statutory form, to recover an undivided one-sixth interest in the land described in the deed above referred to, claiming such interest as the only children and the sole heirs at law of Thomas J. Smith. Oral testimony establishing the relationship claimed in the petition, and the deed referred to, were introduced in evidence, and at the conclusion of the plaintiffs' evidence the defendant asked and the court granted a nonsuit; to which action of the court the plaintiffs filed a bill of exceptions.

Generally, the word "children" does not include grandchildren, and is to be construed according to its ordinary and popular signification, as designating the immediate offspring: *White v. Rowland*, 67 Ga. 546, 44 Am. Rep. 731. The language of the deed above referred to plainly indicates that the word "children," therein used, includes only the first generation of offspring, and does not include grandchildren. The land described in the deed is conveyed to Mary J. Smith for her lifetime, and "on her decease to such child or children they being the heirs of her body that she may leave in life." The designation in the deed referred to excludes grandchildren. The children of the life tenant are described in the deeds as "heirs of her body that she may leave in life." Any children of the life tenant who could take under this deed as remaindermen would have to be heirs of her body, and only her immediate offspring could come within the class designated as being heirs of her body, under the language embraced in the deed; and only such immediate offspring that the life tenant left in life could take as remaindermen under this deed. The life tenant did not leave Thomas J. Smith, in life, but Thomas J. Smith left her in life. As Thomas J. Smith, the father of the plaintiffs, died before the death <sup>534</sup> of the life tenant occurred, his children have no interest in the land in dispute. Thomas J. Smith did not take a vested



remainder under the deed, but took a remainder contingent upon his being in life at the time of the death of the life tenant: *Crawley v. Kendrick*, 122 Ga. 183, 50 S. E. 41.

There is nothing in the habendum clause of the deed which would warrant a different construction of the intention of the grantor from that which we have just construed the prior language of the deed to express. Indeed, the designation of the class who are to take as remaindermen, in the habendum clause, is made identical with the prior designation, by the use of the words "her children, the heirs of her body as above specified."

The court committed no error in excluding parol evidence offered by the plaintiffs to explain the intention of the maker of the deed. The judgment of the court below, awarding a nonsuit, was proper, and is affirmed.

All the justices concur.

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*The Word "Children" in a Deed* or will does not ordinarily include grandchildren: *Mefford v. Dougherty*, 89 Ky. 58, 25 Am. St. Rep. 531; *Estate of Hunt*, 133 Pa. 260, 19 Am. St. Rep. 641. However, the word "children," used in a deed, may be given the meaning of the word "heirs" when the context requires it to carry out the intention of the grantor: *Dick v. Bicker*, 222 Ill. 413, 113 Am. St. Rep. 426, 78 N. E. 823.

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### DYSON v. KNIGHT.

[130 Ga. 573, 61 S. E. 468.]

**EVIDENCE—Copy of Deed.**—The Certificate of an Unofficial Person that a paper is a "true and correct copy of an original deed now in my hands, with the indorsements thereon," does not render the same admissible to prove the contents of the original deed. (p. 185.)

**EVIDENCE.**—The Execution of a Lost Deed Embracing Lands in Two Counties cannot be proved, as to land in one of the counties, wherein the deed was never recorded, by a certified copy from the record of the other county, in which it was duly recorded, and without first proving the execution of an original deed, a copy of the same taken from the records of a county in which the land in controversy is not situate cannot be received in evidence. (pp. 185, 186.)

**ABANDONMENT OF LAND** Acquired by Prescription.—After a good prescriptive title to lands has ripened, the person vested with such title cannot be held to have been divested of title, because of abandonment, so long as he continues to perform acts in relation to the lands and title thereto which are inconsistent with the idea of abandonment. (p. 186.)

Wilson, Bennett & Lambdin, for the plaintiff.

J. L. Sweat, for the defendant.

<sup>574</sup> BECK, J. T. F. Dyson, administrator of Thomas Dyson, deceased, filed an equitable petition against Knight and Pittman, seeking to enjoin them from cutting timber or otherwise trespassing on land lots Nos. 331 and 332 in the eighth district of Ware county. The plaintiff alleged that these lots were granted to Thomas Dyson in 1850; that letters of administration de bonis non cum testamento annexo upon the estate of Thomas Dyson were issued to him by the court of ordinary of Thomas county in 1903; that leave to sell said land had been duly granted by the ordinary; and that the defendants were inflicting irreparable damage upon the estate, by cutting and removing timber from said land. The defendants in their answer admitted having entered upon the land and cut timber therefrom; but alleged that they were the owners of the land. They admitted that these lots were granted by the state to Thomas Dyson, deceased, but averred that the lots were conveyed by him to one Stovall, trustee for S. C. Butts, in 1850; that subsequently one A. G. Butts was substituted as trustee in the place of Stovall, and, in 1888, sold and conveyed the land to one Cribb; and that by several subsequent conveyances the title to the land became vested in Knight, one of the defendants. The defendants also claimed title to the land by prescription.

The case was submitted to a jury, and a verdict was rendered in favor of the defendants. The plaintiff filed a motion for a new trial upon the following grounds: (1-3) The general grounds. (4) "Because the following material evidence was illegally admitted to the jury, over objection of this applicant, viz.: J. C. McDonald, witness for the defendants, in testifying as to his search among the papers of the Southern Pine Company of Georgia for a deed alleged to have been made from Thomas Dyson to Stovall, as trustee for Mrs. Sarah C. Butts, said: 'I had before, <sup>575</sup> in my examinations, found a memorandum there. That memorandum was in the handwriting of Brantley A. Denmark of Savannah. That memorandum is lost; I could not find it. I have seen it, though, and it belonged to be filed in this deed, which I hold in my hand, from A. G. Butts, trustee, to Dodge and Stokes, covering quite a number of lots, and dated May 10, 1870, It was nothing but a pencil memorandum; I remember the memorandum that was there. Col. Denmark acted as general counsel of the old Waycross Lumber Company and as general counsel of the Southern Pine Company of Georgia, in passing upon the title that the Southern Pine Company was obtaining to those lands. I did not find the original deed; it could not

be found in the possession of the Southern Pine Company. Col. Denmark is dead now.' Movant objected to the admission of said evidence, . . . because the said evidence was illegal, irrelevant and inadmissible, but did not illustrate any issue in the case, was a declaration by a third person not connected in any wise with the case on trial, was hearsay evidence, and tended to lead the jury to believe that it had some reference to the alleged deed, claimed by the defendants to have been made from Dyson to Stovall, trustee, and thus tended to prejudice the cause of plaintiff before the jury."

(5) "Because the following material evidence was illegally admitted to the jury over the objection of this applicant, viz.: A certified copy of order of A. P. Powers, judge Macon district, removing Stovall as trustee of Mrs. S. C. Butts, and substituting A. G. Butts in his place as trustee, said order reciting that Stovall prays to be removed, and that said cestui que trust consents and desires said removal and appointment, by her written request to said petition attached, and that A. G. Butts also files to said petition his written consent to an acceptance of said trusteeship. Dated at chambers, May 27, 1857, duly certified by the clerk of the superior court of Bibb county as appearing on the minutes of said court. Movant objected to the admission of this evidence on the ground that the order was inadmissible, because it was not accompanied by a certified copy of the proceedings in said court upon which the order purports to be predicated." (6) "Because the following material evidence was illegally admitted over objection of this applicant, viz.: A certified copy of the will of Thomas Dyson dated June 28, 1865, codicils thereto, dated February 9, <sup>576</sup> 1866, and the appointment and discharge of James E. Dyson as executor, and of Milton C. Smith as administrator de bonis non on the estate of the said Thomas Dyson; the order of the court of ordinary of Thomas county removing James E. Dyson as executor, and the order appointing Milton C. Smith as administrator with the will annexed, both dated October 7, 1867, and the order discharging Milton C. Smith as administrator being dated April 2, 1888, and reciting that said estate of Thomas Dyson has been fully and properly administered; said copy being duly certified by the clerk of the court of ordinary of Thomas county on August 18, 1906; the said will making no reference whatever to the lots of land in controversy." Movant objected to this evidence upon the ground that, having shown that the lots in controversy were granted to Thomas Dyson, and having shown letters of administration upon his estate to the plaintiff, and

an order authorizing the sale of said lots, the plaintiff was entitled to recover in this case, unless the defendants should show title out of Thomas Dyson, or title by prescription; which they could not do by introducing the said evidence. (7) "Because the following material evidence was illegally admitted to the jury over objection of applicant, viz.: A document wholly in the handwriting of A. G. Butts from the beginning to the end thereof, with all the entries, signatures and certificates, purporting to be the copy of a deed from Thomas Dyson to Stovall, trustee, a copy of which is attached as an exhibit. Movant objected to the admission of this evidence . . . on the ground that it is a writing prepared entirely by A. G. Butts, and is not admissible to prove the existence and proper execution and delivery of a genuine original deed from Thomas Dyson to Stovall, trustee, to the lots of land in controversy; that the same was a declaration of A. G. Butts, and was not binding upon the plaintiff; was illegal, irrelevant and inadmissible; could not prove any contested issue in the case, and could only tend to prejudice plaintiff's case before the jury." (8) Because the following material evidence was illegally admitted to the jury, over objection of applicant, viz.: A certified copy of a deed purporting to have been made by Thomas Dyson to Stovall, trustee, and conveying several lots of land, including the lots in controversy. Said deed was recorded in Bibb county, September 6, 1850, and the copy here introduced was certified by the clerk of <sup>577</sup> Bibb superior court. A copy of this evidence is attached as an exhibit. Movant objected to the admission of said evidence, upon the ground that the execution of a lost deed embracing land in two counties cannot be proved as to land in one of the counties, wherein the deed was never recorded, by a certified copy from the record of the other county, in which it was duly recorded, without first proving the execution of the original deed; that a copy of the same taken from the records of a county in which the land in controversy is not situated cannot be received in evidence; that it cannot be received for the purpose of throwing light upon the transaction, for the jury to say whether or not an original deed ever existed from Thomas Dyson to Stovall, trustee; that, therefore, said copy offered in evidence is illegal, irrelevant and inadmissible for any purpose connected with the trial of this case. (9) Because the court erred in charging the jury as follows: "There has been a certified copy of a deed from the records of Bibb county, purporting to be a copy of an original deed claimed to have been made by Dyson to Stovall.

Now, that deed would not be admissible as evidence, or as a certified copy of the original deed. It is not admissible at all for that purpose, because, in order for it to be admissible as a certified copy, it would have to be certified from the records of deeds of this county. It is not admitted for that purpose, but is only admitted for the purpose of illustrating the truth of this case and helping you to determine the question between these people as to whether there was an original deed, and no further than that." This charge was erroneous because it directed the jury to consider the certified copy deed for the purpose of illustrating the truth of the case, and helping them to determine the question between the parties as to whether there was an original deed, whereas it could not be considered by the jury for such purpose, it having no such evidentiary value. (10) Because the court erred in charging the jury as follows: "Another copy has been introduced in evidence here that claims to have been written out by A. G. Butts, with an entry on it made by him, claiming to be a transcript by him from the records of Ware county, taken from book E of the records of this county. This has been introduced for the same purpose as the other, not as a certified copy of the original deed and not for that purpose, but it has been admitted for the purpose, as stated a moment ago, of helping you <sup>578</sup> to determine the question as to whether there ever was an original deed made by Dyson to Stovall. And it is for that purpose alone that this evidence and some other circumstances have been introduced in this case; and if you find from the evidence that has been introduced, and the circumstances, if they are sufficient to establish to your satisfaction that Dyson did, as a matter of fact, convey that land to Stovall, as trustee for the benefit of Mrs. Butts, then I charge you that the plaintiff could not recover in this case, because that would pass title out of him." This charge was erroneous because it directed the jury to consider the evidence referred to, for the purpose of illustrating the truth of the case, and helping them to determine the question between the parties as to whether there ever was an original deed made by Thomas Dyson to Stovall, trustee, whereas said evidence could not be considered by the jury for such purpose, it having no such evidentiary value. (11) Because the court erred in charging the jury as follows: "Because after a prescriptive title has ripened into a perfect title, if they continue to exercise acts of ownership over it by selling property from it, or paying taxes on it, or other acts which go to demonstrate the fact that they are continuing to claim the title by,

exercising acts of ownership over it, why that would be inconsistent with the idea of abandonment. The facts and circumstances are to be looked into by the jury to determine whether, as a matter of fact, the land was abandoned. The purpose to claim it, the claim to own it—was that abandoned and set aside and neglected?" This charge was erroneous "(a) because the court expressed an opinion in said charge to the jury, in that the jury were told that after a prescription has ripened in a person, if such person continue to exercise the acts claimed by the court in its said charge, that would be inconsistent with the idea of abandonment; (b) because said charge instructed the jury that the purpose to claim the land, the claim to own it, was not abandonment, but that to abandon the land meant the purpose not to claim it, not to claim to own it; whereas the court should have charged the jury that, 'although one holds another's land adversely for seven years, under color of title and claim of right, yet if he then abandons the land, he cannot claim the benefit of the statute of limitations'; (c) because the jury were instructed to find that after a person holds another's land adversely for seven years, under color <sup>579</sup> of title and claim of right, there would be no abandonment of the land, provided such person continued to exercise acts of ownership over it by selling property from it or paying taxes upon it."

The court overruled the motion for a new trial, and the plaintiff excepted.

1. The fourth ground of the motion for a new trial assigns error upon the court's refusal to exclude the testimony of a witness as to a certain memorandum. Inasmuch as no part of the memorandum referred to was stated by the witness, it would seem that the defendant could not have been hurt by the admission of this testimony; but the evidence itself was immaterial, and should have been excluded upon objection of the defendants' counsel, based upon that ground.

2. The sixth ground of the motion complains of the admission in evidence of a certified copy of the will of Thomas Dyson, dated June 28, 1865, codicils thereto dated February 9, 1866, "and the appointment and discharge of James E. Dyson as executor, and of Milton C. Smith as administrator de bonis non on the estate of the said Thomas Dyson; the order of the court of ordinary of Thomas county, removing and dismissing James E. Dyson as executor, and the order appointing Milton C. Smith as administrator with the will annexed, both dated October 7, 1867, and the order discharging Milton C.

Smith as administrator, being dated April 2, 1888, and reciting that said estate of Thomas Dyson has been fully and properly administered; said copy being duly certified by the clerk of the court of ordinary of Thomas county, August 18, 1906, the said will making no reference whatever to the lots of land in controversy." In offering said documentary evidence, counsel for the defendants made the following statement: "I want to state that I offer this but for one purpose, and that is as evidence of what I stated in the opening of the case—that this was not an estate partially administered, but an estate which had been fully administered, and for the further purpose of showing that Thomas Dyson, in making his will, apparently made no claim to these lands, made no disposition of them so far as the will shows, and that his administrators, James E. Dyson, who was the first administrator <sup>580</sup> on his estate in Thomas county, and who was succeeded by Milton C. Smith of Thomas county, made no claim to these lands in controversy as belonging to the estate of Thomas Dyson." Inasmuch as neither the will nor an abstract of the contents of the same is set forth in this ground of the motion, nor in the brief of the evidence, we are not able to say whether it should have been admitted or not. The mere fact that the will made no reference to the lots of land in controversy is not necessarily conclusive upon the question of its admissibility in evidence. If the will contained a residuary clause that might have embraced the lots in question, and if it required a sale and a division of the proceeds, might there not arise a presumption that there had been a complete administration of the estate and a distribution according to the scheme set forth in the will?

3. The plaintiff in error objected to the admission of a certain document in the handwriting of A. G. Butts, which purported to be a copy of a deed from Dyson to Stovall, as trustee for Mrs. Sarah C. Butts. The court overruled the objection and admitted the testimony. The objection to this evidence was well taken, and should have been sustained. The special objections urged are set forth in the statement of facts (seventh ground of the motion for a new trial). They were based upon familiar principles of law, and the admission of the paper and the application of those principles demanded the exclusion of the evidence.

4. The court also erred in admitting the evidence set forth in the eighth ground of the motion for a new trial. "The execution of a lost deed embracing lands in two counties cannot

be proved, as to land in one of the counties, wherein the deed was never recorded, by a certified copy from the record of the other county, in which it was duly recorded. And without first proving the execution of an original deed, a copy of the same taken from the records of a county in which the land in controversy is not situate cannot be received in evidence": *Bagley v. Kennedy*, 94 Ga. 651, 20 S. E. 105. Having ruled that the documents referred to in divisions 3 and 4 of this opinion should have been excluded from evidence, it is unnecessary to deal with the question made in the fifth ground of the motion for a new trial, which complains of the admission in evidence of a certified copy of the order removing Massilon P. Stovall, as trustee for Mrs. Sarah C. Butts and children, and substituting <sup>581</sup> Albert G. Butts in his place as trustee, because, those documents having been excluded from the evidence, the order substituting Albert G. Butts in the place of Massilon P. Stovall as trustee would necessarily be nugatory, so far as relates to the effect of such substitution upon the chain of title which those documents were offered to establish.

5. As against the plaintiff, the court did not err in giving to the jury the instructions set forth in the last ground of the motion for a new trial. While it was held in the case of *Vickery v. Benson*, 26 Ga. 582, that, "Although one holds another's lands adversely for seven years, under color of title and claim of right, yet, if he then abandons the lands, he cannot claim the benefit of the statute of limitations," it has not been decided since the adoption of the code, substituting title by prescription for title acquired by adverse possession under the limitation laws, that the doctrine of abandonment, resulting from the discontinuance of use and occupation, in the absence of facts and circumstances showing a devolution of title, can be invoked against one who acquires a good prescriptive title. And the question as to the applicability of that doctrine of abandonment, as against one setting up a prescriptive title, is not here decided, as it is not raised by an assignment of error upon that portion of the court's charge last above referred to. We merely rule that after a good prescriptive title to lands has ripened, the person vested with such title cannot be held to have been divested of title, because of abandonment, so long as he continues to perform acts in relation to the lands and title thereto which are inconsistent with the idea of abandonment.

Judgment reversed.

All the justices concur.



*Where a Deed Conveys Tracts of Land Lying in Two Counties, but is recorded in one only, it has been held that an exemplification of such record is not admissible as a record in ejectment for one of the tracts which lies in the other county: Jackson v. Rice, 3 Wend. 180, 20 Am. Dec. 683. A contrary rule, however, is announced in Wheeler v. Winn, 53 Pa. 122, 91 Am. Dec. 186.*

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## NORTON v. ROURKE.

[130 Ga. 600, 61 S. E. 478.]

**PHYSICIANS.**—An Employer Who Summons a Physician and Requests Him to Care for an Employé, who has suddenly become ill while in the discharge of his duties and unable to act for himself, is under no implied obligation to pay for the medical services rendered. (p. 192.)

Twiggs, Oliver, Gazan & Oliver, for the plaintiff.

Osborne & Lawrence, for the defendants.

601 FISH, C. J. W. E. Norton brought an action against John Rourke & Son, a partnership composed of John Rourke and James A. Rourke, and against James A. Rourke, individually, to recover one hundred and fifty dollars for medical and surgical services, claimed to have been rendered by the plaintiff for John Rafferty, an employé of the defendants. The petition alleged that the services were rendered "at the special instance and request of said defendants, as a firm, and of the said James A. Rourke, individually, for which services the said defendants, and the said James A. Rourke, individually, then and there undertook and became liable to pay. The said services so rendered were necessary, and the charges therefor are reasonable." On the trial the plaintiff testified: "I am a physician and surgeon. I am licensed to practice under the laws of Georgia. . . . I had occasion to visit the foundry place of John Rourke & Sons. . . . Mr. Jim Rourke telephoned me . . . to go down and see a man. He asked if that was Dr. Norton. I said, 'Yes.' He said, 'This is Jim Rourke, of John Rourke & Sons; come down, I have another man hurt.' I said, 'All right; I will come down right away.' I say it was Mr. Jim Rourke who telephoned to me, because he had telephoned to me about a week before; I recognized his voice immediately. . . . I went down to the wharf and met Mr. Rourke, and he said to me, 'Captain Rafferty is injured on this boat, and I will show you where he is.' I went with him and found Captain Rafferty was in his bunk and unconscious;

I ordered the ambulance . . . . and had him sent home; afterward I had him removed to the hospital and treated him for his injuries. . . . Mr. Jim Rourke told me to do the best I could for the injured man, and I told him that I would. It was his boat, I presume, the man was injured on—he took me down there. . . . I never was Mr. Rourke's regular physician. I have done work for the firm. . . . I had rendered professional services before at the instance of Mr. Jim Rourke. My services had been engaged by Mr. Rourke before over the telephone. Mr. Jim Rourke did the telephoning then. At that time I went down to Mr. Rourke's machine-shops. . . . Mr. Rourke asked me where I was going to send Mr. Rafferty. I said I was going to send him home for the present and watch his condition." The witness further testified as to the nature of Rafferty's <sup>602</sup> injuries, the medical and surgical services rendered, and the reasonableness of the charge made therefor.

John Rafferty, a witness for the plaintiff, testified: "I was employed on the tugboat 'Maude.' . . . I was master and pilot of the boat. I was working for John Rourke & Son. Mr. James Rourke employed me. . . . I sustained an injury. . . . I had my skull fractured. I fell and had my skull broke. I don't know what caused me to fall. When I fell I was about eight miles from here, on the boat. I was sick and asked a man to relieve me at the wheel, and before he came I fell. . . . After I fell I remember nothing. . . . When I came to I was at the hospital. I was unconscious about a week, I guess. I didn't employ a physician to attend me. When I came to, Dr. Norton was attending me. . . . Dr. Norton used to come to my house on some occasions for my stepson—he never was there for me. . . . I had never employed Dr. Norton for myself. I went myself to the marine doctor when anything happened to me. I would be treated free by the Marine Hospital service. . . . I didn't pay Dr. Norton anything. He has never presented a bill to me. . . . I didn't employ him or authorize his employment. To have free treatment from the Marine Hospital service, I would have had to go to the Marine Hospital. They would not treat me free if I were home."

James G. Rafferty testified for the plaintiff: "Captain Rafferty is my father. . . . My father was towing mud on the mud scow [at the time he was injured] . . . I got a message to go down to John Rourke & Sons' place, which I did. I met, when I got down there, Mr. Jim Rourke. He asked me who was the family physician, and I said Dr. Norton. He said, 'You better telephone for him.' I said, 'All right,' and

I started to do it, and he said to me, 'No, never mind, I will telephone for him myself.' He went off and I went aboard the boat. I found my father lying in the lower bunk. He was seriously hurt. Dr. Norton came there. We put my father in an ambulance and I went home with him in the ambulance. . . . If I had gone to the telephone when I started, I would have had to walk a couple of hundred feet, I guess. I am a cripple; I walk with a crutch. . . . He (my father) had worked for him [Mr. Rourke] two or three or four months. My father didn't work for him after he got well."

James A. Rourke testified for the defendants: "I am a member of two firms. The machine and foundry business has three members <sup>603</sup> in the firm; the firm name is Rourke & Sons; the members of the firm are my father, my brother John, and myself. The firm of John Rourke & Son is composed of my father and myself. This firm owns the tugboat 'Maude' and all floating property—lighters, tugboats, and so forth. This is the firm that owned the tugboat 'Maude' at the time of the injury to Captain Rafferty. I got down there on the morning this accident happened, shortly after 7. Some time after I got down there I saw the engineer of the boat, and then it was I heard of the accident to Captain Rafferty. I sent a boy after his son. I went to see the old man; he was lying in the bunk. . . . When I saw him the boat was lying at the wharf. . . . When he [James Rafferty] came down, I told him the old man was hurt and asked him what he wanted done; . . . he said, 'Better get the family physician.' I asked who it was. 'Dr. Norton,' he said. . . . Young James Rafferty is incorrect in his statement that I told him to go and telephone for a doctor and finally said no, that I would do it for him. I didn't offer to do that telephoning. I didn't do the telephoning at all. I didn't go to the telephone. . . . Harry Singleton, a white man, who was engineer of the boat, was standing there at the time of this conversation; he went to have the doctor telephoned for. . . . Dr. Norton is not my family physician. He does not do the work for Rourke & Son. . . . Dr. Owens is my father's physician. I knew that Captain Rafferty was a licensed captain. All steamboat people get their treatment free. All we had to do would be to send him to the Marine Hospital; . . . you have to sign a printed slip to get a steamboat man in there, that is all. . . . I had previously employed Dr. Norton to render services down there. That employment was over the telephone. I expect I did the telephoning at that time. . . . I don't think I said [to Dr.

Norton] . . . . 'Do the very best you can for this man.' I would not be positive about it."

Thomas J. Beytaugh, a witness for the defendants, testified that he was bookkeeper for John Rourke & Son at the time Captain Rafferty was injured, and that he telephoned from the office of John Rourke & Son to Dr. Norton to come down there. He did not remember who requested him to telephone, but he had not seen James A. Rourke that morning before telephoning. The testimony of Henry Singleton, a witness for the defendants was to the effect that he was the engineer of the steam tug "Maude" when John Rafferty met with the <sup>604</sup> accident, and brought the boat to the wharf with him, and immediately sent for his son, James Rafferty, who, immediately upon his arrival, requested the witness to send for Dr. W. E. Norton, who was the family physician; and that the witness went to the office of John Rourke & Son and requested the bookkeeper to telephone to Dr. Norton to attend Captain Rafferty. James Rafferty denied that he requested Singleton to send for Dr. Norton.

A nonsuit was granted as to the partnership, as the bill of exceptions states, "after all testimony had been introduced by both plaintiff and defendants." A verdict was rendered in favor of defendant James A. Rourke. The plaintiff moved for a new trial, the motion was overruled, and he excepted, complaining of the nonsuit and the refusal of a new trial.

When one summons a physician to care for another, rendered by sudden illness unable to act for himself, and to whom he stands in no relationship which creates an obligation to furnish necessary medical care, and no express undertaking is entered into, then, from the mere summoning of the physician and requesting him to care for the person who is ill, the law does not presume an implied promise by the one so acting to pay for the services of the physician summoned: *Meisenbach v. Southern Cooperage Co.*, 45 Mo. App. 232; *Jesserich v. Walruff*, 51 Mo. App. 270; *Smith v. Watson*, 14 Vt. 332; *Starrett v. Miley*, 79 Ill. App. 658. In the last case cited a woman who was, so far as appears from the report of the facts, a stranger to Starrett, ran into his house, wounded and bleeding, and fell there unconscious. He at once called in Miley, a physician, and directed him to the injured woman and told him to care for her. Starrett also had her carried to a room in his house. No express promise was made by him to pay the physician for the services rendered the woman. It was held that Starrett was not liable for the physician's services. In *Boyd v. Sappington*, 4 Watts (Pa.), 247, it was held that a

request by a father to a physician to attend his son, then ~~was~~ of full age, and sick at the father's house, raised no implied promise on the part of the father to pay for the services rendered. In *Crane v. Baudouine*, 55 N. Y. 256, the plaintiff attended as a physician upon the daughter of defendant, sick at the latter's house. The daughter was of age, married and living with her husband, but temporarily at her father's house, to be under the care of her mother. Defendant was present at the calls, gave plaintiff a history of the case, and received directions for her treatment. He told others of the visits and of his opinion of the case, assented to calling a consulting physician, and had previously employed other physicians to attend his daughter. Defendant testified that he did not employ or send for plaintiff. It was held that the defendant was not liable for the plaintiff's services. In *Holmes v. McKim*, 109 Iowa, 245, 80 N. W. 329, it was held: "One is not under any implied obligation to pay for the services of a physician called to attend a minor living with his family and supported by him, but not otherwise related to him, though he acquiesced in the attendance and had on a former occasion paid the same doctor for attending the same minor, the physician knowing, however, the true relations of defendant and said child." The doctrine is well stated in 22 *American and English Encyclopedia of Law*, 790. In *Meisenbach v. Southern Cooperage Co.*, 45 Mo. App. 232, Judge Seymour D. Thompson, delivering the opinion, said: "The reason and policy of this rule are obvious. . . . When a person is dangerously wounded and perhaps unable to speak for himself, or suffering so much that he does not know how to do it, . . . any person will run to the nearest surgeon in performance of an ordinary office of humanity. If it were the law that the person so going for the surgeon thereby undertakes to become personally responsible for the surgeon's bill, and especially for the surgeon's bill through the long subsequent course of treatment, many would hesitate to perform this office, and in the meantime the sufferer might die for want of necessary immediate attention. Nor is there a common and fair understanding that the person making the request, or ordering it to be made, in behalf of the sufferer, under the circumstances assumes responsibility for the surgeon's bill."

The general rule is well settled that a master is not, in the absence of some stipulation, under any legal obligation to furnish medical attendance for a servant who falls sick while engaged in ~~his~~ his duties: 26 Cyc. 1049; 20 Am. & Eng. Ency.

of Law, 52; and see the valuable monographic note to the case of *The Kenilworth*, in 4 L. R. A., N. S., 52, wherein many cases in point are collated. In *Sweet Water Mfg. Co. v. Glover*, 29 Ga. 399, decided in the days of slavery, it was said: "When one white man employs another to work for him, it is not an implication or incident that the employer shall pay the employé's physician's bills; it would require an express contract to create that obligation." There are cases holding that there are exceptions to this general rule, but it is needless to cite them, as it is not contended that the case at bar falls within any of the exceptions. In view of the authorities noted, the evidence in the present case, considered in its most favorable light for the plaintiff in error, did not authorize a recovery against either the defendant firm or the individual member thereof against whom the action was brought. While it would have been better practice to have directed a verdict at the conclusion of the evidence submitted by the parties, rather than to have granted a nonsuit as to the defendant firm, this is a matter of which plaintiff in error cannot complain. As the verdict was demanded by the evidence, it is not necessary to pass upon the exceptions to the charge.

Judgment affirmed.

All the justices concur.

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*An Implied Promise on the Part of One Who Requests performance of medical or surgical services to another to pay for them does not arise unless the relation of the patient to the person making the request is such as raises a legal obligation on his part to call in a physician and pay for his services: Spelman v. Gold Coin etc. Co., 26 Mont. 76, 91 Am. St. Rep. 402, and see the cases cited in the cross-reference note thereto. A promise to pay a physician for his services is not implied from the mere fact that a father calls him to attend his sick son, who is a man of mature age; but if the circumstances or conditions are such as to lead the physician to believe, and to charge the father with knowledge that the physician does believe, that the father is undertaking to pay for the services to be rendered, the father is liable under an implied contract: Morrell v. Lawrence, 203 Mo. 362, 120 Am. St. Rep. 660.*

## DORMINEY v. DE LANG.

[130 Ga. 618, 61 S. E. 475.]

**EXECUTION—Necessity of Acts in Making a Levy.**—If the statute requires a precedent act before a levy can be made, the performance of that act is necessary, and an official return thereof should be by appropriate entry. (p. 195.)

**EXECUTION—Levy of, Acts Which Need not Appear by the Return.**—If the statute does not require the entry of a precedent act as an essential to the making of a levy, then the validity of the levy rests upon the performance of the act, and not on the official return. (p. 195.)

**EXECUTION—Amendment of Entry of Levy.**—Where a fieri facias against two defendants is levied on land "as the property of the defendant," the court may, after the sale, allow the officer, who is still in office and present in court, to amend his entry of levy by naming which of the two defendants' property was levied upon. (p. 196.)

W. H. Horne and McDonald & Quincey, for the plaintiffs in error.

Jay & Jay, contra.

**EVANS, P. J.** This was a suit to cancel a sheriff's deed, on the ground that the sale of the land was invalid, because the execution had been paid, and the levy was void for excessiveness and indefiniteness in the entry. The evidence was conflicting on the issues as to payment and the excessiveness of the levy. The execution under which the sale was made ran against C. A. De Lang and Sidney Clare, and the entry of levy was: "Georgia, Irwin county. I have this day levied the within fi. fa. on city lot No. 7, square No. 1, block 10, in the city of Fitzgerald, Irwin county, Ga., as the property of the defendant. This Aug. 6th, 1903"; signed by the sheriff. During the trial the court refused a motion of the defendants in the present case to allow the sheriff, who made the levy, and who was still in office and present in court, to amend his entry of levy by naming which of the two joint defendants' property was levied upon. The court ruled that this amendment could not be made after the sale, and denied the motion. The correctness of this ruling is the controlling point in the present record.

The Civil Code (sections 5116, 5117) provides that "the sheriff or other executing officer may amend his official entries and returns so as to make such entries and returns conform to the facts of the case at the time such entry or return was made." "If the sheriff or other executing officer shall fail to make an

official return which by law he should have made, such entry or return may be made nunc pro tunc by order of the court, so as to make the proceedings conform to the facts at the time the entry should have been made." An amendment to a levy allowable under these sections may be made although the sale under the levy may have taken place: *Williams v. Moore*, 68 Ga. 585; *McLeod v. Brooks L. Co.*, 98 Ga. 253, 26 S. E. 745. The court is not bound to suspend the trial of a case in order to allow a party to secure an amendment <sup>620</sup> to a defective return. Still, if in his discretion the interests of justice require this to be done, he may suspend the trial and hear the necessary evidence and allow the entry or return to be amended, in order that as amended it may be used in the pending case. It is not every entry of levy which may be amended; the entry of levy may be so defective that it does not in law amount to a levy, and in such cases the entry of the sheriff cannot be amended. The statute requires that "the officer making a levy shall always enter the same on the process by virtue of which such levy is made, and in such entry shall plainly describe the property levied on, and the amount of the interest of the defendant therein": Civ. Code, sec. 5421. Where land is levied upon, and the entry of levy is so indefinite that the land cannot be accurately identified, the entry is so defective that it cannot be cured by amendment: *Ansley v. Wilson*, 50 Ga. 418. If, however, the entry describes the land seized, with such particularity that there can be no doubt about its identity, and the defect in the entry refers to other matters than the description of the property seized, the defect may be cured by amendment: *Manley v. McKenzie*, 128 Ga. 347, 57 S. E. 705.

The decisions of this court since the case of *Hopkins v. Burch*, 3 Ga. 222, have been uniform that there must be an entry of "no personal property to be found," before a justice's court fi. fa. can be legally levied on land; and in *Robinson v. Burge*, 71 Ga. 526, it was held that a sheriff's deed based on a justice's court fi. fa. upon which there was no entry of "no personal property to be found," is void, and conveys no title. Yet it has been held that after proper proof by a constable that he had made diligent search for personal property and failed to find any, and that the fi. fa. in his hands was thereupon levied on realty, the court could allow him to make an entry of no personalty, nunc pro tunc, although a sale had taken place under the levy, and the question arose in an ejectment suit based thereon: *Williams v. Moore*, 68 Ga. 585. At first glance it might seem that the last-cited case



conflicts in principle with the case of *Robinson v. Burge*, 71 Ga. 526, and *Hopkins v. Burch*, 3 Ga. 222, but on a careful analysis of the underlying principle it will be found that there is no antagonism between them. There must be a seizure of property to constitute a levy; and in this state, as there is never any actual taking possession <sup>621</sup> of land by the levying officer, his entry of the levy is an official assertion by him of his appropriation of the land to the plaintiff's judgment, and is constructive seizure: *Isam v. Hooks*, 46 Ga. 309. Where the statute requires a precedent act before a levy can be made, the performance of that act is necessary, and an official return thereof should be made by appropriate entry. If the statute does not require the entry of the precedent act, as an essential to the making of the levy, then the validity of the levy rests upon the performance of the act, and not upon the official return. Hence, if the officer did the act which the law required of him as a condition precedent to making the levy, the entry of levy could be amended so as to furnish official evidence that the condition had been complied with. The only means of ascertaining that the levying officer had made diligent search to find personal property of the defendant and had failed to find any, and after such search had levied a justice's court *fi. fa.* on land, is from his entry on the *fi. fa.*, and the code, sections previously quoted allow him to amend his entry so as to conform to the real facts. Thus, where there was no sheriff in a county, and a levy on realty was made by the sheriff of an adjoining county, that fact could be added to the entry by amendment: *Collins v. Hudson*, 69 Ga. 684.

The essential feature of a valid entry of levy on land is the description of the land in such a way as to be thoroughly capable of identification; and minor defects may be supplied by amendment. The entry of levy may be amended by adding the sheriff's signature which has been inadvertently omitted: *Sharp v. Kennedy*, 50 Ga. 208; *Rutherford v. Crawford*, 53 Ga. 138. The date may be supplied. In *Manley v. McKenzie*, 128 Ga. 347, 57 S. E. 705, many of the prior decisions of this court on the subject of amendment of an entry of levy by the officer who made it were examined, and it was there decided that an entry of levy upon land which describes the particular parcel of land in such a way as to be thoroughly capable of identification, but is defective for the reason that it does not state that the property was levied upon as the property of the defendant, may be amended by supplying this statement, where the officer who made the entry is present in court and offers so to do. If the failure to state, in the entry, that the

property seized is levied on as the property of the <sup>622</sup> defendant, be an amendable defect, then, for the same cogent reason, where the entry of levy on a fi. fa. against two defendants recites that the land is levied on as the property of "the defendant," it may be amended by stating which defendant is the alleged owner of the property.

But it is said that in several cases it has been ruled that where an execution is against more than one defendant, an entry of levy which fails to state on whose property it was made is not sufficient, and that a sale and deed under such a levy will not divest the title of the real owner of the land (Anderson v. Lee, 53 Ga. 189; Overby v. Hart, 68 Ga. 493; Cooper v. Yearwood, 119 Ga. 44, 45 S. E. 716; New England Mortgage Security Co. v. Watson, 99 Ga. 733, 27 S. E. 160; Tuells v. Torras, 113 Ga. 691, 39 S. E. 455); and it is argued that these cases imperatively demand a holding that such a defect is not amendable. In none of these cases was there an offer to amend, and in the two last cited the process was an attachment. It is to be noted that more strictness in this regard is required in cases of the levy of attachments upon real estate than in those of ordinary executions. In Anderson v. Lee, 53 Ga. 189, the land levied on was so defectively described that it was impossible to locate it; and that was adverted to in the opinion. McCay, J., said that if the property had been sufficiently described, "something might be said in favor of the levy." It is not disputed that where an ordinary execution against several defendants is levied upon certain land, an entry of levy which does not show as whose property the land was levied on is insufficient, and, unless amended, will invalidate the sale thereunder. The same is true where a justice's court fi. fa., without previous entry of "no personal property to be found," is levied on land. In each instance the levy is not void because of the omission in the entry; it is simply defective. The defect is amendable in the manner defined by the law; but unless amended, the levy will not serve as the basis of a sale so as to divest title. As already pointed out, the amendment may be made just as well after as before sale. The court erred in refusing the motion to amend.

It appears that the sheriff who made the levy died after the trial. No question was made by the record as to whether, under the facts of this case, the amendment proffered could be made <sup>623</sup> after his death, and such question has not been considered and is not decided by us.

Judgment reversed.

All the justices concur.

*On the Amendment of Writs of Execution*, see the note to Kipp v. Burton, 101 Am. St. Rep. 550.

*On the Amendment of Writs of Scire Facias*, see the note to Bank of Eau Claire v. Reed, 122 Am. St. Rep. 96.

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## CITY COUNCIL OF AUGUSTA v. AUGUSTA AND AIKEN RAILWAY COMPANY.

[130 Ga. 815, 61 S. E. 992.]

### INTERSTATE COMMERCE—City Taxation of Railroad.—

Where a city has granted permission to a railway company, exclusively engaged in the transportation of interstate freight and passengers, to run its cars over the tracks of a local street railway company, in accordance with a contract between the two companies, the city cannot impose an annual tax on the business of the interstate company for running its cars over the city streets. (p. 201.)

C. H. Cohen, for the plaintiffs in error.

Boykin Wright and George T. Jackson, contra.

**515** EVANS, P. J. The Augusta and Aiken Railway Company, a South Carolina corporation, is an interurban railroad company, and operates an electric railroad from Aiken, South Carolina, to Augusta, Georgia. In April, 1903, it entered into a contract with the Augusta Railway Company, a street railway, for the use of the latter's tracks in the city of Augusta, subject to the approval of the city council of Augusta. On October 6, 1903, the city council of Augusta passed an ordinance granting permission to the Augusta and Aiken Railway Company to use the streets of Augusta by running its cars upon the tracks of the Augusta Railway Company on certain streets, under the terms, conditions and limitations set out in the contract between the Augusta and Aiken Railway Company and the Augusta Railway Company, and providing that the grant to use the streets should expire with the charter of the Augusta Railway Company. Pursuant to this contract and ordinance, and on the faith thereof, the Augusta and Aiken Railway Company engaged in the business of transporting freight and passengers to and from Augusta over the tracks of the Augusta Railway Company, and had expended large sums and assumed large obligations in carrying out its contract with the local company in compliance with the ordinance. On December 29, 1905, the city council of Augusta enacted a "business license ordinance," the caption and material parts of which are as follows: "An ordinance to fix the

annual and specific taxes and licenses of the city of Augusta on business occupations and professions for the year 1906, and to provide for <sup>s16</sup> the collection of the same."

Section 1 of the ordinance ordains: "That the following annual and specific taxes and licenses on business occupations and professions, to be paid by the person or persons carrying on or engaged in said business occupations or professions, . . . shall be levied and collected, . . . and execution, [with a penalty] upon the amount of said taxes and licenses, shall be issued and enforced for all such annual and specific taxes and licenses," etc.

"Section 2. On the business of the following, viz.: . . . Upon every railroad company not exempted by contract or otherwise, for running cars on the streets of Augusta, \$1,666.66."

And on December 14, 1906, a similar ordinance was passed in the same language, for the levying and collection of a similar specific tax and license on business occupations and professions for the year 1907. Upon the authority of these ordinances the city council of Augusta caused to be issued executions against the Augusta and Aiken Railway Company for the amount of the tax for each of the years 1906 and 1907. The Augusta and Aiken Railway Company filed their petition to enjoin the levy and collection of the tax, on the grounds that it did not do any intrastate business; that it was solely engaged in the transportation of freight and passengers to and from the city of Augusta and points in the state of South Carolina, and did not enter into the business of transporting freight or passengers from any points within the limits of the city of Augusta or the state of Georgia to any other such point; and that it was not operating a street railroad, but an interurban railroad company. The court enjoined the levy and collection of the fi. fas., and the city excepted.

The first contention advanced by the defendant in error as a reason why it is not liable for the tax which the city of Augusta is asserting its right to collect is, that, inasmuch as it is a railroad company engaged exclusively as a common carrier of interstate freight and passengers, it is within the protection of the commerce clause of the constitution of the United States, which reserves to Congress the exclusive power to regulate commerce among the several states. A long line of decisions of the supreme court of the United States, beginning with the case of *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678, <sup>s17</sup> has firmly established the proposition that a tax laid on the occupation or business of carrying on inter-

state commerce is a burden on that commerce, and amounts to a regulation of it, which under the constitution of the United States, belongs solely to Congress: *Williams v. Fears*, 110 Ga. 584, 35 S. E. 699, 50 L. R. A. 685. It is admitted in the record that the defendant in error is a railroad company, exclusively engaged in transporting freight and passengers to and from the city of Augusta in this state, to and from points in the state of South Carolina, and that it does not handle any intrastate business. This being true, the city of Augusta cannot legally impose a tax on its business as an interstate carrier.

The city of Augusta, by its counsel, denies that the ordinance fixes a tax on the business of the defendant in error, but insists that it imposes a license tax on every railroad company "for running cars on the streets of the city of Augusta," and that the city of Augusta may lawfully exact of any railroad company a license tax or rental charge for the use of its streets. It will be seen from the statement of facts that the Augusta and Aiken Railway Company contracted with the local intraurban street railway company for the use of its tracks along certain streets, and that the city of Augusta, by ordinance on October 6, 1903, granted permission to the defendant in error to use the streets of Augusta by running its cars upon the tracks of the Augusta Railway Company on certain streets, under the terms of the contract between the Augusta and Aiken Railway Company and the Augusta Railway Company. The city in this ordinance exacted no terms and imposed no restrictions outside of the contract between the two railway companies; and the ordinance neither reserved nor surrendered any power to tax.

A municipality sustains a dual relation to its streets and thoroughfares—that of sovereign and of proprietor. In the latter capacity a municipality may under certain circumstances contract for the use of its streets. A municipal charge for the use of the streets for any lawful purpose is the exercise of the city's right of proprietorship, and is not the imposition of a privilege or license tax. In the well-considered case of *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. Rep. 485, 37 L. ed. 380, it appeared that the city of St. Louis passed an ordinance authorizing telephone and telegraph companies to set their poles upon the <sup>818</sup> streets, subject to certain prescribed regulations, and the city subsequently passed another ordinance amendatory of the first, imposing upon all telegraph and telephone companies which were not taxed on their gross incomes a charge of five dollars per annum upon each telegraph or telephone pole for the priv-

ilege of using the streets. It was held that the charge was not a privilege or license tax, as the amount to be paid was not graduated by the amount of the business, nor was any stated sum fixed for the privilege of doing business; that the charge was for the use of property belonging to the city, and was more properly a rental. The company might purchase the right to erect its poles on private property, and the city in that event would receive nothing; hence the charge was in the nature of a toll and not a tax. "A tax is a demand of sovereignty; a toll is a demand of proprietorship." But in this case, as well as many others, it was recognized that the grant of authority to a telegraph company to set its poles in the street for a fixed rental, when accepted and acted upon, became an irrevocable contract, and the city could not set it aside, or arbitrarily increase the rental above that obligated to be paid: *People v. Chicago West Division Ry. Co.*, 118 Ill. 113, 7 N. E. 116; *City of Des Moines v. Chicago etc. R. Co.*, 41 Iowa, 569; *Norfolk etc. R. Co. v. Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. Rep. 958, 34 L. ed. 394; *Western Union Tel. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067. The record discloses that, acting upon the permission given in the ordinance, the defendant in error had disbursed large sums of money on the faith of the grant; and the city is now estopped, during the life of the grant, from exacting any additional sum as a rental for the use of its streets. The ordinance by force of which this tax is claimed shows on its face that the city's purpose is to collect a tax, for a fixed sum, for conducting the business of running cars upon the city's streets, and not a rental charge for the use of its property.

Nor can the tax levied by these ordinances be sustained as a license tax under the police power to recompense the city for its police supervision. It has been held that where telegraph companies, engaged in interstate commerce, carry on their business so as to justify police supervision, the municipality is not obliged to furnish such supervision for nothing, but it may, in addition to ordinary property taxation, subject the corporations to reasonable <sup>819</sup> charges for the expenses thereof: *Western Union Tel. Co. v. New Hope*, 187 U. S. 419, 23 Sup. Ct. Rep. 204, 47 L. ed. 240; *Atlantic & Pacific Tel. Co. v. Philadelphia*, 190 U. S. 160, 23 Sup. Ct. Rep. 817, 47 L. ed. 995; *Postal Tel. Co. v. New Hope*, 192 U. S. 55, 24 Sup. Ct. Rep. 204, 48 L. ed. 338. These cases were decided upon the taxing laws of Pennsylvania, and we will not stop to inquire whether the principle therein enunciated would harmonize with the system of taxation of rail-

roads which prevails in this state. We would hesitate to discuss so important a question when a decision of it is not necessary to an adjudication of the present case. The captions of these ordinances disclose their character and purpose, viz.: to raise revenue from taxes placed on business occupations and professions. In express words it is declared that the tax shall be levied "on the business of the following, viz.: . . . . Upon every railroad company not exempted by contract or otherwise, for running cars on the streets of the City of Augusta, \$1,666.66." As was observed by Chief Justice Fuller, in the *Western Union Tel. Co. v. New Hope*, 187 U. S. 419, 23 Sup. Ct. Rep. 204, 47 L. ed. 240, a charge for the enforcement of local governmental supervision is distinct from an occupation or business tax.

By process of elimination, if the tax imposed by these ordinances can neither be upheld as a charge for the rental of the streets nor as a charge for municipal supervision, it must fall on the business of operating the cars of the railroad company on the streets of the city. And as the railway company is exclusively engaged in transporting freight and passengers to and from Augusta to and from points within the state of South Carolina, the tax is laid on the occupation or business of carrying on interstate commerce, which the city of Augusta is without power to impose.

In the argument it was sought to bring this case within the ruling in the case of *Savannah T. & I. H. Ry. v. Savannah*, 112 Ga. 164, 37 S. E. 393. But the facts of the two cases are radically different. In the *Savannah* case the street railroad company did both an intraurban and an interurban business, and the court held that a street railway company which did a business of carrying passengers for hire between intraurban points pursued an occupation in the city, notwithstanding it also did an interurban business; and the fact distinguishes that case from the one now under consideration.

Counsel for plaintiff in error asked leave to review the case of <sup>820</sup> *City Council of Augusta v. Central R. Co.*, 78 Ga. 119, and the later cases where the ruling enunciated in the 78 Ga. was followed. In that case it was held that a city could not lawfully exact of railroad companies entering or passing through the city an annual specific tax on their general business of a common carrier, where the companies did no other business in the city except such as was authorized by their charters as carriers of passengers and freight. Inasmuch as we have reached the conclusion that the occupation tax imposed by the ordinance under consideration did not fall upon

the defendant in error, because its business was exclusively that of a common carrier engaged in interstate commerce, it is unnecessary to examine into the soundness of those cases which are asked to be reviewed.

Judgment affirmed.

All the justices concur.

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*A State cannot Interfere with Interstate Commerce* by the imposition of a tax for the privilege of transacting such commerce, but it does have a right to tax at their full value all the instrumentalities within the state used for such commerce: *Hall v. American Refrigerator Transit Co.*, 24 Colo. 291, 65 Am. St. Rep. 223. A cab service maintained in the city of New York by a foreign railway corporation to transport to and from various points within that city its passengers who are conveyed to and from the city by a ferry from the railway terminus of the corporation in another state, such cab service, both beginning and ending within the city, is not incidental to, nor any part of, interstate commerce, and the capital employed in making such service is not exempt from taxation imposed by sections 182 and 184 of the Laws of 1896, chapter 908, relating to franchise taxes upon corporations: *People v. Knight*, 171 N. Y. 354, 98 Am. St. Rep. 610.



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**INDIANA.**

**STATE v. BELL.**

[169 Ind. 61, 82 N. E. 69.]

**QUO WARRANTO, Who has not an Interest Entitling Him to Maintain to Test Title to an Office.**—One who has received a minority of the votes cast at an election for a public office has not such an interest as entitles him to become a relator and maintain a proceeding to oust an ineligible candidate who has received a majority of the votes cast. (pp. 206, 207, 211.)

**ELECTION, Effect of Where an Ineligible Candidate Receives a Majority of the Votes Cast.**—The votes cast for an ineligible candidate must, in the absence of proof that they were given with knowledge on the part of the electors of such ineligibility, be counted, and they therefore prevent the declaration of the election of an eligible candidate receiving the next highest number of votes. (p. 207.)

**ELECTION—Votes for an Ineligible Candidate—Presumption as to Knowledge of the Want of Eligibility.**—It cannot be presumed that the voters willfully or obstinately cast their votes with notice that he for whom they were cast was ineligible to be elected or to hold the office. (pp. 208, 209.)

**ELECTIONS.—If an Ineligible Candidate Receives the Greatest Number of Votes Cast at an election, it is void, and does not result in the election of the person receiving the next highest number of votes, where it is not shown that the electors voted with knowledge of the ineligibility.** (pp. 209, 211.)

Horace G. Yergin and Thomas J. Study, for the appellant.

M. E. Forkner, G. D. Forkner, W. O. Barnard and W. E. Jeffrey, for the appellee.

**JORDAN, J.** On January 5, 1907, John M. Clawson, as relator, filed a complaint in the lower court, in the nature of quo warranto, for the purpose of contesting the election of appellee to the office of county assessor of Henry county, and of obtaining a judgment ousting him from said office, and awarding the possession thereof to the relator, together with damages in his favor against appellee for the detention of the office in question. Appellee unsuccessfully demurred

to the complaint upon the ground of insufficiency of facts. Thereupon he filed an answer in two paragraphs, the first being a general denial and the second alleging affirmative matter. Upon the issues joined under the pleadings there was a trial by the court and a finding in favor of appellee, and, over the relator's motion for a new trial, assigning the statutory grounds, the court rendered judgment that he take nothing and that appellee recover of him his costs laid out and expended.

The only error assigned and relied upon for a reversal is the overruling of the motion for a new trial. The complaint alleges facts to show the eligibility and qualification of the relator, John M. Clawson, to be elected to and hold the office of county assessor. It further avers that at the general election held on November 6, 1906, at Henry county, for the election of county assessor and other officials, the defendant, Jesse Bell, and the relator and William <sup>es</sup> A. Smith were the only candidates voted for by the electors of said county for the office of county assessor; that the relator "received the highest number of votes at said election for said office of any of the eligible candidates therefor," and therefore he was duly elected thereto for a term of four years from January 1, 1907; that the defendant is ineligible to hold said office of county assessor, for the reason that he was not a resident freeholder of Henry county for four years prior to the date of said election; that the relator on December 19, 1906, filed with the county auditor his official bond, as required by law, with good and sufficient sureties, and that on the same day he took the required oath of office and became duly qualified to act and discharge the duties of county assessor; that on January 5, 1907, he demanded of the defendant possession of the office, together with all books, papers and keys thereto belonging, with which demand the defendant refused to comply; that said defendant on January 4, 1907, usurped said office, and has held the same and received the fees and emoluments thereof, in the sum of twenty-five dollars, and that he has, during said time, wrongfully and unlawfully kept the relator out of possession of the office and deprived him of the fees and emoluments, to his damage in the sum of twenty-five dollars.

The complaint discloses that the relator demanded possession of the office on January 5th, before the commencement of this action on that date. The following, among other facts, is shown by the evidence in the record: Appellee was nominated by the Republican party of Henry county, Indiana, as a candidate for county assessor, at the primary election held

by that party in 1906. Relator was nominated as a candidate for the same office by petition as a candidate of the Citizens party. William A. Smith was also nominated for the office by the Prohibition party. The board of election commissioners of Henry county, in pursuance of law, appears to have caused the names of each <sup>64</sup> of said nominees to be printed on the official ballots as candidates for said office at the election in question. It is shown by the official canvass and return of the votes cast at the election that appellee received 3,257 of the votes cast by the voters of said county for county assessor, the relator received 1,783 votes for the same office, and William A. Smith received 265 votes. Appellee was duly returned by the proper board of canvassers as elected to the office in controversy, and the proper certificate of his election was issued and delivered to him. On November 24, 1906, he appears to have qualified by executing an official bond to the approval of the county auditor, and by taking the required oath of office. After having so qualified he entered into possession of the office on January 4, 1907, and began to discharge the duties thereof. The relator, on November 19, 1906, appears to have taken the oath of office and executed an official bond, which he tendered to the county auditor for acceptance and approval. The auditor refused to receive or approve this bond, on the ground that the relator had not been elected to said office. The evidence shows that the relator had been a resident freeholder of Henry county for over four years prior to the date of election, and was in other respects qualified for said office. There is also evidence tending to show that appellee, at and prior to the election, was a resident freeholder, and had been a voter of the county for many years. Relator predicates his right to institute and maintain this action upon the provisions of sections 1188, 1189 of Burns' Revised Statutes of 1908 (Rev. Stats. 1881, secs. 1131, 1132), relating to the filing of information, etc. It is provided in section 1188, *supra*, that "an information may be filed against any person or corporation in the following cases: First, when any person shall usurp, intrude into, or unlawfully hold or exercise any public office." Section 1189, *supra*, provides that "the information may be filed by the prosecuting attorney in the circuit court of the proper county, upon his own relation, whenever he shall deem it <sup>65</sup> his duty to do so, or shall be directed by the court or other competent authority, or by any other person on his own relation, whenever he claims an interest in the office." Section 112 of the statute concerning taxation, as amended by an act of the legisla-

ture approved February 25, 1903 (Acts 1903, p. 49, sec. 37 Burns' Rev. Stats. 1905, sec. 8530), provides: "There shall be elected on the first Tuesday after the first Monday in November, 1906, and every four years thereafter in each county in this state, one county assessor, who shall possess the powers and perform the duties hereinafter specified. Such county assessor shall be a resident freeholder of the county not less than four years before the date of such election."

The gravamen of the complaint is the ineligibility of appellee to be elected to, and to hold the office in controversy because he had not been a freeholder at the date of the election, as required by the above statute; that by reason of the fact that the relator received at such election the next highest number of votes, he was elected to said office and is entitled thereto. In fact, the only contention urged by counsel for reversal of the judgment is that the evidence in the case establishes that the appellee was not a freeholder at the date of the election in 1906, or at any time within four years prior thereto. Consequently they argue that he was not eligible to be elected to or to hold the office of county assessor. They further insist that, as the relator received the next highest number of votes, and is shown to have been a freeholder, as required by the statute, and otherwise eligible to be elected to and to hold the office, and having qualified as shown, he is entitled to the possession of the office and to receive and have the emoluments thereof; or, in other words, they seek to sustain his right to oust appellee from the office and to be installed therein himself, solely on the ground that he, an eligible candidate at the election in <sup>66</sup> controversy, received the next highest number of votes to appellee, who was, as asserted, ineligible. Opposing counsel endeavor to uphold the right of appellee to the office, (1) because, as they contend, the evidence establishes that he was a freeholder as required by law at the date of the election; (2) that the statute requiring a county assessor to be a freeholder, etc., is repugnant to the state constitution, and contrary to the fundamental principles of our government, and therefore invalid. We pass the question in respect to the invalidity of the statute without consideration, for the reason that we have reached a conclusion unfavorable to relator upon a vital point in the case.

Conceding, without deciding, that appellee, under the facts is shown to have been ineligible at the date of the election on the ground as claimed by the relator, nevertheless the latter, under the facts and the law applicable thereto, as here-

after shown, is not in a position successfully to maintain an action to contest the election of appellee and to oust him from the office in question. It will be noted that by section 1189, *supra*, the prosecuting attorney is authorized, upon his own relation, to file the information provided by section 1188, *supra*, or the same may be filed by "*any other person on his own relation, whenever he claims an interest in the office.*" (Our italics.) The claim to the office which the relator asserts under the facts as alleged in his complaint, and as shown by the evidence, cannot be held to be such an interest therein, within the meaning of the statute, as will authorize him to become the relator in this case. The interest claimed must be shown to be such as will, in the eye of the law, give him a standing in court to maintain the action: *State v. Ireland* (1891), 130 Ind. 77, 29 N. E. 396; *Reynolds v. State* (1878), 61 Ind. 392; 15 Cyc. of Law & Proc. 406.

At the election in question relator neither received a majority nor plurality of the votes cast by the electors of Henry county for county assessor, while, in fact, appellee <sup>67</sup> appears to have received a large majority of the votes cast for that office. Under the facts the relator falls far short of establishing any legal right to or interest in the office. It does not necessarily follow because he, an eligible candidate, received the next highest number of votes to appellee, who was ineligible, as we have, for the sake of argument conceded, must be held to have been elected to the office. While the rule affirmed by the authorities is that a majority or plurality of votes cast at a popular election for a person ineligible to the office for which such votes are cast does not, as a general rule, confer any right or title to the office upon such an ineligible candidate, nevertheless the votes so cast will be effectual to prevent the election of an eligible person who received the next highest number of votes, in the absence of proof of the fact that the votes cast for the ineligible candidate were given by the electors with the full knowledge, either actual or constructive, of his ineligibility: 10 Am. & Eng. Ency. of Law, 2d ed., 758; 15 Cyc. of Law & Proc. 404; *Commonwealth v. Cluley* (1867), 56 Pa. 270, 94 Am. Dec. 75; *People v. Clute* (1872), 50 N. Y. 451, 10 Am. Rep. 508.

This rule is in harmony with the holding in *Gulick v. New* (1860), 14 Ind. 93, 77 Am. Dec. 49, which is the first decision in this state to assert and follow what is recognized as the English rule. The same rule was affirmed and followed in *Carson v. McPhetridge* (1860), 15 Ind. 327. All other cases in this state involving the same question rest upon *Gulick v.*

New, 14 Ind. 93, 77 Am. Dec. 49, and they must be limited to the rule as therein recognized and affirmed, and cannot be considered as extending beyond the holding in that case. The court, in the case last cited, in considering the question as there involved, said: "Whilst it is true that the votes of the majority should rule, the tenable ground appears to be that if the majority should vote for one *wholly incapable of taking the office*, having notice of such incapacity, or should positively refuse, or negligently fail, to <sup>68</sup> express their choice, those, although a minority, who should legitimately choose one eligible to the position, should be heeded." (Our italics.) Perkins, J., in an opinion in the same case, in expressing the views of the court, said: "Where, at an election, there are opposing candidates for an office, and the candidate receiving the highest number of votes is ineligible, but from a fact or cause which the voters did not and were not bound to know the result is a failure, and gives no candidate the right to the office, and should be followed by another election. Probable examples, under this proposition, of cases where the voters might not have knowledge, viz.: infancy of candidate; non-residency; want of naturalization; not of male sex; not of required degree of white blood; not in existence. . . . Where the voters at the election do know, or are legally bound to know, so that, in law, they are held to know, of the ineligibility of a candidate, the election does not result in a failure; but in such case, the eligible candidate receiving the highest number of votes is legally elected, and entitled to the office."

In the case of *Hoy v. State* (1907), 168 Ind. 506, 81 N. E. 509, we considered the basis upon which the English rule is founded, and said: "The cases of *Gulick v. New* (1860), 1 Ind. 93, 77 Am. Dec. 49, and *Vogel v. State* (1886), 107 Ind. 374, 8 N. E. 164, accept and enforce the English rule. Under the latter rule or doctrine great stress is placed upon the fact that the electors, having had notice of the ineligibility or incompetency of the person for whom they cast their votes, therefore it is 'willful obstinacy and misconduct' on their part to cast their votes for a person laboring under a known incompetency." The vital infirmity in the case at bar is that neither the facts as alleged in the complaint, nor as disclosed by the evidence in any manner show that the electors of Henry county, when they cast their votes for appellee, had any knowledge, either actual or constructive, of his ineligibility. It cannot, in the absence <sup>69</sup> of such a showing, be presumed that they "willfully or obstinately" cast their votes for appellee with notice that he was ineligible to be elected to, and to hold

the said office: *Hoy v. State* (1907), 168 Ind. 506, 81 N. E. 509; *Barnum v. Gilman* (1881), 27 Minn. 466, 38 Am. Rep. 304, 8 N. W. 375; *In re Corliss* (1876), 11 R. I. 638, 23 Am. Rep. 538.

In the latter case the court held that where a disqualified candidate has received the greatest number of votes, the election is void and does not result in the election of the eligible candidate for the same office who received the next highest number of votes, where it is not shown that the electors, with knowledge of the disqualification, willfully voted for the ineligible candidate. In *People v. Clute*, 50 N. Y. 451, 10 Am. Rep. 508, the facts appear to be as follows: The relator, Furman, and the defendant, Clute, were at the general election held in November, 1871, opposing candidates for the office of superintendent of the poor for the county of Schenectady, New York. A statute of that state prohibited the election of a supervisor of a town or city to the office of the superintendent of the poor. Clute, at the time of the election, appears to have held the office of supervisor of the fifth ward of the city of Schenectady. He received at said election a majority of all the votes cast for the office in question, and the relator, an eligible candidate, received the next highest number. Clute was declared elected, and, having qualified as required by law, entered upon the discharge of the duties of the office. The relator, Furman, also took the oath of office, tendered to and deposited with the proper officer his official bond, and then claimed the office and commenced an action in the name of the people, on his own relation, to oust Clute therefrom and to obtain possession thereof for himself, on the ground that, under the statute, Clute was ineligible to be elected to the office. There was no proof on the trial of actual notice to any of the electors of the county of Clute's ineligibility, nor were there any facts shown from which <sup>70</sup> such notice could be implied or imputed, other than the fact that at the time of the election Clute held the office of supervisor in said county. The court in that case held that, by reason of the statute, Clute was not eligible to the office, but also held that the relator, who received the next highest number of votes, was not entitled to the office, in the absence of proof that the persons who voted for Clute did so with notice or knowledge of his ineligibility. It was further held that there was no presumption of notice on the part of the electors by reason of the fact that Clute's ineligibility was created by statute. In passing upon the question, and denying the right of the relator to be

awarded the office, the court, by Folger, J., said on page 466: "We think that the rule is this: The existence of the fact which disqualifies, and of the law which makes that fact operate to disqualify, must be brought home so closely and so clearly to the knowledge or notice of the elector, as that to give his vote therewith indicates an intent to waste it. The knowledge must be such, or the notice brought so home, as to imply a willfulness in acting, when action is in opposition to the natural impulse to save the vote and make it effectual. He must act so in defiance of both the law and the fact, and so in opposition to his own better knowledge, that he has no right to complain of the loss of his franchise, the exercise of which he has wantonly misapplied. . . . Our theory of government by the people is upon the assumption that the people as a whole are intelligent of their rights and interests, and are honestly and earnestly concerned in the due and wise administration of affairs, and zealously alive to the need of good and fitting men in the various places of public trust, and hold in high esteem the privilege of suffrage, and are unready to pretermit its exercise or to exercise it meaninglessly. It is much to presume, with this as our starting point, that any considerable body of electors will purposely so exercise their right of electing to office as that it shall be but an empty form; and <sup>71</sup> that going through with outward signs of an election they will of intent so cast their ballots as that they will be votes wasted."

The number of votes which the relator in the case at bar received is far below those received by appellee. To nullify the votes cast for the latter, in the absence of proof of the required knowledge of his ineligibility on the part of the persons who voted for him, and award to the relator the right to the office in question, would be antagonistic to the principles of popular government, and would, as is shown by the number of votes cast for appellee, be in opposition to the deliberate choice of a large majority of the voters of Henry county. There are some loose expressions in the cases of *State v. Gallagher* (1882), 81 Ind. 558, and *State v. Johnson* (1885), 100 Ind. 489, and in other cases decided by this court upon the question here involved, which might afford room for asserting that these decisions do not consider the feature of notice or knowledge upon the part of the voters as an essential and controlling element, and are, for this reason, in opposition to the holding in *Gulick v. New*, 14 Ind. 93, 77 Am. Dec. 49. This is not the intent of these cases, and they must be limited and restricted to the doctrine as enunciated in the latter case.



We find no warrant under the facts in this case for holding that the votes cast for appellee should be treated as nullities, and therefore rejected, and the right to the office be awarded to the relator. In a legal sense, he has no more interest therein or thereto than he would have had he not been a candidate at said election. If appellee, as claimed, is disqualified for holding the office, the proper prosecuting attorney, as provided by the statute, can institute an action in the name of the state on his own relation to oust him from the office.

We find no error. Judgment affirmed.

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**EFFECT OF ELECTION WHERE THE CANDIDATE RECEIVING  
A MAJORITY OF THE VOTES IS INELIGIBLE.**

**I. Rule that There is an Entire Failure to Elect.**

a. Statement of Rule, 211.

b. Reasons for Rule, 212.

**II. Rule that Opposing Candidate is Elected.**

a. In General, 213.

b. In Case of Notice to Electors of the Ineligibility, 213.

**III. Votes Cast for a Deceased or Other Nonexistent Person, 218.**

**IV. Effect on the Incumbent of an Office of the Vote Cast for an Ineligible Successor, 218.**

**V. Whether Eligibility must Exist at the Date of the Election, 218.**

**I. Rule that There is an Entire Failure to Elect.**

a. Statement of Rule.—The general rule is that where the candidate for an office who receives a majority or plurality of the votes is ineligible, the election is without validity and effect for any purpose; it confers no rights on the ineligible candidate, nor does it confer a right to the office on an eligible candidate who receives the next highest number of votes cast: *Swepston v. Barton*, 39 Ark. 549; *Saunders v. Haynes*, 13 Cal. 145; *Crawford v. Dunbar*, 52 Cal. 36; *Campbell v. Free* (Cal. App.), 93 Pac. 1060; *State v. Swearingen*, 12 Ga. 23; *Crovatt v. Mason*, 108 Ga. 246, 28 S. E. 891; *Haggard v. People*, 130 Ill. App. 211; *State v. Bell*, 169 Ind. 61, ante, p. 203, 82 N. E. 69, 13 L. R. A., N. S., 1013; *Prewett v. Stevens*, 25 Kan. 275; *Stevens v. Wyatt*, 55 Ky. (16 B. Mon.) 542; *State v. Gastinel*, 18 La. Ann. 517; 20 La. Ann. 114; *Fish v. Collens*, 21 La. Ann. 289; *People v. Molitor*, 23 Mich. 341; *Sheridan v. St. Louis*, 183 Mo. 25, 81 S. W. 1082; *Herget v. Walsh*, 7 Mo. App. 142; *State v. Boyd*, 31 Neb. 682, 48 N. W. 739, 51 N. W. 602 (reversed on other grounds in 143 U. S. 135, 12 Sup. Ct. Rep. 375, 36 L. ed. 103); *Gardner v. Burke*, 61 Neb. 534, 85 N. W. 541; *People v. Thornton*, 60 How. Pr. 457; *Commonwealth v. Cluley*, 56 Pa. 270, 94 Am. Dec. 75; *In re Corliss*, 11 R. I. 638, 23 Am. Rep. 538; *Batterton v. Fuller*, 6 S. D. 257, 60 N. W. 1071; *State v. McGeary*, 69 Vt. 461, 38 Atl. 165, 44 L. R. A. 446; *Dryden v. Swinburne*, 20 W. Va. 89; *State v. Giles*, 2 Pinn. 166, 1 Chan. 112, 52 Am. Dec. 149; *State v. Smith*, 14 Wis. 497; *Regina v. Tewksbury Corp.*, L. R. 3 Q. B. D. 629, 37 L. J. Q. B. 288, 18 L. T. 851; 16 Week.

Reg. 1200, 9 Best & S. 683; *Regina v. Hiorns*, 7 Ad. & E. 960, 3 N. P. 148, 2 Jur. 108; *Rex v. Bridge*, 1 Maule & S. 76, 14 R. R. 395.

"Where a majority of the votes cast at an election are for a person who is ineligible, they are still not void, but must be counted as votes, and, therefore, the one receiving the minority is not entitled to the office": *State v. Tierney*, 23 Wis. 430. "The effect, where a person who is ineligible receives a majority of the votes cast in an election is not to give the office to the qualified person having the next highest number of votes, but to invalidate the election; and in such a case a new election must be held": *Dobbs v. Buford*, 128 G. 483, 57 S. E. 777. "Although the majority vote for a disqualified person, the votes so cast are not illegal, and therefore to be treated as naught; but the result is, if the ineligible candidate cannot take the office, the electors have failed to make a choice. In truth there has been no election at all, and the minority candidate has no right to the office": *Sublett v. Bedwell*, 47 Miss. 266, 12 Am. Rep. 338.

b. *Reasons for Rule.*—The person receiving the highest number of votes in such a case is not elected because of his ineligibility; and no other candidate can be considered as elected, because a majority of the electors have expressed their will and determination that he should not be elected: *Wood v. Bartling*, 16 Kan. 109. "An election is the deliberate choice of a majority or plurality of the electoral body. This is evidenced by the votes of the electors. But if a majority, those voting, by mistake of law or fact, happen to cast their votes upon an ineligible candidate, it by no means follows that the next man on the poll should receive the office. If this be so, a candidate might be elected who received only a small portion of the votes, and who never could have been elected at all but for this mistake. These votes are not less legal votes because given to a person in whose behalf they cannot be counted; and the person who is the next to him on the list of candidates does not receive a plurality of votes because his competitor was ineligible. The votes cast for the latter, if true, cannot be counted for him; but that is no reason why they should, in effect, be counted for the former, who, possibly, could never have received them. It is fairer, more just, and more consistent with the theory of our institutions, to hold the votes so cast to be merely ineffectual for the purpose of an election, than to give them the effect of disappointing the popular will, and electing to office a man whose pretensions the people had designed to reject": *Saunders v. Haines*, 13 Cal. 145.

"To declare a candidate for an elective office elected who has received but a few votes, on the ground that his competitor, who has received perhaps twice as many, was disqualified, would not accomplish the will of the electors. The object of an election is to ascertain the choice of the majority. If a disqualified candidate received a thousand votes, and his competitor only a hundred, to pronounce the latter elected is not in accordance with any ascertained will of the electors, unless it is inferred that the votes cast for the disqualified candidate were cast with a knowledge of his inability to take the

office—an inference which could not be drawn where the disqualifications are such as are enumerated in the pleadings in this case. It is unnecessary to determine whether it would be the rule in any case of disqualifications, whether patent or latent": *Sheridan v. St. Louis*, 183 Mo. 25, 81 S. W. 1082.

## II. Rule that Opposing Candidate is Elected.

a. **In General.**—The supreme court of Indiana, at least in its earlier decisions, laid down a doctrine at variance with the general rule recognized elsewhere: *Gulick v. New*, 14 Ind. 83, 77 Am. Dec. 49, *Carson v. McPhetridge*, 15 Ind. 327. It is "law, well settled in this state," to quote from *Price v. Baker*, 41 Ind. 572, 13 Am. Rep. 346, "that where a majority of the ballots at an election are given to a candidate who is not eligible to the office, the ballots so cast are not to be counted for any purpose. They cannot be counted to elect the ineligible candidate or to defeat the election of an opposing candidate by showing that he did not receive a majority of the votes cast at such election. They are regarded as illegal, and as having no effect upon the election for any purpose. As a consequence, it follows that the candidate who is eligible, having the highest number of legal votes, though that number may be less than the number of votes cast for the ineligible candidate, and less than a majority of all the votes cast at such election, is entitled to the office." "Votes cast for a person not eligible to an office cannot be counted against the opposing candidate who is eligible": *State v. Johnson*, 100 Ind. 489; *Vogel v. State*, 107 Ind. 374, 8 N. E. 164; *Copeland v. State*, 126 Ind. 51, 25 N. E. 866. The law as thus declared in Indiana is supposed to be supported by the decisions in England: *Hawkins v. Rex*, 10 East, 211, 2 Dow, 124, 14 R. R. 129; *King v. Parry*, 14 East, 550; *Gosling v. Velej*, 7 Q. B. 406; *French v. Nolan*, 2 Moak, 711, 2 C. L. R. 947, 23 L. J. Q. B. 133; *Regina v. Coaks*, 3 El. & B. 249, 18 Jur. 378; *Rex v. Monday*, Cowp. 530; *Rex v. Foxcroft*, 2 Burr. 1017, 1 Black. 229. Whatever may be said of the intermediate Indiana decisions, the earliest and the latest are not necessarily inconsistent. Thus, in the case of *Gulick v. New*, 14 Ind. 83, 77 Am. Dec. 49, the court did not maintain that in all cases where a candidate was ineligible and received the highest number of votes cast, such votes could be disregarded and the office given to the person receiving the next highest number, but, in effect, declared that such could be the case only when the votes were cast with knowledge on the part of the voters of the ineligibility of a candidate. The only questionable part of the decision in this case, if it be at all questionable, was in affirming that the voters must take notice, as a court would doubtless do, of who was the incumbent of a designated office, and that if by law such incumbent was ineligible to another office, for which he was a candidate, then that the voters should be treated as if possessing actual knowledge of the ineligibility.

b. **In Case of Notice to Electors of the Ineligibility.**—But the English doctrine is not so broad as the above extracts from the Indiana

opinions suggest. "In England," to quote from *In re Corliss*, 11 R. I. 638, 23 Am. Rep. 538, "it has been held that where electors vote for an ineligible candidate knowing his disqualification, their votes are not to be counted any more than if they were thrown for a dead man, or the man in the moon; and that in such a case the opposing candidate, being qualified, will be elected, though he has but a minority of the votes: *Hawkins v. Rex*, 10 East, 211, 2 Dow, 124, 14 R. R. 129; *Regina v. Coaks*, 3 El. & B. 249, 2 C. L. R. 947, 23 L. J. Q. B. 133, 18 Jur. 378. But even in England, if the disqualification is unknown, the minority candidate is not entitled to the office, the election being a failure: *Regina v. Hiorns*, 7 Ad. & E. 960, 3 N. & P. 148, 2 Jur. 108; *Rex v. Bridge*, 1 Maule & S. 76, 14 R. R. 395. And it has been held that to entitle the minority candidate to the office, it is not enough that the electors know of the facts which amount to a disqualification, unless they likewise know that they amount to it in point of law: *Regina v. Mayor etc. of Tewksbury*, L. R. 3 Q. B. D. 629, 37 L. J. Q. B. 288, 18 L. T. 851, 16 Week. Rep. 1200, 9 Best & S. 683. In this country the law is certainly not more favorable to the minority candidate."

And the supreme court of Pennsylvania, in speaking of *John Bailey's* case, said: "But neither in his case, nor in any other with which we are acquainted, were the votes given to the successful candidate treated as nullities, so as to entitle one, who had received a less number of votes, to the office. There is a class of cases in England, apparently but not really, asserting otherwise. The earliest of them are referred to by Mr. Buller in his argument in *Rex v. Monday, Cowp.* 530. They were followed by *Hawkins v. Rex*, 10 East, 211, 2 Dow, 124, 14 R. R. 129, and *Rex v. Parry*, 14 East, 550. In these cases it is said that if sufficient notice is given of a candidate's disqualification, and notice that votes given for him will be thrown away, votes subsequently cast for him are lost, and another candidate may be returned as elected, if he has a majority of good votes after those so lost are deducted. There is more reason for this in England, where the vote is viva voce, and the elective franchise belongs to but few, than here, where the vote is by ballot, and the franchise well-nigh universal. In those cases the notice was brought home to almost every voter, and the number of electors was never greater than three hundred, and generally not more than two dozen. Besides, a man who votes for a person with knowledge that the person is incompetent to hold the office, and that his vote cannot therefore be effective, that it will be thrown away, may very properly be considered as intending to vote a blank, or throw away his vote": *Commonwealth v. Cluley*, 56 Pa. 270, 94 Am. Dec. 75.

The Indiana courts have themselves recently decided that in the absence of a showing of notice or knowledge upon the part of electors casting their votes for an ineligible candidate of his ineligibility or disqualification, the eligible candidate who received the next highest number of votes cannot be regarded as elected. It cannot be presumed that the voters willfully or obstinately cast their votes with

notice that he for whom they were cast was ineligible to be elected or to hold the office: *State v. Bell*, 169 Ind. 61, ante, p. 203, 82 N. E. 69, 13 L. R. A., N. S., 1013; *Hoy v. State*, 168 Ind. 506, 81 N. E. 509; *State v. Ross* (Ind.), 84 N. E. 150.

The language of other authorities also implies that knowledge on the part of voters of the ineligibility of a candidate who receives a majority of the votes cast will result in their votes for him being rejected and in the election being given to the eligible candidate receiving the next highest number of votes: *Barnum v. Gilman*, 27 Minn. 466, 38 Am. Rep. 304, 8 N. W. 375; *People v. Clute*, 50 N. Y. 451, 10 Am. Rep. 508; *State v. Vail*, 53 Mo. 97; *Dryden v. Swinburne*, 20 W. Va. 89. But the existence of the fact which disqualifies, and of the law which makes the fact operate to disqualify, must be brought home so closely and so clearly to the knowledge or notice of the elector as that to give his vote therewith indicates an intent to waste it. The knowledge must be such, or the notice brought so home, as to imply a willfulness in acting when action is in opposition to the natural impulse to save the vote and make it effectual. He must act so in defiance of both the law and the fact, and so in opposition to his own better knowledge, that he has no right to complain of the loss of his franchise, the exercise of which he has wantonly misapplied: *People v. Clute*, 50 N. Y. 451, 10 Am. Rep. 508; *State v. McGarry*, 69 Vt. 461, 38 Atl. 165, 44 L. R. A. 446. It must not only appear that the electors knew that existing facts disqualified the candidate, but it must also appear that knowing the disqualification, they voted for him in defiance of law: *Gill v. Pawtucket*, 18 R. I. 281, 27 Atl. 506.

In Minnesota, where an ineligible candidate for a public office receives a plurality of votes, the next highest candidate is not entitled to the office, if the ineligibility does not appear on the ballots: *Barnum v. Gilman*, 27 Minn. 466, 38 Am. Rep. 304, 8 N. W. 375. In Indiana, where a candidate for the office of clerk, recorder, or auditor is ineligible by reason of having already served eight years in a period of twelve, the disability is one of which the voters are bound to take notice: *Carson v. McPhetridge*, 15 Ind. 327; and citizens of a county must take notice as to who hold county offices, and also of the constitutional provision that incumbents of certain of those offices are not eligible to certain other offices; and votes cast in disregard thereof are void, and the candidate receiving the greatest number of legal votes, although not a majority of the whole number cast, will be elected: *Gulick v. New*, 14 Ind. 83, 77 Am. Dec. 49.

To impute to electors, who vote for an ineligible candidate, an intention to throw away their votes because they know or are chargeable with notice that he is disqualified to hold the office, is a doctrine, as applied under ordinary circumstances, not free from criticism, involving as it does minute inquiries into the knowledge and intention of the voters: *Barnum v. Gilman*, 27 Minn. 466, 38 Am. Rep. 304, 8 N. W. 375; *Furman v. Clute*, 50 N. Y. 451, 10 Am. Rep. 508. "The majority of voters, so far from desiring or intending to throw their

votes away, wish to use them to their utmost effect; and it is only by a fiction, raised, if at all, by the law, that the majority in such cases throw their votes away. This presumption of an intent on the part of the voter that his vote should not, for any purpose, be effectual, any more than if it were blank paper, is, indeed, to a great extent a fiction of the English courts, and political considerations have probably contributed to produce it. Out of it arise the difficulties and disagreements of those courts which have followed the English theory. On the one hand it is held—a doctrine which is consistent with legal principle and affords a working rule—that, as ignorance of law, which every one is bound to know, excuses no one, therefore the voter consents that his vote for the ineligible person shall not count for any purpose. But so harsh is the operation of the rule in depriving the sincere voter of his vote, and so directly opposed is the result produced to the purpose of voting, that the consequence has been either a denial of the application of the rule that knowledge of the law is presumed, or a balancing of the presumption of knowledge of the law against the presumption that the voter did not intend to throw away his vote, and a rule which involves minute inquiries, which are both embarrassing and against the policy of the American law, into the intention of the voters and their legal information': *Sheridan v. St. Louis*, 183 Mo. 25, 81 S. W. 1082.

We believe that no American case other than that of *Gulick v. New*, 14 Ind. 83, 77 Am. Dec. 49, can be found awarding an office to a person receiving less than the highest number of votes cast, on the ground that his opponent was ineligible, and therefore that the votes sought to be cast for the latter must be wholly disregarded. In truth, he who receives the lesser number of votes, notwithstanding the ineligibility of another candidate, acquires no rights which he did not otherwise possess, and hence cannot maintain a contest to determine the title to the office, except in his capacity of a private citizen, and if the law does not confer such right on a private citizen any contest attempted to be instituted by one receiving less than the highest number of votes, must be disregarded: *Greenwood v. Murphy*, 131 Ill. 604, 23 N. E. 421; *State v. Bell*, 169 Ind. 61, ante, p. 203, 82 N. E. 69, 13 L. R. A., N. S., 1013; *Lamoreaux v. Ellis*, 89 Mich. 146, 50 N. W. 812. It is manifest that there can rarely be any practical means of disregarding votes on the ground that the candidate for whom they were cast was by the voters known to be ineligible, unless, as in Indiana, knowledge is imputed to them of the facts which ought to be judicially known. Actual knowledge can rarely, if ever, be established. Probably, however, those who cast their ballots must, like persons in the doing of any other act, be adjudged to know the law, and hence, if it can be shown that they had actual knowledge of the facts constituting the want of eligibility, they may be deemed to have voted for one whom they knew could not take and hold office. This question has arisen in England and may arise in America, where the person voted for was a woman, and as such, by law, disqualified to hold office. In such a case, it was held, in that country, that the person

receiving the next highest number of votes was entitled to the office, the court upon this subject saying: "A second question in the case is whether the votes for Lady Sandhurst were thrown away, so that Mr. Beresford-Hope was duly elected, or must there be a new election? The following facts were proved to us upon the subject. In the first place, it was admitted that all those who voted for Lady Sandhurst knew that she was a woman. In the second place it was shown to our satisfaction that the question whether, as a woman, she was incapacitated from election was a subject of common public discussion at the time and place of her election. It was not proved specifically that notice was given to the individual voters. We think, however, that it must be taken that the fact which, if we are right, constituted the disqualification was known to all, and that the voters were also aware that the legal consequence might, though they may not have been aware that it actually did, constitute disqualification. The question whether in such a case the voters voted at their peril, or whether there should be a new election, is not altogether clear. The general principle is laid down in the case of *Gosling v. Veley*, 7 Q. B. 406, and is there stated as follows: 'Where the majority of electors vote for a disqualified person in ignorance of the fact of disqualification, the election may be void or voidable, or, in the latter case, may be capable of being made good, according to the nature of the disqualification. The objection may require ulterior proceedings to be taken before some competent tribunal, in order to be made available; or it may be such as to place the elected candidate on the same footing as if he never had existed and the votes for him were a nullity.' To this general principle the judgment proceeds to add an illustration so opposite to the present case that in quoting it we wish distinctly to state that we do not regard it as more than a singularly pointed illustration: 'But, if the disqualification be of a sort whereof notice is to be presumed, none need expressly be given; no one can doubt that, if an elector would nominate and vote only for a woman to fill the office of mayor or burgess in parliament, his vote would be thrown away; there the fact would be notorious, and every man would be presumed to know the law upon that fact.' This case has been to some extent departed from in the case of *Regina v. Mayor of Tewksbury*, L. B. 3 Q. B. 629, 37 L. J. Q. B. 288, 18 L. T. 851, 16 Week. Rep. 1200, 9 Best & S. 683, decided in 1868. The effect of this case is not unfairly represented by saying that a vote is not to be taken to be thrown away because the voter knows of a disqualifying fact, but does not know that it is by law disqualifying. This decision, however, appears to have been discredited to some extent by *Drinkwater v. Deakin*, L. B. 9 C. P. 626, 43 L. J. C. P. 355, 30 L. T. 832, decided in 1874, in which the present master of the rolls says: 'When the validity or invalidity of an act depends on a question of law, no one can make such act valid in law when it would be otherwise invalid by saying he did not know the law.' Denman, J., agreed in this judgment, and Lord Coleridge said; 'I entirely agree . . . in the general law laid down as to the throwing away of votes in the judgment in

Gosling v. Veley, 7 Q. B. 406.' Etherington v. Wilson, L. R. 20 Eq. 606, is a further authority on this subject. Upon these grounds we think that the votes given for Lady Sandhurst were thrown away, and that Mr. Beresford-Hope was duly elected": Beresford-Hope v. Lady Sandhurst, L. R. 23 Q. B. 79, 58 L. J. Q. B. 316, 61 L. T. 150, 37 Week. Rep. 548, 53 J. P. 805, C. A.

### III. Votes Cast for a Deceased or Other Nonexistent Person.

The theory of the American decisions is, substantially, that it is the duty of the canvassing officers to count all ballots legal in form which appear to have been cast at the election, and not to institute inquiries respecting the eligibility or existence of the persons named thereon as candidates for the office to be voted for. The result of this is, that though it is shown that a person died prior to the opening of the election or that he in fact never existed, still all the ballots cast at the election, including those cast for him, must be counted for the office for which he was a candidate, and if, considering the aggregate of all such ballots, he is found to have received such a number that, if existing or eligible, he must have been declared entitled to the office; then no person receiving a less number of votes is entitled thereto notwithstanding the death or nonexistence of the person apparently receiving the highest number of votes: Howes v. Perry, 92 Ky. 260, 36 Am. St. Rep. 591, 17 S. W. 575; People v. Molitor, 23 Mich. 341, State v. Walsh, 7 Mo. App. 142.

### IV. Effect on the Incumbent of an Office of the Vote Cast for an Ineligible Successor.

Where the person receiving the highest number of votes cast is ineligible, no election takes place. He cannot take the office because of his disqualification, and the other persons voted for are not entitled to it because of the want of the requisite number of votes. The result is, for most purposes, that there has been no election. Hence, if there is an incumbent of the office entitled to hold until his successor is elected, such incumbent continues entitled to the office notwithstanding the ineffective attempt at an election: Taylor v. Sullivan, 45 Minn. 309, 22 Am. St. Rep. 729, 47 N. W. 802, 11 L. R. A. 272; Roane v. Matthews, 75 Miss. 94, 21 South. 665.

### V. Whether Eligibility must Exist at the Date of the Election.

Under statutes and constitutions declaring ineligibility to office, doubt has always existed, and must be regarded as still continuing, whether the eligibility must exist at the time of the election or at the time of the commencement of the term of office. On the one hand, it is maintained that the word "eligible," in effect, means eligible to be chosen, and hence if at the time votes are cast he for whom they were cast is designated by the statute or constitution as ineligible, the election cannot have the effect of entitling him to the office: Searcy v. Groves, 15 Cal. 117; Taylor v. Sullivan, 45 Minn. 309, 22 Am. St. Rep. 729, 47 N. W. 802, 11 L. R. A. 272; Roane v. Matthews, 75 Miss. 94, 21



South. 665; State v. Clarke, 3 Nev. 566; State v. McMillen, 23 Neb. 335, 36 N. W. 587; State v. Moores, 52 Neb. 770, 73 N. W. 299; State v. Collister, 27 Ohio C. C. 529; Commonwealth v. Pyle, 18 Pa. 519; In re Corliss, 11 R. I. 638, 23 Am. Rep. 538. On the other hand, it is said that eligibility must be considered as referring to capacity to hold the office when it is claimed or when the official term begins, and hence, though ineligibility existed at the time of the election, its termination or removal subsequently may entitle a person to the office, though the result must have been otherwise if his eligibility could be understood as referring to the time when the votes were cast or the appointment made: State v. Fowler, 66 Conn. 294, 32 Atl. 162, 33 Atl. 1005; People v. Hamilton, 24 Ill. App. 609; Smith v. Moore, 90 Ind. 294; Brown v. Goben, 122 Ind. 113, 23 N. E. 519; Shuck v. State, 136 Ind. 63, 35 N. E. 993; State v. Van Beek, 87 Iowa, 569, 43 Am. St. Rep. 397, 54 N. W. 525, 19 L. R. A. 622; State v. Huegle, 135 Iowa, 100, 112 N. W. 234; Privett v. Bickford, 26 Kan. 52, 40 Am. Rep. 301; Demaree v. Scates, 50 Kan. 275, 34 Am. St. Rep. 113, 32 Pac. 1123; 20 L. R. A. 97; Kirkpatrick v. Brownfield, 97 Ky. 558, 53 Am. St. Rep. 422, 31 S. W. 137, 29 L. R. A. 703; State v. Dunn, 11 La. Ann. 549; De Turk v. Commonwealth, 129 Pa. 151, 15 Am. St. Rep. 705, 18 Atl. 757, 5 L. R. A. 853; State v. Murray, 23 Wis. 96, 9 Am. Rep. 489; State v. Trumpff, 50 Wis. 103, 5 N. W. 876, 6 N. W. 512. Perhaps it may be affirmed that this latter view is growing in favor.

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### FLETCHER v. STATE.

[169 Ind. 77, 81 N. E. 1083.]

**BIGAMY, Burden of Proof as to the Dissolution of the First Marriage.**—If, in a prosecution for bigamy, the first marriage is proved, as well as the continuance in life of the first wife, it is incumbent on the accused to show a divorce granted before the second marriage was celebrated. (p. 220.)

**JURY TRIAL, Instruction upon Facts, What is not.**—An instruction on a trial for bigamy that the jury has the right to consider the fact, "if such be the fact," that in making application for the second marriage license the accused misstated his name and residence and concealed the fact of his former marriage, is not an assumption of the truth of a controverted fact. (p. 221.)

James W. Fortune and Frank M. Mayfield, for the appellant.

James Bingham, attorney general, Edward M. White, Henry M. Dowling and Alexander G. Cavins, for the state.

<sup>78</sup> **MONTGOMERY, J.** Appellant was convicted of the crime of bigamy, and seeks a reversal of the judgment for an alleged error in overruling his motion for a new trial. The

grounds of error relied upon are the giving of instructions 2 and 4, at the request of the prosecuting attorney, and the refusal to give instructions 11, 12, 13 and 14, as tendered by appellant. The court charged the jury in instruction 2, that if all other allegations of the indictment had been established beyond a reasonable doubt, and nothing had been proved indicating that appellant's first marriage had been dissolved at the time his second marriage was entered into, the state was not required to introduce any evidence to show that the first marriage was undissolved in order to make out a *prima facie* case. Appellant's counsel, in criticising this instruction, insist that, when a marriage has been consummated in accordance with the forms of law, it must be presumed that a former marriage has been legally dissolved, and the burden of showing that such marriage has not been dissolved rests upon the party seeking to impeach the last marriage. Public policy, social convenience and safety often justify a resort to certain presumptions, and for such reasons a presumption of the validity of a marriage duly solemnized has been indulged in collateral proceedings of a civil nature involving private rights. *Teter v. Teter* (1885), 101 Ind. 129, 51 Am. Rep. 742; *Boulder v. McIntire* (1889), 119 Ind. 574, 12 Am. St. Rep. 453, 21 N. E. 445; *Wenning v. Teeple* (1896), 144 Ind. 189, 41 N. E. 600.

In a criminal charge of bigamy, brought by the state against a party to the marriage assailed, there is no occasion for resorting to presumptions, and we find no authority to sustain the doctrine for which appellant contends. In such case the accused has opportunities, above all others, of knowing whether a divorce has <sup>79</sup> been granted, and if so, where proof of the fact may be obtained. Public policy and convenience do not require the state, in this class of cases, to search all records extant for proof of a negative fact peculiarly within the knowledge of the defendant; but when the state shows that the accused has been married to a woman who was still living at the time of his second marriage to another, it is incumbent upon him to show a divorce from such former wife: *State v. Barrow* (1879), 31 La. Ann. 691; *Commonwealth v. Boyer* (1863), 7 Allen, 306; 4 Elliott on Evidence, sec. 2873; 3 Greenleaf on Evidence, 16th ed., sec. 208; *Fleming v. People* (1863), 27 N. Y. 329; *Hull v. State* (1880), 7 Tex. Ct. App. 593; *May v. State* (1878), 4 Tex. Ct. App. 424.

The substance of instructions 11, 12, 13 and 14, tendered by appellant and refused by the court, was that if it was shown that appellant and Katie K. Kirk had been formally married, the presumption of law was against the illegality of

such marriage, and unless it had been proved that appellant was not divorced from his former wife at the time of such marriage, a divorce would be presumed. This presumption in favor of one upon trial for bigamy was unwarranted. The court correctly charged the jury upon this point, and did not err in rejecting the instructions tendered by appellant.

The court advised the jury in instruction 4, that, in determining the criminal intent charged, they had a right to consider the facts, "if such be the facts," that in making application for license to marry Katie K. Kirk appellant misstated his name and residence, and falsely concealed the fact of his former marriage. Counsel attack this instruction with the declaration that it is reversible error to instruct the jury that the appellant falsely concealed the fact of his former marriage. The proposition that the court must not assume the truth of a controverted fact in charging the jury is well settled, but that rule was manifestly not violated in this instance. The <sup>80</sup> statement was made conditionally, and the court correctly advised the jury that if, in point of fact, the accused had falsely concealed his former marriage, that circumstance was proper matter for their consideration upon the question of criminal intent.

We find no reversible error, and the judgment is affirmed.

*In a Prosecution for Bigamy*, if the defendant relies upon a divorce to justify his second marriage, it is incumbent on him to prove it: See the note to *Pittinger v. Pittinger*, 89 Am. St. Rep. 200.

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### COUCH v. STATE.

[169 Ind. 269, 82 N. E. 457.]

**A WRIT OF MANDATE will Ordinarily be Denied Where the Applicant has Another Remedy.** (p. 222.)

**MANDAMUS cannot be Invoked to Settle Doubtful Claims to an Office or to have the title thereto adjudicated between adverse claimants.** (pp. 223, 225.)

**MANDAMUS may Issue to Put One in Possession of an Office who holds a prima facie uncontested title.** (p. 224.)

**OFFICER, PUBLIC—Duty to Surrender.**—It is the duty of the incumbent of a public office at the expiration of his term to surrender it to one who has received a certificate of election and has qualified thereunder. If it is desired to contest the eligibility, election or qualification of such person, this may be done in the manner prescribed by law for determining claims to an office. (p. 224.)

**MANDAMUS to Compel Admission to Public Office, Who may be Joined in the Proceedings as Defendants.**—If one has received a

certificate of election and qualified as a member of the board of trustees of a town, and, on presenting his credentials, the member of the board whose term had expired and the remaining members refuse to permit the new member to exercise the functions of his office, all may properly be joined in a proceeding to compel them to admit the applicant to such office. (p. 224.)

**MANDAMUS to Compel Admission to a Public Office—Parties Defendant.**—It is no objection to an application for a writ of mandate to compel the members of a board of trustees of a municipality to permit one elected and qualified to exercise the functions of a member of such board that the proceedings were brought against such members personally and not against the municipality or its president or board of trustees. (p. 224.)

**APPEAL AND ERROR—Harmless Error.**—An Error Committed in Striking Out a Part of an Answer is waived and rendered harmless, if evidence of the same facts is received under the answer of general denial. (p. 225.)

**MANDAMUS to be Admitted to an Office—Questions Which may be Presented by the Answer.**—In an application by one who has received a certificate of election and qualified for a public office for a writ of mandate to compel him to be admitted to exercise the functions, the only question to be tried is the *prima facie* right to possession, and an answer, therefore, will not be permitted to present as an affirmative defense matters which might have been relied upon in a contest for the office. (p. 225.)

W. T. Friedley and George B. Hall, for the appellants.

<sup>270</sup> **MONTGOMERY, J.** An alternative writ of mandate was issued by the Switzerland circuit court upon the application of relator, requiring appellants and others to show cause why they should not surrender to him possession of the office of trustee of the fifth ward of the town of Patriot. Appellants' motions to quash the writ, and demurrers thereto, were overruled, issues of fact were joined, and the cause transferred to the court below. A trial by the court was had, with special findings and conclusions of law, and judgment rendered thereon in favor of the relator.

Errors have been assigned upon the overruling of appellants' motion to quash the writ and the demurrer thereto, and upon the several conclusions of law stated.

It appears from the allegations of the alternative writ that on November 7, 1905, a general election of municipal officers was held in the town of Patriot, and relator and appellant Rush Platt were opposing and the only candidates for the office of trustee of the fifth ward of said town. Relator was a resident of the ward and in all respects—particularly averred—legally qualified to hold said office. He received the highest number of votes, and was by the election <sup>271</sup> board duly declared elected as such trustee for the term beginning on the first Monday of May, 1906, and ending on the first Monday of January, 1910. A certificate of his elec-

tion was signed and issued to him by the election board, and on November 10, 1905, he subscribed and took the oath of office, which oath was written upon the back of such certificate. On the first Monday of May, 1906, the board of trustees of said town was convened according to law, and comprised the following members: John G. Couch, Frank McHuron, Harvey Elliott, Henry Schroeder and the relator, and while so convened relator presented his certificate of election and official oath to Rosman I. White, the town clerk of said town, and requested that the same be filed, and to the members of said board, and demanded possession of said office, but Couch and Schroeder, together with appellant, Rush Platt, who was then and there present, and who had been trustee from said ward for the term immediately preceding, over the votes and protests of Elliott and McHuron, refused to permit relator to take said office or to participate in the proceedings of the board, and said clerk refused to receive and file such election certificate and oath, and said Platt continued in possession of said office, and refused to surrender the same or anything connected therewith.

It is contended that the motion to quash the alternative writ and the demurrer thereto should have been sustained, for the reason that the relator had a complete remedy at law. The doctrine that a writ of mandate is not proper and will not be granted, where the applicant has another adequate remedy, has been frequently declared by this court: *State v. Real Estate etc. Assn.* (1898), 151 Ind. 502, 51 N. E. 1061; *Wampler v. State* (1897), 148 Ind. 557, 47 N. E. 1068, 38 L. R. A. 829; *State v. Board of Commrs.* (1891), 131 Ind. 90, 30 N. E. 892; *Harrison School Tp. v. McGregor* (1884), 96 Ind. 185; *State v. Board of Commrs.* (1865), 25 Ind. 210; *Board of Commrs. v. Hicks* (1851), 2 Ind. \*527.

<sup>272</sup> Appellants' application of this principle to the case at bar proceeds upon the assumption that this is an action to try the title to an office. This assumption is erroneous, and it must be observed and borne in mind that no adversary claims to the right of possession or title to the office named appears from the complaint. The complaint proceeds upon the theory that relator was duly elected, commissioned and qualified as trustee from the fifth ward, and that appellants arbitrarily refused to receive and honor his certificate of election or admit him to membership upon the board of trustees. It is clearly shown that relator was clothed with a prima facie title to the office, and the right to enjoy the privileges and exercise the functions thereof. It is true that a writ of

mandamus cannot be rightfully invoked to settle a doubtful claim to an office, or to have the title thereto adjudicated between adverse claimants, and in such case an information in the nature of quo warranto affords the proper remedy. *Hoy v. State* (1907), 168 Ind. 506, 81 N. E. 509. But where the relator is shown to hold a prima facie and uncontested title to an office, a writ of mandate may be issued to put him in possession of the office: *City of Madison v. Korbly* (1869), 32 Ind. 74; *McGee v. State* (1885), 103 Ind. 444, 3 N. E. 139; *Mannix v. State* (1888), 115 Ind. 245, 17 N. E. 565; *Swindell v. State* (1895), 143 Ind. 153, 42 N. E. 528, 35 L. R. A. 50; *State v. City of Noblesville* (1901), 157 Ind. 31, 60 N. E. 704.

It is the duty of an incumbent of a public office at the expiration of his term, when a certificate of election has been issued to another who has qualified thereunder, to surrender the office to his successor; and, should he then desire to contest the eligibility, election or qualification of the person so holding the certificate, he may do so by proceeding in the manner prescribed by the law for determining contested claims to office: *State v. Johnson* (1892), 30 Fla. 433, 18 South. 845, 18 L. R. A. 410; <sup>273</sup> *Stevens v. Carter* (1895), 27 Or. 553, 40 Pac. 1074, 31 L. R. A. 342; *State v. Archibald* (1896), 5 N. D. 359, 66 N. W. 234; *Cruse v. State* (1897), 52 Neb. 831, 73 N. W. 212.

The alternative writ required appellants to surrender to the relator the possession of the office to which his certificate of election entitled him. It is argued that the writ was too broad, and that Schroeder and Couch did not hold possession, nor have control of the office. The charge is that Rush Platt was in attendance upon this meeting of the board of trustees and occupying the position to which relator was entitled, and that they co-operated with him in withholding from relator the privilege of exercising the functions of his office. The power was certainly lodged in them to give efficacy to his official credentials and to admit him to membership in their body, and, in our opinion, they were properly joined with appellants Platt in this proceeding.

Counsel next assert that the proceeding is against appellants in their individual capacity, and contend that it should have been brought against the municipal corporation, or the president and board of trustees of the town. We cannot concur in this claim. The complaint alleges the official relation of appellants to the town and to the office in question, and, as we have already seen, appellants were proper parties

defendant. In order to enable the court to enforce its mandate, or administer the proper penalty for disobedience, it is necessary that the officials derelict in the performance of duty should be proceeded against personally: *State v. Real Estate etc. Assn.*, 151 Ind. 502, 51 N. E. 1061. No complaint was made in the demurrer or motion to quash of the nonjoinder of any other party. It follows that there was no error in overruling the motion to quash and the demurrers to the writ.

The assignment that the court erred in striking out part <sup>74</sup> of the second paragraph of appellants' answer has been expressly waived, since the court heard evidence upon the facts therein alleged, under the answer of general denial.

It appears from the special finding of facts that on March 17, 1906, relator with his family removed from the fifth ward to another ward of the town of Patriot, where he continued to reside until the trial of the cause. This fact formed the substantive allegation of the second paragraph of answer, and is the basis of the controversy between the parties. It is manifest that the questions whether Platt's term ceased upon the first Monday of January, 1906, upon the election and qualification of his successor, or continued until May 7th, when the office was demanded, and whether the relator forfeited his office, ipso facto, by his removal from the ward, or furnished ground upon which the board of trustees might properly declare a vacancy, cannot be decided in this proceeding. The cases cited above clearly settle the proposition that a disputed title and right of possession to an office cannot be adjudicated in a proceeding of mandamus, and such an issue cannot be presented in an affirmative paragraph of answer. The supreme court of South Dakota in *State v. Kipp* (1898), 10 S. D. 495, 74 N. W. 440, has aptly stated the principle as follows: "The only question to be tried in such a proceeding is the prima facie right to the possession of the office, and the jurisdiction of the court to determine that question cannot be affected by an attempt to raise issues by the answer, not material to the determination of such prima facie right."

The special findings fully sustained all the allegations of the complaint, and the conclusions of law were in accord with the facts so found.

The judgment is affirmed.

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*Mandamus does not Lie, as a Rule, to Try Title to a Public Office:*  
See the note to *State v. Gardner*, 98 Am. St. Rep. 884. The fact, however, that title to an office may be incidentally drawn in question, Am. St. Rep., Vol. 124—15

tion in mandamus proceedings is not conclusive against the issuance of the writ: *McKannay v. Horton*, 151 Cal. 711, 121 Am. St. Rep. 146; *State v. Grant*, 14 Wyo. 41, 116 Am. St. Rep. 982. And one prima facie entitled to an office under the authorized canvass of votes and certificate of election may enforce his right to the possession of the office by writ of mandamus, as against one who holds the office without color of authority after the expiration of his term especially when the statutory proceeding to compel the delivery of the books and papers of the office is inadequate: *State v. Oates*, 80 Wis. 634, 39 Am. St. Rep. 912. Mandamus will issue after a void order removing a public officer to compel his readmission to the use and enjoyment of his office: *State v. Hewitt*, 3 S. D. 187, 44 Am. St. Rep. 788.

## TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY v. LONG.

[169 Ind. 316, 82 N. E. 757.]

**CONSTITUTIONAL LAW**—Imposing Duties and Penalties on Corporations and Associations not Imposed on Individuals in Like Circumstances.—A statute requiring every company, corporation or association, in the absence of written contract to the contrary, to make a full settlement with, and payment of money to, its employes engaged in manual or mechanical labor at least once in every calendar month, and imposing a penalty for the violation of this requirement, is unconstitutional, because of the fourteenth amendment to the constitution of the United States. Such statute imposes duties and penalties on corporations, companies and associations not imposed on individuals in like circumstances. (pp. 227, 228.)

Guenther & Clark, Clarence Brown and Charles A. Schmettau, for the appellant.

Asa H. Boulden and Henry H. Spaan, for the appellee.

<sup>316</sup> **MONKS, C. J.** This action was brought by appellee an employé of appellant, for the recovery of wages for manual labor, also to recover penalties and attorneys' fees under sections 7056, 7057 of Burns' Revised Statutes of 1901 (Act 1885, p. 36, secs. 1, 2). An answer and counterclaim were filed by appellant. A trial of said cause by jury resulted in a verdict in favor of appellee for the wages, penalties and attorneys' fees, and over a motion for a new trial judgment was rendered thereon against appellant.

Several of the causes for a new trial call in question the right of the appellee to recover said penalty and attorneys' fees under said sections of the statute.

It is insisted by appellant that sections 7056, 7057, supra are <sup>317</sup> in violation of the fourteenth amendment of the constitution of the United States, citing, among other au



thorities, the following: South & N. A. R. Co. v. Morris (1880), 65 Ala. 193; Chicago etc. R. Co. v. Moss & Co. (1882), 60 Miss. 641; San Antonio etc. R. Co. v. Wilson (1892), 4 Tex. App. Civ. Cas. 323, 19 S. W. 910, 50 Am. & Eng. R. R. Cas. 513; Gulf etc. R. Co. v. Ellis (1897), 165 U. S. 150, 17 Sup. Ct. Rep. 255, 41 L. ed. 666, 6 Am. & Eng. R. R. Cas., N. S., 752; Davidson v. Jennings (1900), 27 Colo. 187, 83 Am. St. Rep. 49, 60 Pac. 354, 48 L. R. A. 340. Said sections read as follows:

Section 7056: "That every company, corporation or association, now existing or hereafter organized and doing business in this state, shall, in the absence of a written contract to the contrary, be required to make full settlement with, and full payment in money to, its employes engaged in manual or mechanical labor, for such work and labor done or performed by said employes for such company, corporation or association at least once in every calendar month of the year."

Section 7057: "If any company, corporation or association shall neglect to make such payment, such employe may demand the same of said company, corporation or association, or any agent of said company, corporation or association, upon whom summons might be issued in a suit for such wages, and if said company, corporation or association shall neglect to pay the same for thirty days thereafter, said company, corporation or association shall be liable to a penalty of one dollar each succeeding day, to be collected by such employe in a suit (together with reasonable attorney's fees in said suit) for wages withheld: Provided, that said penalty shall in no instance exceed twice the amount due and withheld."

It will be observed that said sections, so far as they affect employers, only apply to "every company, corporation or association," and, so far as their employes are concerned, only apply to those "engaged in manual or mechanical labor" thereby denying the right to such of their employes as are not "engaged in manual or mechanical labor." Employes of an individual, although engaged in manual or mechanical labor, are excluded from the benefit of said sections of the statute. They give to a certain class of employes of companies, corporations and associations the right to recover penalties and attorneys' fees, but deny such right to the same class of employes of an individual engaged in the same business under the same conditions.

They impose new burdens on "every company, corporation and association" doing business in the state, while an in-

dividual engaged in like business, under like circumstances and conditions, is left without any such burden. This brings said sections within the rule declared in *Bedford Quarries Co. v. Bough* (1907), 168 Ind. 671, 80 N. E. 529, 14 L. R. A., N. S., 418, and the cases there cited, and upon the authority of said case we hold that they are unconstitutional.

Appellant urges that said sections are unconstitutional for other reasons, but as they are unconstitutional on the ground mentioned, the same are not considered.

As said sections do not put railroads in a class by themselves, as does the employer's liability act, we are not required to determine whether such a classification made would render said sections valid as to railroads.

Other questions are argued, but, as they are either not properly presented in the brief or may not arise on another trial, they are not considered. It follows that the lower court erred in overruling appellant's motion for a new trial.

Judgment reversed, with instructions to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion.

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*The Constitutionality of Statutes regulating the time and method of payment to employes is the subject of a note to Shortall v. Puget Sound etc. Co., 122 Am. St. Rep. 903.*

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## MARION TRUST COMPANY v. BENNETT.

[169 Ind. 346, 82 N. E. 782.]

**CORPORATIONS, Construction of Provision Respecting Creation of by Special Act.**—The provision of the state constitution providing that corporations, other than bank, shall not be created by special act should be so interpreted as to render it impossible for the general assembly by special act to alter an existing charter in such manner as in effect to make a new corporation. (p. 231.)

**CORPORATIONS.—A Change in the Capital Stock of a Corporation cannot be Made Without Special Legislative Authorization.** (p. 231.)

**CORPORATIONS—Increase in Capital Stock, When Unconstitutional.**—A statute permitting a corporation created with a definite capital stock to enlarge such stock at the will of its stockholders is unconstitutional as an attempt to create a corporation, under a constitution providing that corporations shall not be created by special act. (p. 231.)

**CORPORATIONS, Subscription to Stock of, When Void Because of Want of Capacity of the Corporation.**—A subscription to the capital stock of a corporation which it has no capacity to issue is a nudum pactum and hence not enforceable. (p. 231.)

**CORPORATIONS, Subscription to Stock of, When cannot be Validated by Estoppel.**—As between a corporation and its stockholders, subscriptions to a wholly unauthorized issue of stock cannot be validated on the principle of estoppel. (p. 232.)

**CORPORATIONS, Subscription to Stock of, Right of Receiver to Enforce.**—Where the receiver of a corporation does not represent any particular creditor, he stands on no higher plane than the corporation itself, and cannot enforce subscriptions to stock which the corporation could not enforce. (p. 232.)

**CORPORATIONS—De Facto Issue of Stock.**—If the provisions of a statute authorizing an increase in the capital stock of a corporation are unconstitutional, there can be no de facto issue of stock thereunder. (p. 232.)

**CORPORATIONS.—A De Facto Corporation cannot Exist under a statute under which no attempt was made to organize, nor under an organization attempted under a statute which was unconstitutional and therefore void.** (p. 237.)

**CORPORATIONS.—An Issue of Stock of a Corporation cannot be Justified by one act of the legislature when it was clearly attempted under another, and the corporation never accepted the former act nor became entitled to enjoy its privileges.** (p. 237.)

**CORPORATIONS, Subscription for Stock, Notes Given for, When not Enforceable.**—An assumption of, or agreement to pay, notes issued on account of subscriptions to the stock of a corporation is not enforceable if the stock subscribed for cannot be issued by the corporation for want of authority. (p. 238.)

**APPEAL AND ERROR—Right of the Appellate Court to Consider Facts not Disclosed by the Findings.**—Where the findings are not sufficiently full to exclude a particular idea or theory, the appellate court may, nevertheless, give heed to a fact appearing in evidence, which does not admit of dispute, in order to uphold the judgment. Such a case may be regarded as one of a defect in form, or imperfection contained in the pleadings, which the statute provides shall be deemed amended in the supreme court. (p. 238.)

**CORPORATIONS—Subscription for Stock Partly Illegal.**—If there is an attempt to enforce a liability for a subscription to stock in a corporation or upon notes given for such subscription, and there is no means of distinguishing between the sums due for legal and those due for an illegal subscription to stock, the whole must fail. (p. 239.)

Iglehart & Taylor and W. H. Latta, for the appellant.

C. A. De Bruler, J. D. Welman and G. R. De Bruler, for the appellees.

<sup>348</sup> GILLETT, J. This action was brought by appellant, the receiver of the Citizens' Insurance Company of Evansville, Indiana, against appellees, Alexander Hutchinson, Henry S. Bennett and Isaac H. Odell. The case is before us on exceptions to the court's conclusions of law.

It appears from the findings that said company is an insurance corporation, organized under an act of the General Assembly approved February 3, 1832 (Acts 1832, p. 144), as amended by an act approved March 6, 1873 (Acts 1873,

p. 162), and that on August 1, 1890, said company increased its capital stock from one hundred thousand dollars to two hundred thousand dollars. The firm of Bennett & Odell, who were agents for said company, became the owner of two hundred and forty shares of its stock, of the par value of fifty dollars each, and on February 3, 1894, they executed to said company certain notes for the balance due on said stock, payable as calls were made. About one month later Bennett bought Odell's interest, and immediately thereafter Bennett formed a partnership with Hutchinson for the purpose of carrying on the fire insurance business, which partnership continued down to the bringing of this action. It is stated in one of the findings that Hutchinson assumed all of the liabilities <sup>349</sup> of the firm of Bennett & Odell, but, taking the findings as a whole, and reading them in the light of the evidence, we think that it should be understood that the fact was that when Odell retired Bennett assumed and agreed to pay all of the debts of the firm, and that Hutchinson, in terms, guaranteed said contract, but that as said stock notes were omitted from the list of liabilities furnished Hutchinson at the time, and as he had no actual notice or knowledge that the stock was not paid for, it was not his intent to guarantee the payment of said notes. When Hutchinson became a partner, the stock certificates passed into his hands, but they were never transferred to him upon the books of the corporation, and he gave the certificates to Odell. In the same year, however, Odell was notified by Hutchinson to return such certificates, and he notified the insurance company that he was the owner of said stock, and not to transfer it to Odell. Bennett brought an action in his own name to secure possession of such certificates, and, as a result, they were turned over to his attorneys, where they have since remained. It is found that it was to the advantage of said firm to have said stock; that after receiving said notice the insurance company at all times recognized Hutchinson & Bennett as the owners of said stock, and, by virtue thereof, acted as a director of said company. During 1898 two calls, of ten per cent each, were issued by the directors of the corporation, and, upon the appointment of a receiver thereof, the court ordered an assessment of fifty per cent additional.

The special act under which the Citizens' Insurance Company of Evansville, Indiana (originally known as the Lawrence Insurance Company), was incorporated provided that it should have a capital stock of one hundred thousand dollars (Acts 1832, *supra*), while the act of 1873, *supra*, pro-

vided that said capital stock "may be increased from time to time, to such additional sum or sums as may be determined upon by a vote of the majority in value of stockholders."

<sup>350</sup> The first question which presents itself is whether the provision just quoted is in violation of section 13, article 11, of the state constitution, which provides that "corporations, other than banking, shall not be created by special act," etc. This prohibition relative to the creation of corporations does not admit of exact definition. It is evident, however, that the provision should be so interpreted as to render it impossible for the General Assembly by special law to alter an existing charter in such manner as, in effect, to make a new corporation: In re Bank of Commerce (1899), 153 Ind. 460, 53 N. E. 950, 55 N. E. 224, 47 L. R. A. 489; Town of Longview v. City of Crawfordsville (1905), 164 Ind. 117, 73 N. E. 78, 68 L. R. A. 622; 1 Morawetz on Private Corporations, 2d ed., sec. 12; Clark on Private Corporations, Tiffany's ed., p. 39. To give a close or literal interpretation to the word "create" would make it possible, after a corporation had been brought into existence under a valid law, so to fashion the organization as practically to bring upon the people of the state the evil of special privilege which it was designed to avoid. A change in the amount of the capital stock of a corporation, like a change in the objects thereof, is fundamental, and cannot be made without clear legislative authority: Chicago etc. R. Co. v. Allerton (1873), 18 Wall. 233, 21 L. ed. 902; McNulta v. Corn Belt Bank (1897), 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954; note to Peck v. Elliott (1897), 38 L. R. A. 616; Clark on Private Corporations, Tiffany's ed., p. 346. What, then, shall be said of a special act which attempts to change a corporation of limited capital stock to one in which the whole matter of the extent of the capital stock is left to the stockholders? It is clear, in our opinion, since the corporation in question is limited to one hundred thousand dollars capital by the act of its creation, that the provision of the act of 1873, supra, whereby there was attempted to be conferred upon the association the capacity of infinite growth, so that it might bulk with the largest of corporations, was unconstitutional and void, <sup>351</sup> as an attempt to create an insurance corporation by special act.

The undertaking of a subscriber to the capital stock of a corporation must find a correlative in the capacity of the corporation, if it be a going concern, to deliver such stock, and if the association be without capacity in that behalf the undertaking of a subscriber is a nudum pactum.

It is urged that Bennett & Hutchinson are estopped by their conduct to deny their liability. The receiver in this case does not pretend to represent the interest of any particular creditor, but to represent all, irrespective of their having grounds of estoppel. In these circumstances, it can only be said that he stands on no higher plane than the corporation itself. As between the corporation and its stockholders, subscriptions to a wholly unauthorized issue of stock cannot be validated on the principle of estoppel.

In *Stace & Worth's Case* (1869), L. R. 4 Ch. \*682, an attempt was made to charge certain holders of such an issue of stock, on the ground that they had accepted shares; that their names appeared on the register of shareholders, and that they had sat as directors of the corporation. Vice-Chancellor James, however, declared: "This was a void agreement, with a void acting upon it, a void recognition and a void ratification by the acts which have been mentioned. It comes to an aggregate of nothings, and that aggregate of nothings is all that there is to fix those gentlemen on the list of stockholders."

Upon the question under consideration the case of *Scovill v. Thayer* (1881), 105 U. S. 143, 26 L. ed. 968, is the leading authority. In that case the law under which the corporation was organized authorized any corporation to increase its capital stock in any amount not exceeding double its authorized capital. The corporation, after so increasing its capital, had made two further issues of stock, <sup>352</sup> and the question was as to the right of its assignees in bankruptcy to recover on an assessment ordered by the court against a holder of shares in the corporation, on account of his subscription to the overissues, it appearing that, in addition to accepting the stock, he had attended by proxy the meetings of the stockholders at which the third and fourth issues were voted. The court said: "In this case the attempt to increase the stock of the company beyond the limit fixed by its charter was ultra vires. The increased stock itself was, therefore, void. It conferred on the holders no rights and subjected them to no liabilities. If the stock of the first and second issues had been held by one set of holders, and the stock of the third and fourth by another, in a contest between them the latter would have been excluded from all participation in the management of the company or in its profits. To decide that the holders of stock issued ultra vires have the same rights as the holders of authorized stock is to ignore and override the limitations and prohibitions of the charter. We think it follows that if the holder of such spurious stock has none of the rights, he can

be subjected to none of the liabilities of a holder of genuine stock. His contract to pay for spurious shares is without consideration and cannot be enforced. It is insisted, however, that the defendant having attended by proxy the meetings at which the increase of the stock beyond the limit imposed by law was voted for, and having received certificates for the stock thus voted for, and after such increase the company by its agents having held itself out as possessing a capital of four hundred thousand dollars, and invited and obtained credit on the faith of such representations, he is now estopped from denying the validity of the stock and his obligation to pay for it in full. We think that he is not estopped to set up the nullity of the unauthorized stock. It is true that it has been held by this court that a stockholder cannot set up informalities in the issue of stock which the corporation had the power to create: *Upton v. Tribilcock* (1875), 1 Otto (U. S.), 45, 23 L. ed. 203; *Chubb v. Upton*, (1877), 5 Otto (U. S.), 665, 24 L. ed. 523; *Pullman v. Upton* (1877), 6 Otto (U. S.), 328, 24 L. ed. 818. But those were cases where the increase of the stock was authorized by law. The increase itself was legal and within the power of the corporation, but there were simply informalities in the steps taken to effect the increase. These, it was held, were cured by the acts and acquiescence of the defendant. But here, the corporation being absolutely without power to increase its stock above a certain limit, the acquiescence of the shareholder can neither give it validity nor bind him or the corporation. 'A distinction must be made between shares which the company had no power to issue and shares which the company had power to issue, although not in the manner in which, or upon the terms upon which, they have been issued. The holders of shares which the company had no power to issue in truth had nothing at all, and are not contributors.' . . . As forcibly suggested by counsel, a creditor who has been defrauded by misrepresentation of the real capital of the company has his remedy in an action of tort against all who participated in the fraud. But the wrong done to him cannot entitle the entire body of creditors, who have not suffered from the alleged fraud, to recover of the entire body of stockholders, who have taken no part in it."

In *Winters v. Armstrong* (1889), 37 Fed. 508, a national bank had attempted to increase its capital stock without securing the consent of the comptroller. The bank passed into the hands of a receiver, and he brought an action on certain stock notes given on account of such unauthorized issue. The

defendants answered no consideration, to which the receiver replied by way of estoppel, to the effect that after the attempted increase the bank, by means of circulars and statements upon the letter-heads represented its <sup>354</sup> capital stock at two million dollars, which was the amount to which it was proposed to increase the stock, and that said bank also advertised its capital stock at said amount in the newspapers of the city in which it was located, all of which was done with the knowledge of the defendants, and that with such knowledge they allowed their names to remain on the subscription list until the bank went into the hands of a receiver. Mr. Justice Jackson, delivering the opinion of the court, said: "National banking associations have no authority of law by their own action to increase their capital stock to any amount whatever. They can make no increase to any extent without the approval of the comptroller as the representative of the government. . . . In effecting an increase of its capital stock the association may, so far as relates to its own action, proceed in an irregular or informal manner, which a stockholder who has acquiesced therein may not, as against either the corporation or its creditors, take advantage of or insist upon as invalidating his subscription or the stock issued to him thereunder. But in regard to the sovereign's consent to such increase, to be expressed in and by the approval of its comptroller of the currency, that is an essential prerequisite or condition precedent, like a special enabling act, in conferring the power and authority to make the proposed increase valid. Such approval involved the grant of power to complete and perfect the proceedings commenced by the association looking to an increase of its capital stock. It is something lying beyond the action or control of the association and its stockholders seeking to effect an organic and fundamental change in the constitution of the bank; and in respect to this essential thing, in nowise involved in the action or steps taken by the association, the question of irregularity or informality in its own mode of procedure, and the consequences thence resulting, do not apply. . . . The authorities brought to our attention do not support such an extension of the doctrine of estoppel, which <sup>355</sup> is never invoked to confer corporate powers. No estoppel can properly arise in any case where the party's direct and affirmative act could not have made the transaction valid. What the Fidelity Bank did in misrepresenting what did not lie within its power or that of its stockholders to do by their own action cannot, upon any sound principle, be taken and accepted as



the equivalent of, or the substitute for, the power it did not possess. Parties deceived or misled to their damage by such misrepresentations must seek relief against those making or responsible for the false statement, as individuals, but cannot look to them in the character of stockholders created under the operation of an estoppel, in the absence of power on their part or that of the association to establish that relation. This conclusion is sound in principle, and is, as we think, supported by the authorities."

It was held in *Clark v. Turner* (1884), 73 Ga. 1, that an issue of stock which was wholly unauthorized by statute was *ultra vires* and void. Concerning a claim of estoppel the court said: "If this subscriber had induced insurance on the part of any person in the Grangers' Life and Health Insurance Company by his acts as trustee or agent, or on the faith of his subscription, then an action on his individual right for the tort against Turner would lie; but his assignee stands in the shoes of the corporation and sues for the benefit of all creditors, and there is no pretense in this record that any particular creditor was induced or influenced by his action to insure in the company: *Scovill Thayer* (1881), 105 U. S. 143, 26 L. ed. 968. So that neither the corporation nor its general assignee can recover in this suit, on the facts which the record discloses": See, also, *Ross-Meehan etc. Foundry Co. v. Southern etc. Iron Co.* (1896), 72 Fed. 957; *American Tube Works v. Boston Mach. Co.* (1885), 139 Mass. 5, 29 N. E. 63; *Reed v. Boston Mach. Co.* (1886), 141 Mass. 454, 5 N. E. 852; *Kampman Tarver* (1895), 87 Tex. 491, 29 S. W. 768; <sup>356</sup> *Schierenberg v. Stephens* (1888), 32 Mo. App. 314; *Muncie Nat. Gas Co. v. City of Muncie* (1903), 160 Ind. 97, 66 N. E. 26, 60 L. R. A. 822.

There being no element of estoppel in the case as between the stockholders and the corporation, the further proposition that the receiver cannot, at least irrespective of individual right, bring forward an estoppel on behalf of the whole body of creditors is well illustrated by the late case of *Ellison v. Daniard* (1906), 167 Ind. 471, 79 N. E. 450, in which there was the contention, made on behalf of the plaintiff, a trustee in bankruptcy, that the defendants, who were claimants under a declaration of trust, executed by the insolvent in connection with a deed made to him by a third person, were estopped to assert such right as against the creditors, because such claimants had neglected to record such declaration, and had permitted the deed to the insolvent, which was absolute

upon its face, to remain recorded and unquestioned, with a result that certain of the creditors had extended credit to him on the strength of his apparent ownership. In disposing of this contention we said: "It is contended that the appellee is invested with the power to assert this estoppel against appellants for the benefit of all the creditors of the bankrupt. But the facts as established show that out of the eight hundred creditors, but two, Shoup and Walter, can be said to have any basis whatever for asserting or invoking the principle of estoppel against appellants. Conceding, for the sake of argument, without deciding, that these two creditors, under the evidence, have the right successfully to assert an estoppel against appellants, certainly these facts alone would not, under the law, justify appellee, as trustee, to maintain this suit and thereby, as he has succeeded in doing under the judgment of the trial court, bring all of the property in controversy into the estate of the bankrupt to be disposed of for the benefit of all of the insolvent's creditors. This proposition is so manifestly true that, it appears to us, nothing can be said to the contrary. A case which very much supports the proposition we assume is *Audenried v. Betteley* (1862), 87 Mass. 382, 81 Am. Dec. 755. In that appeal it was claimed that a contract between the plaintiffs and the insolvent was made in order to enable the latter to obtain a false credit in conducting his business in the purchase of merchandise and the borrowing of money upon the strength of the possession of property which apparently belonged to him. It was held therein by the court that an assignment under the insolvent laws of the state of Massachusetts did not vest in the assignee title to property which had been placed in the hands of the insolvent for the fraudulent purpose of giving him a false credit, although some of his creditors may have been defrauded thereby. The question of estoppel in that case, as in this, was advanced by the parties and considered by the court. Judge Hoar, in passing upon the question, said: 'An estoppel in pais, the ground of fraud, is personal to the particular creditor defrauded, and does not pass the property so as to inure to the benefit of creditors generally. . . . "To constitute such an estoppel, a party must have designedly made an admission inconsistent with the defense or claim which he proposes to set up, and another party have, with his knowledge and consent, so acted on that admission that he will be injured by allowing the admission to be disproved; and this injury must be coextensive with the estoppel."' If the two creditors

question, or any other of the eight hundred, have a right successfully to assert an estoppel against appellants, it is a matter personal to them, and they may avail themselves of such an estoppel, in a suit against appellants to subject the lands in question to the payment of their respective claims."

As the provision of the act of 1873 relative to an increase of the capital stock was unconstitutional, it could <sup>358</sup> afford no basis for an irregular, or, as it might be termed, a de facto issue of stock, for an unconstitutional enactment purporting to authorize an increase of capital stock is a nullity: *Clark v. American etc. Coal Co.* (1905), 165 Ind. 213, 112 Am. St. Rep. 217, 73 N. E. 1083. The entire authority of the corporation to issue stock rested on the act of 1832, and that act, in legal effect, limited the capital to one hundred thousand dollars. As was said in *Ross-Meehan etc. Foundry Co. v. Southern etc. Iron Co.* (1896), 72 Fed. 957, in which the principle of estoppel was also sought to be invoked to enforce a subscription to an overissue of stock: "Where the power is wanting it can make no difference in the effect whether this lack of power results from an express limitation or a limitation by implication."

It is contended, however, that the increase of stock was only irregular and not void, since there was in force between the years of 1853 and 1891 a general law relative to stock insurance companies which permitted an increase of stock to an amount not exceeding five hundred thousand dollars: *Burns' Rev. Stats.* 1894, sec. 4840; *Rev. Stats.* 1881, sec. 709. The authority thereby granted is, to quote the words of the statute, confined to any insurance company "organized under this act." Said enactment does not even give the Citizens' Insurance Company a standing as a de facto corporation, since it did not attempt to organize under said act: *Tulare Irr. Dist. v. Shepard* (1902), 185 U. S. 1, 22 Sup. Ct. Rep. 531, 46 L. ed. 773; *In re Gibb's Estate* (1893), 157 Pa. 59, 27 Atl. 383, 22 L. R. A. 276. The finding is that said corporation was organized under the act of 1832 as amended by the act of 1873. A corporation thus organized would differ essentially from a corporation organized under the law of 1853; their rights and duties would be different, and, in said circumstances, it appears plain to us that a corporation which is organized under a special law cannot claim a de facto existence under a law which it does not recognize as its charter. It is equally plain that the <sup>359</sup> issuance of the additional stock cannot be justified by

section 4076 of Burns' Revised Statutes of 1908 (Acts 1883, p. 135, sec. 5), which is a part of an act passed in 1883 authorizing the extension of the corporate life of corporations, chartered by special act before the constitution took effect, for the period of thirty years. Assuming, without deciding, that said section may be disentangled from the portion of the act held unconstitutional in *In re Bank of Commerce* (1899), 153 Ind. 460, 53 N. E. 950, 55 N. E. 224, 47 L. R. A. 489, it is enough to say that as to corporations enjoying special charters in perpetuity, it was necessary for them to accept said act in order to enjoy its privileges, and that the terms of the act would have operated to repeal the law under which the original charter was granted. The special finding speaks negatively when it finds that said corporation is organized under the act of 1832, *supra*, as amended by the act of 1873, *supra*.

We have already indicated that it appears to us that Hutchinson did not assume to pay the subscription of Bennett & Odell. The assumption of the notes by Bennett, comprehended by the agreement, must be held to be based on the correlative duty of the corporation to deliver the stock subscribed for, and if the association was never in position to do this, and cannot now deliver even what would represent Bennett's interest in the charter, it would be making a new contract to charge him with the stock notes, waiting performance by the association: *Merrill v. Beaver* (1877), 46 Iowa, 646; *Kampman v. Tarver* (1895), 87 Tex. 491, 2 S. W. 768.

It is, however, insisted by counsel for appellant that the findings are not sufficiently full to exclude the idea that the stock obtained by Bennett & Odell was a part of the four-fifths of the original capital stock, which, under the original act, the board of directors was empowered to sell at such times as it might direct. This insistence may be granted, and it is true that we have no power, generally speaking, to add to a special finding. We may, however, <sup>360</sup> give heed to a fact appearing in the evidence which does not admit of dispute, in order to uphold the judgment: *Dyke v. Spargue* (1894), 143 N. Y. 651, 38 N. E. 269; *Sturgeon v. Hull* (1894), 8 Ohio C. C. 269. Such a case, in our opinion, is one of defect in form, or imperfection contained in the proceedings which the statute provides shall be deemed amended in the supreme court: Burns' Rev. Stats. 1908, sec. 700; Rev. Stats. 1881, sec. 658; 2 Thornton's Civil Code, p. 1007.

Appellees put in evidence all of the entries in the stock-book of the Citizens' Insurance Company. This book shows stock certificates, of date August 1, 1890, aggregating approximately one hundred and ninety thousand dollars. The stock certificates introduced by the receiver as issued to Bennett & Odell were dated respectively October 20, 1890, November 8, 1890, and March 6, 1894, and this corresponds with the stock-book entries of stock held by said firm. It may be inferred that these certificates in part stand for earlier subscriptions made by Bennett and Odell severally, but the earliest one, made by Bennett, was a part of the issue of August 1, 1890, and is preceded, in the order of entry upon the book, by certificates to the amount of more than one hundred and thirteen thousand dollars. It is alleged in the complaint that the notes were given as and for the unpaid balance of the purchase price of stock of said corporation subscribed for on February 3, 1894, and the finding of the court is that on said day Bennett & Odell became indebted to said company in the amount represented by said notes for and on account of the issue to them of two hundred and forty shares of its stock. Upon this state of the record there is no room for the inference that the shares in question were unsold stock of the old corporation. The stock was either part of an issue in excess of one hundred thousand dollars, or else, if the corporation had not before issued stock to the full amount of its authorized capital, the new issue which Bennett and Odell, either severally or jointly subscribed for, brought the amount of outstanding stock up to a sum <sup>361</sup> far in excess of the authority of the corporation to issue it, and as there is no means of distinguishing the legal from the illegal, the whole must fail: *Kampman v. Tarver* (1895), 87 Tex. 491, 29 S. W. 768. And see *Gas Light etc. Co. v. City of New Albany* (1901), 156 Ind. 406, 59 N. E. 176.

Judgment affirmed.

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*An Increase or Reduction of the Capital Stock* of a corporation is a fundamental change in its affairs, and must be authorized by a majority of the stockholders, at a corporate meeting, and in a manner prescribed by law: *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203; *Theis v. Dun*, 125 Wis. 651, 110 Am. St. Rep. 880, and see cases cited in the cross-reference note thereto.

**McADAMS v. BAILEY.**

[169 Ind. 518, 82 N. E. 1057.]

**A QUITCLAIM DEED is not Ineffectual to Convey any Possible Future Interest** which may accrue to the grantor. (p. 243.)

**EXPECTANT INTEREST, Conveyance of.**—A conveyance of an expectant interest to a stranger is invalid at common law. Courts of equity, however, upheld assignments of mere possibilities based on valuable consideration where the enforcement of the agreement would not contravene their own rules of public policy. (p. 243.)

**CONVEYANCE of Subsequently Acquired Interest Resulting from Estoppel.**—Irrespective of courts of equity, it has always been possible to convey subsequently acquired interests by the operation of the principles of estoppel. (pp. 243, 244.)

**CONVEYANCE with Warranty, Effect of.**—The effect of a warranty deed is to conclude the warrantor, so that his present and future rights are extinguished or passed to his grantee. (p. 244.)

**QUITCLAIM DEED, Effect of on Subsequently Acquired Title.**—Although an ordinary quitclaim deed does not estop the grantor from asserting an after-acquired interest, yet a distinct recital in the deed, without covenants, showing that the parties proceeded on the theory that a particular interest was thereby conveyed, may be as effectual to create a title as a warranty. (p. 244.)

**ESTOPPEL AND WARRANTY.**—An estoppel may exist because of a covenant of warranty, although the truth appears by the instrument. Hence, though it appears by the conveyance that the grantor does not hold a present or perfect estate in the lands described, yet any interest subsequently acquired by him may pass to the grantee as a result of a covenant of warranty. (pp. 244, 245.)

**CONVEYANCE.—A Warranty is Usually Considered as Co-extensive with the Granting Clause,** and hence a conveyance of the grantor's interest is satisfied by passing a present interest, but if the conveyance goes further and purports to convey an interest subsequently to be acquired, the grantor is estopped from claiming that interest when acquired. (p. 246.)

**STARE DECISIS—Construction of Decisions.**—Observations of the court are to be limited to the facts before it. (p. 247.)

**CONVEYANCE of Expectancies, When not Deemed in Fraud of the Ancestor.**—A conveyance by one whose interest or right is fixed by law is not subject to the rule that a conveyance of a bare expectancy is in fraud of the bounty of the testator. (p. 247.)

**CONVEYANCE of Future Interest, When Sustained.**—Though attempted conveyances of bare expectancies by presumptive heirs are narrowly watched by courts of equity, and the burden is on the grantee to repel an inference of constructive fraud, it cannot be affirmed that such courts look with disfavor upon what are construed as executory contracts for the transfer of future interests where common honesty requires that they be carried out. (p. 247.)

**CONVEYANCE of Future Interest, When not Against Public Policy.**—It is not against public policy for a son to unite with his mother in a conveyance of real property to convey all his present interest and such future interest as he may acquire therein on his death, and the conveyance will be given the effect of a transfer to the grantee of any future interest which the grantor may thereafter acquire. (p. 248.)

**CONVEYANCE of Expectancies and of Reversionary Interests.**—A transfer of an expectancy or of a reversionary interest is not necessarily subject to the same inhibitions founded upon public policy. Any person owning a contingent interest in real or personal property may sell it for such sum as may be agreed upon by himself and the purchaser, provided there is no trust relation between them and the purchaser acts in good faith. (pp. 248-251.)

**CONVEYANCE of Contingent Interest—Inadequacy of Consideration.**—Mere inadequacy of consideration does not afford a sufficient reason for setting aside a conveyance of a contingent interest in property, although the doctrine is otherwise as respects sales by expectant heirs of their supposed interest in the lands of living ancestors. (pp. 251, 252.)

**CONVEYANCE of Future Interests—Overruling 139 Ind. 111, 38 N. E. 334.**—In so far as the sales of future interests in property based on contract, devise or statute are placed in the category of wagering contracts and forbidden, where there is no fraud or undue influence, the case of *Chambers v. Chambers*, 139 Ill. 111, 38 N. E. 334, is overruled. (p. 252.)

**APPEAL AND ERROR—Effects in Special Findings.**—If a finding leaves some issue or material fact undetermined, it will be regarded as not proved by the parties having the burden of proof. (p. 253.)

**APPEAL AND ERROR—Special Finding, When does not Establish Fraud.**—If the court does not find enough of the ultimate facts to make out a case of fraud, the appellate court must assume that they were not proved and that the appellees were successful in rebutting all adverse inferences which might have been drawn as matters of fact from what is contained in the special findings. (p. 253.)

**APPEAL AND ERROR—Special Findings, Additions cannot be Made to on Appeal.**—Though certain facts found may justify the inference of fraud or call on appellees to show a fair contract, the appellate court cannot add to the special finding a fact, unless as a necessary conclusion from the facts found. (p. 253.)

**CONVEYANCE of a Future Interest Without Consideration or for a Consideration Received by Another.**—If a son unites with his mother in a conveyance of an interest in real property then held by him, and also of such future interest therein as he will acquire at her death, such conveyance is binding upon him, although he receives no consideration and the consideration actually paid by the grantee was paid over to her, and the son had nothing to do with the negotiation of the transfer. (p. 254.)

**CONVEYANCE of Future Interest, When Sustained as in the Nature of a Family Contract.**—Where a son conveys a future interest to be acquired by him on the death of his mother, without taking any part in the negotiations preceding the transfer and permitting her to receive such consideration as was paid, the transaction is not necessarily constructively fraudulent, but may be sustained as in the nature of a family transaction, which is favored in equity. (p. 254.)

Charles V. McAdams, pro se.

Fraser & Isham, for the appellees.

<sup>520</sup> GILLETT, J. Appellant was plaintiff below. His suit was to quiet title. The questions in the case arise upon a  
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special finding, and, so far as now material, they relate to the ownership of a one-third interest in a tract of real estate owned by Elizabeth Weidenhammer in her lifetime. According to the findings, she inherited said share from her first husband, James H. Lincoln. Zachariah T. Lincoln was a son by said marriage, and is still in life. Said Elizabeth, while so holding said interest, married Simon Weidenhammer, and died during the continuance of the latter coverture. Said Zachariah inherited, upon the death of his father, a two-ninths interest in said tract of land, and afterward contracted to sell his two-ninths interest to his stepfather, said Simon. Subsequently, in the year 1871, the latter and his wife, together with said Zachariah and his wife, executed a warranty deed to Moses Fowler and Samuel Alexander through whom appellees claim. The granting clause of the deed was of "all the interest by right of inheritance which said grantors acquired from said James H. Lincoln, deceased, in and to" a certain tract of land, which was particularly described, the description being of the tract in which said Elizabeth and said Zachariah had their respective interests as before stated. Following the granting clause it was recited in said deed that "the interest hereby conveyed by said Zachariah T. Lincoln is the equal, undivided one-third part of two-thirds of the same, and any other interest which might accrue to said Zachariah T. Lincoln after the death of said Elizabeth, his mother, in consequence of her second marriage with said Weidenhammer, and the interest of said Elizabeth hereby conveyed is the equal undivided one-third part of said land, and is the entire estate except two-thirds of two-thirds due the remaining heirs, being two, of said James H. Lincoln, deceased." Said Simon negotiated the sale evidenced by said deed. He had not purchased said Zachariah's expectancy in the one-third of his father's lands which came to his mother. Said <sup>521</sup> Zachariah had nothing to do with the negotiation of the subsequent sale except to execute the deed. He executed the same to carry out his contract of sale with said Weidenhammer, and for no other purpose. The grantees paid the reasonable value of the interests which the deed purported to convey. The purchase money was paid to said Simon, and no part of it was paid to said Zachariah. Said Simon retained of the purchase money the portion representing the two-ninths interest of said Zachariah, and gave to said Elizabeth the balance thereof. The suit was originally commenced by said



Zachariah, but during its pendency he made a conveyance to appellant, who was thereupon substituted as plaintiff.

As the fee was in said Elizabeth to the one-third of the real estate which she inherited from her first husband, it does not admit of question that a mere quitclaim deed by her son, not purporting to convey any particular interest, would have been ineffectual to convey his possible future interest therein. A deed of such an interest to a stranger would have been invalid at the common law, as calculated to provoke maintenance and other contentions: *Lampet's Case* (1613), 10 Coke, 46-48. Courts of equity, however, have from a very early period upheld specific assignments of mere possibilities, based on a valuable consideration, where the enforcement of the agreement would not contravene their own rules or public policy, the underlying theory being that where there is a duty to convey the agreement will be given force as an executory contract: 3 *Leading Cases in Equity*, 3d Am. ed., 307, 308, 343, 362; *Smithurst v. Edmunds* (1862), 14 N. J. Eq. 408; *Varick v. Edwards* (1840), Hoffm. Ch. \*382; *Emerson v. European etc. R. Co.* (1877), 67 Me. 387, 24 Am. Rep. 39; *In re Wilson's Estate* (1845), 2 Pa. 325; *East Lewisburg Lumber etc. Co. v. Marsh* (1879), 91 Pa. 96; *Ruple v. Bindley* (1879), 91 Pa. 296; *Rodijkeit v. Andrews* (1906), 74 Ohio St. 104, 77 N. E. 747, <sup>522</sup> 5 L. R. A., N. S., 564; note to *McCall v. Hampton* (1895), 56 Am. St. Rep. 335, 354. In *Mitchell v. Winslow* (1843), 2 Story, 630, Fed. Cas. No. 9673, which involved the validity of a mortgage upon machinery, tools and stock in trade, to be thereafter acquired in connection with a going business, Story, J., said: "Upon the best consideration which I am able to give to the subject, I think it [the mortgage] is good and valid. Courts of equity do not, like courts of law, confine themselves to the giving of effect to assignments of rights and interests, which are absolutely fixed and in esse. On the contrary, they support assignments, not only of choses in action, but of contingent interests and expectancies, and also of things which have no present actual or potential existence, but rest in mere possibility only. In respect to the latter, it is true that the assignment can have no positive operation to transfer, in praesenti, property in things not in esse; but it operates by way of present contract, to take effect and attach to the things assigned, when and as soon as they come in esse; and it may be enforced as such a contract in rem, in equity." Irrespective, however, of the jurisdiction of courts of equity, it has always been possible to convey subsequently

acquired interests by the operation of the principle of estoppel: 3 Washburn on Real Property, 6th ed., sec. 1916; Rawle on Covenants for Title, 4th ed., 393; 18 Viners' Abridgment, tit. "Release," G 299; Jackson v. Wright (1817), 14 Johns. \*193; Stover v. Eycleshimer (1865), 4 Barb. 84; Bank of Utica v. Mersereau (1848), 3 Barb. Ch. 528, 49 Am. Dec. 189; Pelletreau v. Jackson (1833), 1 Wend. \*110; Trull v. Eastman (1841), 3 Met. (Mass.) 121, 37 Am. Dec. 126; Habig v. Dodge (1891), 127 Ind. 31, 2 N. E. 182; Griffis v. First Nat. Bank (1907), 168 Ind. 546, 81 N. E. 490; Smith v. Pendell (1848), 19 Conn. \*107, 4 Am. Dec. 146. In the leading case of Doe v. Oliver (1829), 5 Man. & R. 202, reported in 2 Smith's Leading Cases, 11th ed. by Chitty, 724, it is declared that the interest, <sup>523</sup> when it accrues, feeds the estoppel. The fruit and effect of a warranty in a deed is that it concludes the warrantor, so that all present and future rights that he has or may have in the land are thereby extinct: 1 Sheppard's Touchstone, 18 Am. ed., \*182.

Although, as before indicated, an ordinary quitclaim deed will not estop the grantor from asserting an after-acquired interest, yet a distinct recital in a deed without covenants showing that the parties proceeded on the theory that a particular interest was thereby conveyed, may be as effectual to create an estoppel as a warranty: Van Rensselaer v. Kearney (1850), 11 How. 297, 13 L. ed. 703; 1 Jones on Real Property, sec. 991. Appellant, however, insists that there can be no estoppel where the truth appears in the instrument. This is, no doubt, a general principle as applied to ordinary recitals. We question the application of this doctrine to distinct undertakings for the transfer of after-acquired property. We place our ruling, however, not on the effect of the recitals, as such, but on the ground that an estoppel exists because of the covenant of warranty. Lord Coke observes that although estoppels are odious, yet warranties are favored in law, being part of a man's assurance: 2 Coke's Institutes (by Thomas), \*272. It is a mistake to liken an estoppel by deed to an estoppel in pais. It is stated in a note to 4 Kent's Commentaries, fourteenth edition, by Gould, \*261, that "technical estoppels by deed or matter of record sometimes conclude the party without any reference to the moral qualities of his conduct"; citing Welland Canal Co. v. Hathaway (1832), 8 Wend. \*480, 24 Am. Dec. 51; Dezell v. Odell (1842), 3 Hill, 215, 38 Am. Dec. 628. In Trull v. Eastman (1841), 3 Met. (Mass.) 121, 27 Am. Dec. 126, it was held

that a deed between brothers, made with the consent of their father, purporting to convey all of the interest of the grantor in and to the estate of the father, whether the same should fall to the grantor by will or descent, accompanied by a special covenant of <sup>524</sup> nonclaim, operated to rebut or bar the grantor when he afterward sought to recover his share of the real estate. In *Habig v. Dodge* (1891), 127 Ind. 31, 25 N. E. 182, the facts were that by warranty deed a man attempted to convey to his brother the former's contingent interest in lands which were held by his stepmother by virtue of her marital right in the lands of the grantor's deceased father, she being a childless second wife. Mitchell, J., speaking for the court, said: "It appears upon the face of the instrument that the grantor assumed to convey and warrant title to a reversionary interest equal to the undivided one-third of the real estate previously set off to the widow. It is evident that the parties dealt upon the footing that the grantor bargained and sold, and that the grantee acquired by the deed, a one-third interest in the land in dispute, subject to the estate, or supposed estate, of the widow. In equity and good conscience the grantor and all those claiming through him should now be estopped to assert the contrary": See, also, *Clendening v. Wyatt* (1895), 54 Kan. 523, 38 Pac. 792, 33 L. R. A. 278.

The question under consideration is discussed in *Ayer v. Philadelphia etc. Brick Co.* (1893), 159 Mass. 84, 34 N. E. 177, where Holmes, J., speaking for the court, said: "The estoppel is determined by the scope of the conventional assertion, not by any question of fraud or of actual belief. But the scope of the conventional assertion is determined by the scope of the warranty which contains it. Usually the warranty is of what is granted, and therefore the scope of it is determined by the scope of the description. But this is not necessarily so; and when the warranty says that the grantor is to be taken as assuring you that he owns and will defend you in the unencumbered fee, it does not matter that by the same deed he avows the assertion not to be the fact. The warranty is intended to fix the extent of responsibility assumed, and by that the grantor makes himself answerable for the fact being true. In short <sup>525</sup> if a man by a deed says, 'I hereby estop myself to deny a fact,' it does not matter that he recites as a preliminary that the fact is not true. The difference between a warranty and an ordinary statement in a deed is, that the operation and effect of the latter depend on the whole context of the deed, whereas the warranty is

put in for the express purpose of estopping the grantor to the extent of its words. The reason 'why the estoppel should operate is, that such was the obvious intention of the parties *Blake v. Tucker* (1840), 12 Vt. 39.'" In *Burk v. Hill* (1874), 48 Ind. 52, 17 Am. Rep. 731, this court quoted with approval the following language of the supreme court of Illinois in *Beach v. Miller* (1869), 51 Ill. 206, 2 Am. Rep. 290: "When a purchaser obtains title by deed without covenants, he of course takes it subject to all defects and encumbrances it may be under at the time of the conveyance. But where a person insists upon and obtains covenants for title, he has the right, when obtained, to rely upon them and enforce their performance or recover damages for their breach. The vendor is under no compulsion to make covenants when he sells land, but having done so he must keep them or respond in damages for injury sustained by their breach. Nor is it a release or discharge of the covenant to say that both parties knew it was not true or that it would not be performed when it was made": See, also, *Watts v. Fletcher* (1886), 107 Ind. 391, 8 N. E. 111.

It is true that the warranty is usually construed as co-extensive with the granting clause, and therefore a conveyance of all the grantor's interest, while capable of carrying the fee, is ordinarily satisfied by the passing of a present interest, since it would not necessarily be assumed that the grantor was warranting the conveyance of that to which a title could be made in praesenti. So to hold would cast on the grantor an unjust obligation. Here, however, the deed goes further, and it purports to convey, not alone all of the interest by right of inheritance, <sup>526</sup> which the grantors acquired from James H. Lincoln, deceased, but it specifically states that the interest conveyed by the grantor, under whom appellant claims, is, in addition to his two-ninths interest, the particular interest which might accrue to him, after the death of his mother, in consequence of her second marriage. There can be no doubt, in these circumstances, that said grantor, as well as appellant, who claims under him, are under the operation of an estoppel. They cannot be heard to say that the title to said contingent interest did not pass, because the former warranted the title to that which was granted, and the deed states that such contingent interest is "hereby conveyed." As was said by the New York court of appeals in *Thompson v. Simpson* (1891), 128 N. Y. 270, 28 N. E. 627: "The rule found stated in some of the books that there is no estoppel where an interest passes, according to the modern

cases, has no application to conveyances intended to pass the whole title, although the grantor had a limited interest which was carried by the conveyance."

It is, however, contended by appellant that the deed is void as against public policy, citing *McClure v. Raben* (1890), 125 Ind. 139, 25 N. E. 179, 9 L. R. A. 477; *McClure v. Raben* (1893), 133 Ind. 507, 36 Am. St. Rep. 558, 33 N. E. 275. Appellant also relies upon *Chambers v. Chambers* (1894), 139 Ind. 111, 38 N. E. 334, in which it was held that a reversionary interest could only be sold upon a full consideration, and that the adequacy of the consideration must be determined without reference to the value of the particular estate. As to *McClure v. Raben*, it is to be observed that that case had to do with an attempted conveyance of the bare expectancy of a son in the real estate of his mother, the absolute fee being in her. The composite of the decisions in said case is that such conveyances are regarded with disfavor, and that the burden is on the grantee to repel an inference of fraud by showing a fair transaction in which a full consideration was paid, and that the consent of the ancestor was obtained.

<sup>527</sup> It is scarcely necessary to state that the observations of the court in the decisions last referred to are to be limited to the facts before it, and that in such a case as this, in which the interest or right of the son was fixed by the law, the theory that conveyances of bare expectancies are in fraud of the bounty of the ancestor can have no application. It is doubtless true that attempted conveyances of bare expectancies by presumptive heirs are narrowly watched by courts of equity, at least when it is necessary to invoke their jurisdiction, and that in such cases the burden is on the assignee to repel the inference of constructive fraud, yet it cannot be affirmed that such courts look with disfavor upon what are construed as executory contracts for the transfer of future interests, where common honesty requires that they should be carried out, for there is a multitude of cases in which courts of chancery, whose affirmative action can only be invoked by considerations of conscience, have ordered the specific performance of such contracts: See *White & Tudor's* and *Hare & Wallace's* notes to 3 Lead. Cas. in Eq., 3d Am. ed., 306, 332; note to *McCall v. Hampton* (1895), 56 Am. St. Rep. 335, 339. In this case the fee was in the mother, but it was in the nature of a base or determinable fee. In strictness, said *Zachariah*, as a child by the first marriage, had no interest, since the statute (1 Rev. Stats. 1852, p. 250, sec. 18) was but a canon of descent. But it is to be observed that in

the accomplishment of the general purpose of the law, to transmit the estate to the child or children of the former marriage, the only prohibition therein found is that the widow shall not alienate. No such limitation is found as to the children, and, if of full age, there would be no more reason in public policy for prohibiting their conveyance, by any form of deed which would be effectual in law or equity, than there would be for prohibiting the conveyance of any reversion or remainder of a contingent character. Indeed, the statutory rights of the children <sup>528</sup> under our statute are analogous to the contingent interest of one whose title must take effect as an executory devise, whereunder an interest having a resemblance to a contingent remainder may be supported, although it cannot take effect as such, on the theory that although the freehold may not, in the meantime, be disposed of until the happening of the event, the title remains in the heir at law. Such an interest is regarded as a possibility coupled with an interest, and alienable as such: 2 Washburn on Real Property, 4th ed., \*367. Where, however, the contingency lies in the survivorship of the devisee until the happening of the event, it is obvious that he can only alien the contingency which he himself possesses.

Bearing in mind the words and purpose of the statute, it is evident that the attempted conveyance of appellant's grantor which is here in question should not be put on the plane of a conveyance by a child who has a mere expectancy that he may receive property by devise or descent from his parent. The difference between the two situations is indicated in *Jackson v. Waldron* (1834), 13 Wend. 178, wherein Senator Tracy said: "The right or interest which one may have as heir apparent or heir presumptive is very distinguishable from that one has under a devise, which gives him an estate in fee simple on the contingency that the first devisee dies without issue; for the heir, during the life of the ancestor, not only has no estate, but even if he survive him, he will not necessarily get any—for the entire and unlimited estate being in another, it is in his mere volition to sell it or devise it to another; in short, the interest of the heir does not differ in its nature from that of an expectant devisee, which is an interest which everyone may claim to have in every other's estate. But in the other case, the contingent devisee has a defined right of expectation, which is independent of the volition of caprice of any other; and on the happening of a contingency which Providence alone controls, he must come to the enjoyment of the full estate. In <sup>529</sup> two such cases, I

say, one can easily recognize the distinction between a mere naked possibility and a possibility coupled with an interest." Our concern, however, need not be to show that the particular assignment was of a possibility coupled with an interest, but it is enough to show that the transaction is without the category of an attempted sale by a mere expectant heir, as to whom there are peculiar rules of proof. The grantor not being in that category, it would seem that the grantees ought not to be put in a worse position, because there was a possibility, than they would have been in were the grantor destitute of interest: 3 Lead. Cas. in Eq., Hare & Wallace's notes, 343.

It is true that as respects assignments by mere expectant heirs, courts of equity have been disposed to hedge them about by rigid rules designed to repel the inference of fraud, and it must be admitted that a disposition has been manifested by the English courts to treat the sale of reversionary interests as falling within the same class. Some of the English judges have taken the broad ground that the consummation of such transactions ought to be made difficult, but the doctrine has met with remonstrance (*Shelly v. Nash* (1818), 3 Madd. 125; *Hincksman v. Smith* (1827), 3 Russ. Ch. 433), and the right to make such sales by auction has been recognized: *Shelly v. Nash* (1818), 3 Madd. 125. The English rule was changed, as to the requirement of a full consideration, by 31 Victoria, chapter 4, the act providing that "no purchase made bona fide and without fraud or unfair dealing of any reversionary interest in real or personal estate shall hereafter be opened or set aside merely on the ground of under value." Jeremy observes that sales of reversionary interests are not necessarily of a character calculated to excite suspicion (*Jeremy's Equity Jurisdiction*, \*399), while Judge Story, referring to such sales, states that "the principle and the policy of the rule may both be equally questionable. Sellers of reversions are not necessarily in <sup>530</sup> the power of those with whom they contract, and are not necessarily exposed to imposition and hard terms": 1 *Story's Equity Jurisprudence*, 13th ed., by Bigelow, sec. 388. The question received full consideration upon the authorities in *Cribbins v. Markwood* (1856), 13 Gratt. 495, 67 Am. Dec. 775, and the doctrine of the English courts was there repudiated, the case being one of a conveyance of a vested remainder. It is shown in that case that in some of the English cases the courts have been disposed to place reversioners and remaindermen in the category of expectant heirs as a matter of public policy, in order

to keep them dependent upon the ancestor, to the end that the power of the head of the house may be preserved, and that wealth and titular rank may be transmitted together. No such public policy exists in this country, the court declares, our policy being against the locking up of wealth in families from generation to generation, and therefore it is not necessary for the purchaser to take the burden of making good the transaction. Allen, J., speaking for the court, on page 508, said: "The inquiry in reference to sales by reversioners or remaindermen should be whether in the particular case actual fraud existed. Inadequacy of price, youth, inexperience, indebtedness, distress, are circumstances to be looked to and weighed in determining whether the bargain in the particular instance is not so unconscionable as to demonstrate some gross imposition, circumvention or undue influence; and to justify relief on the ground of fraud. In the absence of such proof of actual fraud, I do not think that it is incumbent on the purchaser of such an expectant interest to make good the bargain, by showing that a full and adequate consideration was paid." And again, it was said on page 507: "Whatever principle may be adopted in reference to contracts with expectant heirs, secretly selling the chance of a parent's or some relation's bounty, it seems to me that the actual owner of a vested interest in property, whether in reversion or remainder, should not be reduced to the condition of pupillage<sup>531</sup> from regard to any supposed rule of public policy, or for the purpose of extending to him any particular protection."

Davidson v. Little (1853), 22 Pa. 245, 60 Am. Dec. 81. It was a case where a remainderman sold his interest for a disproportionate consideration. Black, C. J., after pointing out the fact that the contract was executed, and that there was no difference between such a case and one where the grantee had to apply for specific performance, said: "But inadequacy alone must be rejected as insufficient to justify the cancellation of a conveyance, except in the case of an heir expectant who anticipates his inheritance by selling it before he gets it. . . . Inadequacy of price is not fraud. A man may be as honest in making a profitable bargain as a bad one; and the law does not require him to pay a full price, if the person he deals with is willing to take less. The owner of property may sell it for very little, or give it away for nothing, if he thinks fit; and however unreasonable his conduct may seem, his will alone is sufficient to avouch the act—'stat pro ratione voluntas.' . . . The court should have charged the jury



that, if there was no actual fraud committed by the vendee, the conveyance could not be disturbed; that the inadequacy of the price, gross as it was, could be regarded only as evidence of fraud; that this being the case of an executed contract, the inadequacy is not sufficient to prove the fraud without some additional evidence; that all the facts connected with the transaction must be considered together; and if by this means it should appear to be honest, the verdict ought to be for the vendee." *Whelen v. Phillips* (1892), 151 Pa. 312, 25 Atl. 44, involved the validity of the sale of a legacy which had been bequeathed to a person on the contingency that he outlived his mother, and the court there said: "In England, the words 'expectant heir' originally meant just what the expression naturally signifies—an heir expecting an inheritance through intestacy or devise. The doctrine of 'expectant heir' amounted to nothing more than this: that a person should not, at <sup>532</sup> common law, sell that which did not belong to him, either in possession or by vested right, but which he hoped might be acquired either certainly or contingently in the future. As thus understood, the doctrine was similar to that recognized in this state, viz., that, at common law, a man may not sell or assign that in which he has no interest, and which therefore does not and may not exist; but in England, as here, in equity a person may be compelled to make good or to treat as valid an assignment of a mere expectancy, of a mere possibility, of something which does not actually exist. As the result of judicial sympathy with the nobility in England, the doctrine from time to time expanded until it became so inconsistent with justice as to call for the interposition of parliament: *Pollock's Principles of Contract*, Am. ed. by Wald, \*549, \*556; 2 Lead. Cas. in Eq., 4th Am. ed., Hare & Wallace's notes, 1607 et seq. But, without inquiring as to the present status of the law elsewhere, it may be confidently asserted that in this state a person, sui juris, owning a contingent remainder in land, or in personal property, may sell the same for such sum as may be agreed upon between himself and the purchaser, provided the former does not stand toward him in a trust relation, and, in making the purchase, acts in good faith": See, also, *Jackson's Estate* (1902), 203 Pa. 33, 52 Atl. 125; *Phillips' Estate* (1903), 205 Pa. 511, 55 Atl. 212; *Jaeschke v. Reinders* (1876), 2 Mo. App. 212; *Bispham's Principles of Equity*, 7th ed., p. 333; note to *McCall v. Hampton* (1895), 56 Am. St. Rep. 335, 354; 5 Am. & Eng. Ency. of Law, 2d ed., 765. Chancellor Kent declares the general rule respecting ordinary sales that in-

adequacy of price is not a sufficient ground for setting them aside, unless the inadequacy is so gross and palpable as, of itself, to afford evidence of actual fraud: *Osgood v. Franklin* (1816), 2 Johns. Ch. 1, 7 Am. Dec. 513.

There can be no doubt, under the authorities in this country, that mere inadequacy of consideration does not afford <sup>533</sup> sufficient reason for setting aside the conveyance of contingent interest in property, or what approximates thereof, although the doctrine is doubtless otherwise as respects sales by expectant heirs of their supposed interest in the land of living ancestors. It must be admitted that our holdings cannot be in all respects reconciled with *Chambers v. Chambers* (1894), 139 Ind. 111, 38 N. E. 334. In that case the court was influenced to lay down an iron rule as to consideration by reason, as it appears, of some general observations by text-writers, which had for their basis the English rule. Future interests in property, based on contract, devise or statute, are valuable interests, and it is a mistake to place them in the category of wagering contracts. Imposition may often be practiced on reversioners, and contracts with them are doubtless subject to the scrutiny of courts of equity, but there being no policy in this country to maintain families in wealth, and such interests being often the only possession of reversioners, we refuse to hold that a rule as to consideration which would place an embargo upon all such sales should be adopted, or that, there being no fraud in fact, and no undue influence, the court should go to any quixotic length to protect such persons. We have considered whether the case referred to should be distinguished, as might possibly be done, or whether it should be overruled so far as it places reversioners and persons having an expectancy from a living ancestor in all cases in the same class. Having considered that the case is a solitary one in this state, that more good is likely to come from modifying it than from maintaining a wrong rule, and that no extensive property rights based on said case can be affected by its overthrow, since subsequent deeds of reversioners, in the nature of things, cannot often have been taken while the lands were in the adverse possession of others under a prior deed, our conclusion is that said case should be overruled to the extent indicated: *Paul v. Davis* (1885), 100 Ind. 422.

The question remains whether the findings are sufficient to <sup>534</sup> justify a setting aside of the conveyance. It may be admitted that an inference of fraud may in some circumstances grow out of the fact that the grantor parted with his ex-

pectancy without directly receiving any consideration. It does not admit of doubt that the fact that a parent was the beneficiary of the transaction might, at least while the child was under the dominion of the parent, cause a court of equity to scan the agreement closely. So, too, the fact that the transaction did not represent the real purpose of the grantor to make the conveyance complained of might be of much importance. It must be affirmed, however, that these circumstances, when considered singly or in combination, are not the legal equivalent of fraud.

Appellant was the plaintiff below, and whatever facts are not found must be presumed to have been found against him: *Maxwell v. Wright* (1903), 160 Ind. 515, 67 N. E. 267. In that case it was said, relative to a special finding, that if the "finding leaves some issue or material fact undetermined, such issue or fact will be regarded as not proved by the party having the burden of proof." The burden of proving the issue devolved upon a party never shifts, although the burden of producing evidence to satisfy the court or jury may shift during the trial: *Fay v. Burditt* (1882), 81 Ind. 433, 42 Am. Rep. 142; *Carver v. Carver* (1884), 97 Ind. 497; 4 *Wigmore on Evidence*, sec. 2489. If, therefore, the court has not found enough of the ultimate facts to make out a case of fraud, we can only assume that they were not proved, and that appellees were successful in rebutting all adverse inferences which might have been drawn, as matters of fact, from that which is contained in the special findings.

The mere fact that a finding of certain facts might justify an inference of fraud or call on the defendants to show a fair contract will not aid appellant now, for we cannot add to a special finding a fact unless it results as a necessary conclusion from the facts found. Aside <sup>535</sup> from the facts that the sale was of a reversionary interest, that the consideration was paid to another, and ultimately was turned over to the grantor's mother, there are no facts found to militate against the burden which the appellant assumed when he became a plaintiff in the suit, except that the stepfather negotiated the sale, that said Zachariah had nothing to do with the negotiation except to execute the deed, and that he so executed the same to carry out his contract of sale with his stepfather and for no other purpose.

The transaction could not be said to have been fraudulent per se, even if the son had made a voluntary deed, upon a nominal consideration, of his interest to his mother. It was said in the syllabus to *Jenkins v. Pye* (1838), 12 Pet. 241,

9 L. ed. 1070: "To consider a parent disqualified to take a voluntary deed from his child, without consideration on account of their relationship, is opening a principle at war with all filial, as well as parental, duty and affection." The finding that the grantor had nothing to do with the negotiation and that he executed the deed for the sole purpose of carrying out his contract is not the equivalent of a finding that he was not acquainted with the contents of the deed, which contained an express recital that he was conveying his expectancy, and no excuse appears for his failure to understand the deed, if there was such failure. So far as we are able to say, said grantor may have been fully apprised of the contents of the deed, while yet he executed it for the sole purpose, so far as he was concerned, of carrying out his contract. He may have been indifferent to his expectancy, or, while joining in the deed for the purpose of carrying out his contract, he may have been content that the deed should contain the further provision, because his mother was receiving the purchase money. This brings us to the proposition respecting the lack of consideration, that the transaction might, as between appellant and his mother, have been in the nature of a family transaction, which is favored in equity: *St. Clair v. Marquell* (1903), 161 Ind. 56, 67 N. E. 693; *Eissler* <sup>530</sup> v. *Hoppel* (1902), 158 Ind. 82, 62 N. E. 692. In *Bellamy v. Sabine* (1847), 2 Phill. \*425, \*439, the court said: "It has often been decided that in such transactions between a father and son the ordinary rules which are applied to the acts of strangers are not to regulate the judgment of this court. In such cases apparent inadequacy of consideration and the circumstance that the property was reversionary have little weight. Fraud will indeed vitiate these as well as other transactions, but arrangements between members of the same family to assist their several objects or relieve their several necessities are affected by so many peculiar considerations, and are influenced by so many different motives, that they have been wisely withdrawn from the influence of the ordinary rules by which the court is guided in adjudicating between other parties." We do not know the age of said grantor, or the measure of his business experience, or whether he was in any respect under the dominion of his mother or stepfather. The findings fail to advise us of any of the many conceivable circumstances which might have appeared in evidence tending to show the utmost good faith upon the part of the purchasers. Admitting, for the sake of the argument, that in some way said grantor might have failed to understand the nature of the

transaction, yet it is conceivable that it might nevertheless have had, from the viewpoint of the grantees, every indicia of a fair bargain. As was said by Ashhurst, J., in *Lickbarrow v. Mason* (1787), 2 Term Rep. 63, 70: "We may lay it down as a broad general principle that, wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." There is a great hiatus between the legal effect of the facts found and the ultimate facts which in such a case as this would be necessary to warrant the conclusion that appellant was the owner of the land, and therefore the judgment should be affirmed.

It is so ordered.

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*The Operation and Defect of Quitclaim Deeds* are discussed in the note to *Babcock v. Wells*, 85 Am. St. Rep. 854. Such a deed does not of itself operate as an estoppel against either the grantor or grantee as to the nature or extent of the title: *Olmstead v. Tracy*, 145 Mich. 299, 166 Am. St. Rep. 299. An unrecorded warranty deed has precedence over a subsequently executed and recorded quitclaim deed purporting to remise, release and quitclaim the grantor's interest in the premises: *Fowler v. Will*, 19 S. D. 131, 117 Am. St. Rep. 338.

*The After-acquired Title of a Grantor* usually inures to his grantor: *Ford v. Unity Church Society*, 120 Mo. 498, 41 Am. St. Rep. 711; *Bernardy v. Colonial etc. Mtg. Co.*, 17 S. D. 637, 106 Am. St. Rep. 791; *Collins v. McKay*, 36 Mont. 123, 122 Am. St. Rep. 334. If a person at the time of conveying land by deed of warranty has no title, but afterward acquires one, such title inures and passes eo instanti to his grantee, and this rule applies when the warranty is such as the law implies from the employment of statutory words: *New England Mortgage etc. Co. v. Fry*, 143 Ala. 637, 111 Am. St. Rep. 62. If, however, a conveyance with warranty is void, because the land is in the adverse possession of another, it has been held that the after-acquired title of the grantor does not inure to the benefit of the grantee: *Altemus v. Nickell*, 115 Ky. 506, 103 Am. St. Rep. 333.

*Contingent Interests and Expectancies*, and things having no present existence, but which rest only in possibility, may, by contract bona fide made and for a sufficient consideration, be assigned so as to be binding in equity: *Hudnall v. Ham*, 183 Ill. 486, 75 Am. St. Rep. 124; *Crossman v. Keister*, 223 Ill. 69, 114 Am. St. Rep. 305. See the note to *McCall v. Hampton*, 56 Am. St. Rep. 339, on the assignment of expectancies.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**IOWA.**

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**CITY OF NEWTON v. BOARD OF SUPERVISORS OF  
JASPER COUNTY.**

[135 Iowa, 27, 112 N. W. 167.]

**STATUTES, CONSTRUCTION OF.**—The Word "Shall," when used in a statute directing that a public body do certain acts, is to be construed as mandatory and not permissive, and excludes the idea of discretion. (p. 258.)

**CONSTITUTIONAL LAW—Title of Act.**—Under a constitutional provision that an act shall embrace but one subject and matters properly connected therewith, which subject shall be embraced in the title, the title is sufficient if it expresses the subject matter of the act, without specifying the matters connected therewith (pp. 258, 259.)

**CONSTITUTIONAL LAW—Title of Act—Sufficiency.**—An act entitled "An act to revise, amend and codify the statutes in relation to roads, bridges and ferries and the destruction of thistles," sufficiently expresses the subject of the act, although it does not mention all matters properly connected therewith. (p. 259.)

J. Silwold, for the appellants.

H. C. Korf, and J. E. Cross, for the appellee.

**28 DEEMER, J.** Defendants are the board of supervisors and the individual members thereof in and for Jasper county and plaintiff is a city of the second class within said county. In September of the year 1904 the board levied a tax of one mill on the dollar upon all property in Jasper county, including that within the city of Newton, for the creation of county road fund. There had been paid to the county treasurer when this action was commenced in taxes upon property within the city of Newton the sum of nine hundred and seventy-two dollars and seventy-one cents. Of this amount there had been expended under the direction of the city council of Newton upon roads and streets therein and upon the

highways adjacent thereto the sum of five hundred and fifty dollars, leaving a balance in the hands of the county treasurer of four hundred and twenty-two dollars and seventy-one cents. The city council demanded that this balance be expended upon the roads and streets of the city, and upon the roads adjacent thereto, as directed by the city council, which demand was refused by the defendant board upon the ground that it had the absolute authority to expend all of said fund upon <sup>the</sup> the roads of Jasper county as it saw fit. This action is to compel the board to comply with the demand of the city council.

1. Defendant contends that the road fund was and is entirely within its authority and jurisdiction, and that the statute upon which plaintiff relies is unconstitutional and void. As the case is primarily one for statutory construction, we here quote the law upon which plaintiff relies. It is known as section 1530 of the Code, with amendments, and reads as follow:

"County Road Fund—How Levied and Paid Out.—The board of supervisors of each county shall, at the time of levying taxes for other purposes, levy a tax of not more than one mill on the dollar of the assessed value of the taxable property in its county, including all taxable property in cities and incorporated towns, which shall be collected at the same time and in the same manner as other taxes, and be known as the county road fund, and paid out only on the order of the board for work done on the roads of the county in such places as it shall determine; but so much of the county road fund as arises from property within any city or incorporated town, shall be expended on the roads or streets within such city or town, or on roads adjacent thereto, under the direction of the city or town council; and the county treasurer shall receive the same compensation for collecting this tax as he does for collecting corporation taxes. Moneys so collected shall not be transferable to any other fund nor used for any other purpose. The board of supervisors shall levy such additional sum for the benefit of such townships as shall have certified a desire for such additional levy, as provided for in section fifteen hundred and twenty-eight of this chapter; but the amount for the general township fund and county road fund shall not exceed in any year five mills on the dollar."

This has been amended by chapter 56, Acts of 31st General Assembly, but the amendment is not material, save as it in-

dicates an intent on the part of the legislature to direct how the road fund shall be expended. The act as amended, and <sup>30</sup> as it appears in the Code Supplement of 1902, as section 1530, was the outgrowth of chapter 200, Acts of 20th General Assembly, except that it expressly includes all taxable property in cities and embraces the following clause: "But so much of the county road fund as arises from property within any city or incorporated town shall be expended on the roads or streets within such city or town or on the roads adjacent thereto, under the direction of the city or town council." Taking the act as we now have it, it is manifest that, unless we construe the word "shall" as the equivalent of "may," plaintiff is right in its position, unless there be something in the claim that the act is unconstitutional. Sometimes courts are justified in interpreting the word "shall" as "may," but when used in a statute directing that a public body do certain acts, it is manifest that the word is to be construed as mandatory and not permissive: *Grant v. City of Newark*, 28 N. J. L. 491; *Madderom v. City of Chicago*, 194 Ill. 572, 62 N. E. 846. The uniform rule seems to be that the word "shall," when addressed to public officials, is mandatory, and excludes the idea of discretion: *People v. Board of Assessors*, 39 N. Y. 81; *French v. Edwards*, 80 U. S. 506, 20 L. ed. 702. There are many reasons for this rule which need not be elaborated upon as the cases cited fully present the grounds upon which it is based.

2. The claim of unconstitutionality is based upon the thought that the title is defective, in that it does not sufficiently indicate the subject matter of the act. The clause in controversy first made its appearance in the Code of 1897 and is a part of title 8 of that Code, which was entitled "An act to revise, amend and codify the statutes in relation to roads, bridges and ferries and the destruction of thistles." Surely, the act does refer to roads or to the working of roads as expressed in the subtitle to chapter 2 of the act. The act authorizing and creating roads refers not only to roads and highways, but also to roads which lie within the limits of cities and towns (see section <sup>31</sup> 1508 of the Code et seq.) and the words "roads" and "highways" are synonymous. Code, sec. 48, par. 5. The main object of the law was to secure a road fund wherewith to work the roads of the county, and that the streets of the city were or might be included is no objection to the act. The title does not say anything about how the money shall be expended. Nevertheless, it will not be contended, we think, that the entire act



is void because the title does not refer to the matter of the expenditure of the money. The case is ruled in this respect by *Boggs v. School Dist.*, 128 Iowa, 15, 102 N. W. 796; *Cook v. Marshall Co.*, 119 Iowa, 384, 104 Am. St. Rep. 283, 93 N. W. 372; *Beresheim v. Arnd*, 117 Iowa, 83, 90 N. W. 506; *State v. County Judge*, 2 Iowa, 280; *Chamberlain v. Iowa Tel. Co.*, 119 Iowa, 619, 93 N. W. 596; and other like cases. The constitutional provision is that an act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title: See Const., art. 3, sec. 29. It is the subject which is to be expressed, and not all matters properly connected therewith. We think that the subject is properly expressed in the title to the act now before us.

No error appears, and the judgment is affirmed.

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*The Word "Shall" Used in Statutes* is usually regarded as mandatory and not directory merely: *State v. Ellet*, 47 Ohio St. 90, 21 Am. St. Rep. 772.

*The Sufficiency of the Title to Statutes* within constitutional requirements is discussed in the notes to *Lewis v. Dunne*, 86 Am. St. Rep. 267; *Crookston v. Board of County Commissioners*, 79 Am. St. Rep. 456; *Bobel v. People*, 64 Am. St. Rep. 70.

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## SPIKER v. EIKENBERRY.

[135 Iowa, 79, 110 N. W. 457.]

**NUISANCE—Baseball.—Injunction.**—The owner of a vacant lot cannot be enjoined from knowingly permitting the use of his lot for playing baseball thereon without pecuniary compensation to himself, although the result of such playing is likely to be the batting of the ball upon adjoining premises. (pp. 261, 262.)

**NUISANCE—Baseball.**—The playing of the game of baseball is not a nuisance per se, against which persons living in the vicinity where the game is played are necessarily entitled to equitable relief. (p. 262.)

W. B. Barger, Stuart & Stuart and C. A. Murray, for the appellant.

Dungan & Atten, for the appellees.

<sup>20</sup> **McCLAIN, J.** It appears that defendant is the owner of the west six lots of the north half of an outlot in the city of Chariton, which outlot constitutes a subdivided block of said city, and that the Chicago, Burlington and Quincy Railroad

Company is the owner of the east two lots, constituting the remainder of the north half of said outlot. Plaintiffs are the owners of lots in the south half of the block, which are occupied for residence purposes. The complaint made by plaintiffs is that defendant allows his lots to be used from time to time as a place for holding shows, games, and exhibitions, which necessarily produce great annoyance to plaintiffs' comfortable use of their property, by reason of the noise, profanity, and trespassing upon plaintiffs' property by going thereon to recover balls, sitting on fences and buildings adjoining the grounds, and other annoyances to plaintiffs<sup>s1</sup> incident to the use of the premises for the playing of games of baseball. It is also charged that during the year 1904 defendant rented his grounds for the use of shows, which would arrive at night, and by the rattling of wheels, shouts of the drivers, neighing of horses, and howling of wild animals, make a continuous uproar nearly all night, causing annoyance to plaintiffs. Defendant in his answer admits the ownership of the property, but denies that he ever leased, permitted or consented to the use of his property for the purposes complained of, and alleges that his lots are open and unfenced, adjoining a railroad right of way, and that for more than thirty years, and for at least ten years before the erection of any houses on the south half of the block, they had been used as the place for shows, and for the playing of baseball; and further, that it would be impossible, without incurring the expense of fencing the lots and employing watchmen to keep boys from playing ball thereon.

With reference to the complaint of annoyance caused by the use of defendant's premises for shows, the allegations of plaintiffs' petition as amended are probably not sufficient to entitle plaintiffs to any relief, for the specific allegations are only as to the renting of the premises by defendant on three occasions for show purposes during the year 1904, and it is not satisfactorily made out that there has been any continuous use, real or threatened, for such purposes. The trial court found from the evidence that the noises chiefly complained of with reference to the shows resulted from the loading and unloading in the railroad yards, for which defendant could not be held responsible. As the plaintiffs have served no notice of appeal from the action of the trial court in dismissing plaintiffs' petition, so far as it relates to the use of defendant's premises for show purposes, that branch of the case need not be further considered.

With reference to the playing of baseball on defendant's lots, the trial court found that defendant was not responsible for some of the incidents thereof, such as drinking in the <sup>82</sup>alley adjoining plaintiffs' lots, and trespasses committed by those who go upon plaintiffs' premises to recover balls which are knocked there in connection with the games. But it is found that an inevitable result of the playing of ball on defendant's premises is the batting of the ball upon the premises of plaintiffs, which constitutes such an obstruction to the free use of plaintiffs' property as essentially to interfere with the comfortable enjoyment thereof by the occupants. The question now for determination is whether defendant should be enjoined from knowingly permitting the use of his lots for the playing of ball, the result of which is likely to be the batting of the ball upon the premises of plaintiffs.

We have not here a case where the nuisance complained of is the condition of defendant's property interfering with the comfortable enjoyment of adjoining premises. Undoubtedly, the owner of property may be required to keep it in such condition as not to unreasonably interfere with the safety and comfort of those occupying the adjoining premises: *Gray v. Boston Gas Light Co.*, 114 Mass. 149, 19 Am. Rep. 324; *Mahoney v. Libbey*, 123 Mass. 20, 25 Am. Rep. 6; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567; *Attorney General v. Heatley*, [1897] 1 Ch. Div. 560. Nor is this a case where the owner of premises by employing or leasing them for profit for a use constituting a nuisance to the adjoining occupants of property renders himself directly responsible for nuisances necessarily resulting from such use. In such cases the owner may unquestionably be held responsible for the results flowing from the uses which he makes, or for his own advantage allows others to make, of his premises: *Gilbough v. West Side Amusement Co.*, 64 N. J. Eq. 27, 53 Atl. 289; *Seastream v. New Jersey Exhibition Co.*, 67 N. J. Eq. 178, 58 Atl. 532; *Cronin v. Bloemecke*, 58 N. J. Eq. 313, 43 Atl. 605; *Walker v. Brewster*, L. R. 5 Eq. Cas. 25; *Inchbald v. Robinson*, L. R. 4 Ch. App. 388; *Rex v. Moore*, 3 Barn. & Adol. 184. Here the premises are <sup>83</sup>not, in themselves, the occasion of any injury to plaintiffs, nor is the defendant doing or threatening to do any act thereon which will be injurious to plaintiffs. If persons without authority of the defendant, and without his consent, go upon his vacant lots and engage in acts which threaten injury or annoyance to plaintiffs, it would seem that the per-

sons causing, or threatening to cause, such injury or annoyance are the persons to be complained of, and not the defendant. The rule applicable to such a case as this seems to us to be correctly expressed in this sentence from the opinion in *Seastream v. New Jersey Exhibition Co.*, 67 N. J. Eq. 178, 58 Atl. 532: "No responsibility cognizable in this court attached to the owners of the vacant lots who simply permitted any parties who chose to come along and play baseball there without any pecuniary profit to anybody except the common carriers who transported them." This language may, perhaps, be dictum in the case in which it is uttered, but it correctly expresses the rule which ought to be applied in the present case. The playing of the game of baseball is not a nuisance per se, against which persons living in the vicinity where the game is played may necessarily be entitled to equitable relief: *Alexander v. Tebeau*, 24 Ky. Law Rep. 1305, 71 S. W. 427. And the evidence does not show that the game as played on defendant's lot has been so played as to constitute a nuisance. These games have been attended by ministers of the gospel and ladies of the first social circles in the city, and have been found by them unobjectionable so far as the conduct of the players has been concerned. As we understand it, the sole ground on which the trial judge granted the injunction was that the ball was likely to be sometimes knocked foul in such a way as to fall upon plaintiffs' premises. It might perhaps be well said that, so far as this has occurred in the past, the defendant ought not to be held liable, for the batter and catcher have stood upon the lots belonging to the railway company, which is not a party defendant in this suit. But without regard to any such <sup>84</sup> rather technical excuse, it is sufficient to say that no responsibility for the knocking of the ball upon the premises of the plaintiffs can be laid at the door of the defendant, and the court ought not to have charged him with the responsibility of actively preventing the use of his uninclosed lots by those who may see fit to engage in ball games there without his affirmative consent.

In answer to the argument that defendant might take proper steps to prevent the wrongful act of going upon his lots without permission, and thereby avoid the consequent injury to plaintiffs, it may be said that plaintiffs have just as adequate a remedy as against persons who knock balls into their yards, and we think it more reasonable that plaintiffs be required to take the necessary steps against the actual wrongdoers than that the burden be thrown upon defendant,

who is not a participator in any wrong against plaintiffs, to prevent such conduct on his premises as will result in plaintiffs' injury.

Appellant's motion to strike appellees' argument in reply is sustained.

We think the trial court erred in granting a decree against the defendant, and its judgment is therefore reversed.

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*The Playing of Baseball as a Nuisance* is discussed in the note to *Acme Fertilizer Co. v. State*, 107 Am. St. Rep. 227.

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## BOHN v. BOONE BUILDING AND LOAN ASSOCIATION.

[135 Iowa, 140, 112 N. W. 199.]

**BUILDING AND LOAN ASSOCIATIONS—Maturity of Stock.** If shares of stock in a building and loan association have matured, the holder is no longer a stockholder in such association, but simply a creditor thereof, whose certificates of stock are valuable only as proof of the number of shares on which he is entitled to receive his money. (p. 265.)

**BUILDING AND LOAN ASSOCIATIONS—Maturity of Stock—Right to Loan to Association.**—When the shares of stock in a building and loan association held by a member have matured, he has a right to leave the money as a loan in the hands of the association, unless such transaction is so clearly in excess of its corporate power as to be ultra vires. (p. 265.)

**BUILDING AND LOAN ASSOCIATIONS—Power to Borrow Money.**—The power of building and loan associations to borrow money is implied from the general nature of the business they are organized to carry on. (pp. 265, 266.)

**BUILDING AND LOAN ASSOCIATIONS—Loans to Retiring Member.**—A provision in the by-laws of a building and loan association that, upon the maturity of the shares of a member, he shall have no further interest in or profit thereon, does not prevent him from making a valid loan of the amount due to the association and taking its note therefor. (p. 266.)

**BUILDING AND LOAN ASSOCIATIONS, Loans to—Authority of Officers.**—The president and secretary of a building and loan association have power to accept a loan from a retiring member whose shares have matured for the amount thereof, and to give him a note therefor, where the transaction is made a matter of record in pursuance of a practice or custom prevailing in the management of the corporate business. (p. 266.)

**BUILDING AND LOAN ASSOCIATIONS—Estoppel to Plead Insolvency.**—A building and loan association cannot plead in avoidance of a retiring member's right of action on a note given him by the association for the amount of his matured stock, that it was in fact insolvent at the time of giving the note, and long prior to the date when it actually ceased to do business. (p. 267.)

Goody, Koontz & Mahoney and W. M. Wilcoxon, for the appellant.

Crooks & Snell and Dyer & Hull, for the appellee.

<sup>141</sup> WEAVER, C. J. The defendant is a building and loan association organized under the laws of this state. Prior to July 31, 1903, the plaintiff was a nonborrowing member and holder of twenty shares of stock in said association. On the date named, plaintiff's shares were found to be fully paid up, the book value having become equal to the par value thereof, and he thereby became entitled to demand and receive from the association the sum of two thousand dollars upon the surrender of his certificate. Instead of drawing the money, however, he entered into an arrangement with the officers of the association, or with some of them, by which he accepted a promissory note purporting to be the obligation of the association for two thousand dollars due in one year, at five per cent interest, with an option under certain conditions on part of the maker to have the same extended on same terms for an additional year. The note is upon a form in which the name and obligation of the association are printed in full, with blanks attached for the signatures of its president and secretary. These blanks appear to have been filled with the names of the president and secretary then holding and exercising functions of the offices named. The giving of the note was not concealed, for, as we understand the matters stated in the abstract, the transaction was properly entered in the "bills payable" account of the association, and there was no other entry which could mislead the association, or any of its members or officers, into the belief that this plaintiff had ever withdrawn the money to which he was entitled. No officer or other witness attempts to deny knowledge of this transaction, or of the giving of the note; or to say that <sup>142</sup> in giving it the president and secretary departed from the authority usually exercised by them, or from the course of business usually transacted by them for and in the name of the corporation.

This obligation not having been paid, plaintiff brought action to recover thereon. By an amendment to his petition, filed at a later date, plaintiff alleged in a separate count the fact of his former membership in the association, the maturity of his stock, and that the sum so due, though demanded, had not been paid. The answer of the defendant admits the issue of the stock, but denies that the note was issued by or with the authority of the association, and denies

the authority of the president and secretary to bind it by the issuance of such an obligation. It further pleads a section of its by-laws, which provides that no profit or interest shall be paid upon shares of stock after they are once matured, but the only right of the holders of such shares after maturity is the right to demand and receive the face value of their certificates.

It is further pleaded that, in the year 1904, the precise date not being given, but evidently after the maturity of the note given to the plaintiff, the association was found to be insolvent and went into voluntary liquidation, for which reason it is contended that the only right plaintiff has in the premises is to be paid pro rata with the other stockholders from the residue which may remain of the assets of the concern, after the demands of the creditors of the corporation have been satisfied. The district court entered judgment for defendant for costs, without prejudice to plaintiff's right to share pro rata with the other stockholders in the net assets of the corporation, and plaintiff appeals.

We are of the opinion that the judgment of the learned trial court cannot be upheld. In the first place, the plaintiff is making no claims as a stockholder in the association. True, he was once a stockholder, and while that relation existed the value of his stock could be determined only by consideration <sup>143</sup> of the relative rights of his fellow-stockholders, who equally with himself were entitled to share in the common fund; but when his shares matured, and upon settlement with the association he was found to be entitled to withdraw the face value thereof, his relations as a stockholder ceased, and he became a creditor simply, without power to vote the shares of stock or to exercise any of the ordinary rights of membership. His certificate ceased to be evidence of continuing membership, and was valuable only as proof of the number of shares on which he was entitled to receive his money: *Winegardner v. Equitable Loan Co.*, 120 Iowa, 485, 94 N. W. 1110. When, therefore, plaintiff's shares matured, and his right to withdraw the value thereof became fixed, it was perfectly competent for him to leave the money as a loan in the hands of the company, unless such transaction was so clearly in excess of the corporate power of the association as to be ultra vires and void.

There is no statute of this state denying to building and loan associations the power to borrow money, and, in the absence of such restrictions, we think the power is implied from the general nature of the business they are organized to carry

on: See, upon this proposition, *Grommes v. Sullivan*, 81 Fed. 45, 26 C. C. A. 320, 43 L. R. A. 419; *North Hudson B. & L. Assn. v. First Nat. Bank*, 79 Wis. 31, 47 N. W. 300, 11 L. R. A. 845. Nor do we find any restriction in this respect in the section of the by-laws to which our attention has been directed. That provision is simply a restatement of the general proposition of law that, when the shares held by a stockholder have matured, the right to further interest or profit thereon ceases. But plaintiff claims in this action no interest or profit on his shares after maturity. By the first count of his petition he alleges in effect a loan to the corporation for which he received its promissory note. If he had received the money in his hand, and then passed it back as a loan, taking a promissory note <sup>144</sup> therefor, no one would question the regularity of the transaction, providing, of course, the officers were acting within the apparent scope of their authority. Such being the case, no reason occurs to us why the same effect is not to be accorded to the giving of the note, without the idle form of passing the money over the secretary's table, only to pass it back again.

As to the authority of the president and secretary to execute the note in question, we are of the opinion that it is sufficiently established by the facts disclosed in the record to which we have already made general reference. The president and (more especially) the secretary are the executive officers of a building and loan association. The form of this note, and the circumstances of its execution, clearly indicate that it was given pursuant to a practice or custom prevailing in the management of the corporate business. The association received the consideration given for the note, and a record of the transaction appeared upon its books, to be read by every member and officer who cared to examine into its business. To permit it now to repudiate liability would be unconscionable: *Field v. Eastern B. & L. Assn.*, 117 Iowa, 185, 90 N. W. 717; *Wisconsin Lumber Co. v. Green & W. T. Co.*, 127 Iowa, 350, 109 Am. St. Rep. 387, 101 N. W. 742, 69 L. R. A. 968.

By the second count of plaintiff's petition, a right of action is based upon the maturity of the stock, and if for any reason the trial court felt compelled to hold the note invalid, we see no escape from the conclusion that a recovery should have been allowed on this alternative claim. It is not denied that the stock had matured, or that upon settlement between plaintiff and the managing officers he was found entitled to the full face value of his shares. There is no claim that it



has been paid, except by the giving of the note, as above stated, and, if the note should be held void for want of authority to issue it, then the original debt remains a good and valid claim, for which a recovery should be allowed. <sup>145</sup> The fact, if it be a fact, that the association has since become insolvent, can have no effect to invalidate such claim or to relegate the plaintiff from his position as creditor to that of a member. The association admittedly continued in business as a going, solvent corporation for a year or more after maturing plaintiff's shares and giving him the note sued upon in the first count of the petition, and, while there is some conflict in the authorities, we think the better rule to be that the association cannot be heard to plead, in avoidance of the retiring member's right of action, that it was in fact insolvent at a time long prior to the date when it actually ceased to do business: In re Investment B. Soc., 44 Week. Rep. 141; In re Alliance Soc., 28 Ch. D. 559; In re Middleborough B. Soc., 54 L. J. Ch. D. 592.

It should also be said, as to the case before us, that the record is barren of any evidence of the insolvency of the association at the time the plaintiff retired therefrom, or, indeed, at any time since. What we have said sufficiently indicates our conclusion that, upon the case made, the plaintiff was entitled to recover.

The judgment of the district court is therefore reversed.

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*A Building and Loan Association may Borrow Money* and give its promissory note therefor. A note given by a building and loan association for borrowed money may be enforced, though the association was insolvent, and the money was used in paying withdrawing stockholders, who were not entitled to receive the whole of it, and the lender had knowledge of these facts: Marion Trust Co. v. Crescent Loan etc. Co., 27 Ind. App. 451, 87 Am. St. Rep. 257; and see also the note to Robertson v. Homestead Assn., 69 Am. Dec. 158.

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## HOME SAVINGS BANK v. OTTERBACH.

[135 Iowa, 157, 112 N. W. 769.]

**BANKS AND BANKING—Misappropriation of Funds—Right to Retain.**—A person who accepts a draft issued by the cashier of one bank against funds held by its correspondent in payment of the individual indebtedness of such cashier, is charged with knowledge that the draft is drawn on the bank's funds, and cannot retain the fund thus diverted as against a showing that the cashier acted without authority. (pp. 268, 269.)

**BANKS AND BANKING—Misappropriation of Funds by Cashier—Estoppel.**—One not induced by any action of the officers of a bank to rely on the authority of its cashier to use the bank's funds

for his own benefit, is bound to know that such cashier has no apparent authority to do so, and the burden of establishing an estoppel against the bank is upon him. (p. 269.)

**BANKS AND BANKING—Misappropriation of Funds by Cashier—Ratification—Right to Recover.**—An attempt on the part of a bank to hold its cashier individually liable for an amount which he has unlawfully diverted from the bank's funds, does not prevent the bank from following such funds and reclaiming them from the person to whom they have been wrongfully paid. (p. 269.)

**BANKS AND BANKING—Joint Conversion of Funds—Extinction of Liability.**—If two persons are jointly liable for the conversion of funds of a bank, the liability of both is extinguished only by the receipt by the bank of satisfaction from one of them. (p. 270.)

**CONVERSION, JOINT—Settlement—Extinction of Liability.**—If two persons are jointly liable for the conversion of funds, a settlement with one of them must be of such character as to relieve him from further liability to operate as a discharge of the liability of the other. (p. 270.)

**CONVERSION, JOINT—Election of Remedies—Settlement.**—If two persons are jointly liable for a conversion of funds, a criminal prosecution against one of them therefor does not constitute an election of remedies, or a settlement which will relieve the other from liability. (p. 270.)

Nagle & Nagle, for the appellant.

Bryson & Bryson and E. P. Andrews, for the appellee.

159 **McCLAIN, J.** There is no question under the evidence that on February 23, 1903, E. O. Soule, the cashier and managing officer of the plaintiff bank, was personally indebted to the defendant in the sum of one thousand and thirty dollars upon a promissory note; for while the proceeds of the loan of one thousand dollars by defendant to Soule for which his individual note was given went into the funds of the bank, such proceeds were received by the bank as the property of Soule, and not as the property of defendant. It is also established beyond question that on demand of payment being made on this individual note, Soule drew a draft of the plaintiff bank on its Chicago correspondent for one thousand dollars payable to defendant, and delivered said draft to him, and entered a credit in defendant's favor upon his passbook as depositor in the plaintiff bank in the sum of thirty dollars; that the defendant thereupon surrendered to Soule the personal obligation which he held against the latter; and that subsequently defendant drew out of the plaintiff bank the thirty dollars entered to his credit, and received the proceeds of the draft issued to him.

1. The transaction involving the payment by Soule of his individual note with plaintiff's Chicago draft would not have been different in legal effect if Soule had paid his debt to

defendant by handing over to him at the cashier's window bills taken with defendant's knowledge from the cash of the bank lying on its counter. Defendant was charged with knowledge that the Chicago draft given to him was a draft <sup>100</sup> drawn on the bank's funds, and, while he might assume, for the purpose of being relieved from any criminal liability, that Soule was acting under some arrangement with the bank by which he was authorized to use the bank's funds to pay his individual debt, he cannot, as against a showing that Soule acted without any authority in thus diverting the funds of the bank, insist on the right to retain the funds thus diverted: *Kitchens v. Teasdale Commission Co.*, 105 Mo. App. 463, 79 S. W. 1177.

There was no estoppel as against the bank. Defendant was not by any action of the officers of the bank induced to rely on the authority of Soule to use the bank's funds for his own benefit, and he was bound to know that Soule had no apparent authority to do so: *Lamson v. Beard*, 94 Fed. 30, 36 C. C. A. 56, 45 L. R. A. 822; *Heir v. Miller*, 68 Kan. 258, 75 Pac. 77, 63 L. R. A. 952; *Campbell v. Manufacturers' Nat. Bank*, 67 N. J. L. 301, 91 Am. St. Rep. 438, 51 Atl. 497; *Wheeler v. Home Savings & State Bank*, 188 Ill. 34, 80 Am. St. Rep. 161, 58 N. E. 598. The burden of establishing an estoppel was upon the defendant, and he has failed to establish the facts essential to constitute such estoppel: *City Bank of Boone v. Radtke*, 87 Iowa, 363, 54 N. W. 435; *Durlam v. Steele*, 88 Iowa, 498, 55 N. W. 509; *Redhead v. Iowa Nat. Bank*, 127 Iowa, 572, 103 N. W. 796.

2. There was no ratification by the bank of Soule's unauthorized act in using its funds for the purpose of paying his own debt. The bank did attempt to hold Soule individually liable for the amount which he had diverted from the bank's funds in payment of his individual indebtedness to defendant, but no ratification of his unauthorized act would arise from the assertion of such a claim on the part of the bank. To assert Soule's liability for the diversion of the funds was not to ratify, but to disaffirm. There was a conversion by Soule of the funds of the bank, and liability for this conversion could be insisted upon without regard to any right of the <sup>101</sup> bank to follow the funds and reclaim them from the person to whom they had been wrongfully paid: *Kitchens v. Teasdale Commission Co.*, 105 Mo. App. 463, 79 S. W. 1177.

3. For the reasons suggested in the last preceding paragraph with reference to the question of ratification, we are

satisfied that there was no election of remedies on the part of plaintiff by proceeding against Soule which would preclude the prosecution of a claim against defendant. Soule and the defendant were jointly liable for the conversion of these funds by Soule to the payment of his debt, and the liability of one of the wrongdoers would be extinguished only by the receipt by the bank of satisfaction from the other. Unless there has been a binding settlement with Soule relieving him from further liability, there has been no satisfaction which would extinguish the liability of defendant: *Austin Mfg. Co. v. Decker*, 109 Iowa, 277, 80 N. W. 312; *Cushing v. Hederman*, 117 Iowa, 637, 94 Am. St. Rep. 320, 91 N. W. 940.

4. Finally, it is insisted that there was a settlement of the bank's claim against Soule, which included his liability for the funds diverted by him to the payment of his individual debt to defendant; but the record does not sustain such a settlement. The only evidence on the question is that of defendant, who testified to a conversation with the president of plaintiff bank, in which the president said that "they had got the money and some property" and five thousand dollars on Soule's bond. But it appears that an action instituted by the bank against Soule to recover money embezzled by him, including money paid defendant, is still pending, and there is no showing of facts which would defeat a recovery against Soule. As no settlement with Soule such as would relieve him from further liability is made out, there was no satisfaction of the claim which would discharge the liability of the defendant as joint wrongdoer.

The criminal prosecution against Soule for embezzlement of funds, including the funds paid to defendant, would clearly not constitute an election of remedies or a settlement for it would not relieve Soule from his liability, and, therefore, would not discharge defendant as a joint wrongdoer.

Our conclusion is, that under the evidence which was before the court at the conclusion of the testimony introduced on both sides there was not only error in sustaining the motion of defendant for a directed verdict in his favor, but that there was no evidence on which a verdict, if rendered in favor of defendant, could have been sustained, and that therefore, the court should have directed a verdict for plaintiff under its motion made at the same time, and the cause is therefore remanded, with direction to the lower court to enter up a judgment in favor of the plaintiff.

Reversed and remanded.

Weaver, C. J., taking no part.

*The Cashier of a Bank* is only its agent and his conduct is governed by the general law of agency. Hence the bank is bound so long as he keeps within the scope of his authority, but is not answerable if he acts beyond his authority or in his individual capacity: See the monographic note to *Corser v. Paul*, 77 Am. Dec. 759-763; *Simmons Hardware Co. v. Bank*, 41 S. C. 177, 44 Am. St. Rep. 700; *L'Herbette v. Pittsfield Nat. Bank*, 162 Mass. 137, 44 Am. St. Rep. 354; *Oakland County Sav. Bank v. State Bank*, 113 Mich. 284, 67 Am. St. Rep. 463; *Allen v. First Nat. Bank*, 127 Pa. 51, 14 Am. St. Rep. 829; *Davenport v. Stone*, 104 Mich. 521, 53 Am. St. Rep. 467.

*To Make Acts of Bank Cashiers Valid* as against their banks, the transaction must be a bank transaction made by the cashier, within his express or implied authority in the conduct of the business of the bank; and so long as a person deals with the cashier in a matter wherein, as between himself and the cashier, he is dealing with, or has a right to believe he is dealing with, the bank, the transaction is obligatory upon the latter: *Campbell v. Manufacturer's Nat. Bank*, 67 N. J. L. 301, 91 Am. St. Rep. 438.

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## HUBBARD v. ELLITHORPE.

[135 Iowa, 259, 112 N. W. 796.]

**ATTORNEY AND CLIENT—Lien for Services.**—An attorney has a lien for his services under statutory notice thereof, upon money paid to the clerk in satisfaction of a judgment. (p. 272.)

**ATTORNEY AND CLIENT—Lien on Alimony in Divorce Proceedings.**—An attorney has a lien upon alimony awarded in divorce proceedings, where the property rights of the parties are finally settled. (p. 273.)

**ATTORNEY AND CLIENT—Negligence—Burden of Proof.**—A person seeking to avoid the payment of attorney's fees in a divorce proceeding, on the ground that such attorney has negligently failed to procure a larger fee from the defendant therein, has the burden of proof to show such negligence. (p. 274.)

**ATTORNEY AND CLIENT—Lien for Services—Judgment.**—In enforcing an attorney's lien for services in a divorce proceeding against money due his client, a personal judgment against the client for the amount is proper. (p. 274.)

**ATTORNEY AND CLIENT—Enforcement of Lien for Services—Necessary Parties.**—To establish an attorney's lien against a judgment for alimony paid to the clerk of the court, the defendant in the divorce proceedings is not a necessary party. (p. 274.)

P. W. Harding, for the appellants.

Johnston Bros., for the appellee.

<sup>280</sup> **SHERWIN, J.** The firm of which the plaintiff's intestate was a member was employed by the defendant, Lulu R. Ellithorpe, to procure a divorce for her. The case was contested, and, after trial, the plaintiff was given a decree of divorce and permanent alimony in the sum of three thousand

dollars. While the case was pending, temporary alimony and suit money in the sum of four hundred dollars was awarded the plaintiff. After the judgment of divorce had been entered fixing the permanent alimony at the sum stated, the attorneys for Lulu R. Ellithorpe made a memorandum on the record as follows: "We hereby file and claim a lien on the within judgment in the sum of one thousand dollars." After this memorandum had been made, the defendant paid the amount of the judgment to the clerk of the district court, and one thousand dollars thereof has remained in his hands and is now held by him, awaiting final disposition of this case. Code, section 321, provides: "An attorney has a lien for a general balance of compensation upon money due his client in the hands of the adverse party . . . upon an action or proceeding in which the attorney claiming the lien was employed. . . . After judgment in any court of record, such notice may be given, and the lien made effective against the judgment debtor by entering the same in the judgment or combination docket opposite the entry of judgment."

The appellant contends that an attorney has no lien upon a judgment, but only upon money while in the hands of the <sup>261</sup>adverse party, that the statute does not provide that an attorney may have a lien upon money when paid into the hands of the clerk of the district court. It is further claimed that an attorney is not entitled to a lien on alimony secured by him in a divorce proceeding, and that he can only recover for his services such sum as has been allowed by the court to be paid by the opposite party. Of these questions in their order.

It is true the statute does not give an attorney a lien on the judgment itself, but provides only that he may have a lien upon money in the hands of the adverse party, but it does provide that the notice of a claim to the money in the hands of the adverse party shall be given by the memorandum note on the judgment or combination docket. The filing of this notice is sufficient to protect the attorney against payment of the judgment by the party against whom it is rendered, and, if the judgment debtor pays the judgment notwithstanding the notice, he does so at his own peril, but we know of no sound reason why the judgment debtor may not pay the money into the hands of the clerk conditionally—that is, he may deposit it with the clerk, making the clerk his agent for the purpose of protecting him against the attorney's lien, and enter into an arrangement with the clerk whereby the fee due the attorney may be turned over to him.

when the amount to which he is entitled is determined—and this we take from the nature of this proceeding, and the record is what was done in this case.

As we understand it, it is conceded that the clerk still holds one thousand dollars of the judgment for the sole and only purpose of satisfying the amount which shall be found due the attorneys. This was the view taken by Judge Wright in a dissent in *Fisher v. Oskaloosa*, 28 Iowa, 381, and in the main opinion in that case the majority of the court recognized the fact that conditions might arise when it would be permissible for the judgment debtor to pay the money to the clerk of the court, but in the *Fisher* case the controversy<sup>262</sup> was between the judgment debtor and the attorney, and the holding there was that, as between the two, the former had no right to pay the money to the clerk under the conditions there presented. In this case the controversy is an entirely different one, there being no question between the plaintiff and the judgment debtor, but only between the plaintiff and the judgment creditor, and the latter is surely in no position to complain because the debtor paid the judgment as he was bound to do, unless he refrained from so doing because of the attorney's notice. In either event the situation of the judgment creditor could not be changed.

The appellant very seriously urges that an attorney can have no lien upon alimony awarded in a divorce action. This may be conceded to be the rule so far as temporary alimony is concerned. In fact, the rule seems to be pretty general that such a lien cannot be had where temporary support money or temporary alimony is alone involved. But the converse of this rule is well established where the decree of the court makes a final division of the property, awarding to the party obtaining the divorce specific property, or, in lieu thereof, a money judgment representing such party's interest in the property of the adverse party. In this state the property rights of the parties to a divorce proceeding are generally determined upon the trial, and the final distribution is made of the property in order that the parties may thereafter remain independent of each other; and, in making this distribution, the court must of necessity estimate and consider the property of both parties, and adjudicate the claims that may exist between them. Thus in *Patton v. Loughbridge*, 49 Iowa, 218, it was held that a claim of the husband for property of which he had been defrauded by his wife would be presumed to have been adjudicated in an action by the wife for

a divorce in which there was a decree allowing alimony. In *Byers v. Byers*, 21 Iowa, 270, it was said that in a divorce action the property equities or property rights of the parties <sup>263</sup> should be finally settled. And this has been the rule in this state for a great many years: See, also, on this subject, *Lynde v. Lynde*, 181 U. S. 183, 21 Sup. Ct. Rep. 555, 45 L. ed. 810, and the same case in 162 N. Y. 405, 76 Am. St. Rep. 332, 56 N. E. 979, 48 L. R. A. 679; *Calame v. Calame*, 24 N. J. Eq. 440. The decree in this case divided the property, and the judgment was payable without any conditions, and it is clearly ruled by the cases cited. The cases from our own state cited by the appellants in support of their contention on this branch of the case are not in point.

The appellants further contend that there was negligence on the part of Mrs. Ellithorpe's attorneys because they did not procure a larger attorney's fee from her husband in the divorce proceeding, but there is nothing in the record tending to sustain this claim. Two applications for temporary alimony and suit money were in fact made, and the record shows that the larger part of the total so awarded was used in the legitimate expenses of the trial aside from the attorney's fees. The defendant, Lulu R. Ellithorpe, was, of course, primarily liable for the services of her own attorneys, and, in order to defeat their recovery in this action, the burden would rest upon her to establish such negligence on the part of her attorneys as would release her from liability to them, and this she has not done.

The court rendered a personal judgment against the defendant, and established the plaintiff's lien on the fund in the hands of the clerk, and the appellant complains of the personal judgment. We do not see what difference it could make to her whether she pays the claim from the money in her own possession, or whether it is paid from the fund in the hands of the clerk.

The appellant makes the further point that the divorced husband, N. S. Ellithorpe, was a necessary party to this suit, but we are unable to agree with her position. As <sup>264</sup> we have heretofore shown, he had paid the money to the clerk conditionally, and the money being in the clerk's hands awaiting the determination of the plaintiff's right thereto, it is within the reach of the court whether N. S. Ellithorpe be a party or not. The clerk was made a party, and he has not appealed from the order requiring him to pay the money over in satisfaction of the judgment, and we are unable to find any reason why Ellithorpe was a necessary party defendant.



No question seems to be made in argument as to the amount allowed the plaintiff for the services of the attorneys, and we do not consider that question.

On the record before us we have no question as to the correctness of the judgment of the trial court, and it is therefore affirmed.

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*Where an Attorney is Employed by a Married Woman to procure a divorce, and gives him her promissory note to cover his compensation, agreeing to secure the note by a deed of trust on certain land if the title thereto is vested in her by the decree of divorce, an equitable lien or mortgage attaches to the property the moment the decree is rendered, which is not affected by her claim of homestead: Patrick v. Morrow, 33 Colo. 509, 108 Am. St. Rep. 107.*

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### PLOEG v. VAN ZUUK.

[135 Iowa, 350, 112 N. W. 807.]

**BILLS AND NOTES—Holder in Due Course—Defenses—Negotiable Instruments Act.**—If a blank note is wrongfully filled out and delivered by one of the makers to the payee without notice to him that the instrument as delivered is not filled out in accordance with the authority given by the other makers to the one who fills it out and delivers, the payee does not become a holder in due course, under a negotiable instruments act providing that any such instrument when completed, to be enforced against any person who became a party thereto prior to its completion, must be filled up strictly in accordance with the authority given within a reasonable time, and the note is subject to the defense by the other makers, that it was not completed in accordance with their agreement. (pp. 279, 280.)

H. H. Sheriff & Wm. G. Vander Ploeg, for the appellant.

C. Ver Ploeg, for the appellee, B. Van Zuuk.

P. H. Bousquet, for the appellee, A. Van Zuuk.

<sup>281</sup> **McCLAIN, J.** The facts, established practically without dispute, are that the note for two thousand dollars, naming the plaintiff as payee, and the two defendants as joint makers with one Pothoven, on which this action is brought, was signed by these two defendants before it was fully completed, being at the time their signatures were affixed thereto a mere blank printed form; that these defendants so signed their names at the request of Pothoven, who was a partner of one of them in a mercantile business, on the representation that he might within a short time find it necessary to raise

one hundred and fifty dollars or two hundred dollars for temporary use in the business; that Pothoven, being indebted on his individual account to plaintiff on a note for about two thousand dollars, inserted plaintiff's name as payee, two thousand dollars as the amount to be paid, and the rate of interest, and delivered the instrument, filled out by him without authority, to the plaintiff, who thereupon surrendered to him the past due obligation. It appears in the evidence that the date was filled in by one W. G. Vander Ploeg, who frequently transacted business for the plaintiff, his father, and who knew of <sup>352</sup> the filling of the name of the payee and the amount by Pothoven before the note was delivered to plaintiff; but the final delivery was made directly by Pothoven to plaintiff, and there is a conflict in the evidence as to whether the son had any authority to act for the plaintiff in this particular transaction, or whether plaintiff had any knowledge that his son had so acted for him. If it were material to charge the plaintiff with the knowledge which his son had of the act of Pothoven in filling out the note, the question should have been submitted to the jury, and we shall therefore dispose of the case without taking into account any knowledge of or participation in the act of Pothoven in filling out the note, on the part of W. G. Vander Ploeg.

We have, then, the simple case of a note wrongfully filled out and delivered by one of the makers to the payee without notice to the payee that the instrument as delivered is not filled out in accordance with the authority given by the other makers to the one who thus fills it out and delivers it. With reference to the filling of blanks in an instrument after the fixing of his signature by the maker sought to be charged, the negotiable instruments acts (Acts 29th General Assembly, chapter 130; Code Supp. 1902, section 3060) contains the following section:

"Section 14, Blanks—When may be Filled.—Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such in-

strument, after completion, is negotiated to a holder in due course it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in <sup>333</sup> accordance with the authority given and within a reasonable time."

It is apparent from the last sentence of this section that, if plaintiff is to be regarded as "a holder in due course," then the instrument is effectual in his hands for all purposes as though it had been filled up strictly in accordance with the authority given by defendants to Pothoven; i. e., defendants would not be allowed to contend as against a holder in due course that Pothoven did not have authority to fill the instrument out for two thousand dollars; but, under the sentence immediately preceding the last, if plaintiff is not to be treated as the holder in due course, then, as defendants became parties thereto prior to its completion, they are not liable to plaintiff, because it was not filled up in accordance with the authority given. By section 191, the term "holder" is defined as meaning "the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof," and by section 52 a "holder in due course" is defined as one who has taken the instrument complete and regular upon its face, before maturity, without notice of previous dishonor, in good faith and for value, and without notice that at the time it was negotiated to him there was any infirmity or defect in the title of the person negotiating it. By section 59, "every holder is deemed prima facie to be a holder in due course," and by section 57, "a holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

It seems to us, under these definitions and the applications thereof, that the plaintiff was a holder of the note, but not a holder in due course. The latter term seems unquestionably to be used to indicate a person to whom after completion and delivery the instrument has been negotiated. In the ordinary case the payee of the instrument is the person with whom the contract is made, and his rights are not in <sup>334</sup> general dependent on any peculiarities in the law of negotiable instruments. The peculiarities of that law distinguishing negotiable instruments from other contracts relate to a holder who has taken by negotiation, and not as an original party. This is the construction put on the same phrase used in the English negotiable instruments act by Lord

Russell, C. J., in *Lewis v. Clay*, 67 L. J. Q. B. 224, in which he says: "A holder in due course is a person to whom, after its completion by and as between the immediate parties, the bill or note has been negotiated. In the present case, the plaintiff is named as payee, on the face of the promissory notes and therefore is one of the immediate parties. The promissory notes held and sued on [by the person named as payee therein] have in fact never been negotiated within the meaning of the act." In *Herdman v. Wheeler* (1902), 1 K. B. 361, this language of Lord Russell is said to be dictum, and it evidently is so, for in the further course of the opinion he points out that, without regard to the definition of that term which he gives, the result would be the same. But the court, in *Herdman v. Wheeler*, holds that the delivery of a note by one to whom it has been intrusted by the maker for the purpose of delivery after the filling in of the name of the payee, which has been left blank at the time of the affixing of the maker's signature, does not constitute a negotiation, and it seems to us clear that if there is in such case not a negotiation, then the payee whose name is thus filled in cannot be a holder in due course. In other words, we think that "holder in due course" should be construed as applicable only to one who takes the instrument by negotiation from another who is a holder. Certainly, in the case before us *Pothoven* was not a holder of a promissory note, for as the instrument was delivered to him it was not a note at all, but only a blank from of a note with the makers' name affixed. In *Guerrant v. Guerrant*, 7 Va. Law Reg. 639, a case at nisi prius, it is held that the holder filling a blank left in the <sup>355</sup> instrument at the time of delivery acts at his peril as to the authority given by the maker signing the instrument with the name of the payee left blank, and putting it in the hands of another for final delivery, and says that, while this interpretation of the negotiable instruments act involves a change in the law as recognized in that state before the act was passed, such interpretation is required by the language of the act itself. In *Boston Steel & Iron Co. v. Steuer*, 188 Mass. 140, 97 Am. St. Rep. 426, 66 N. E. 646, a case decided under the negotiable instruments act as adopted in that state, it is held that one who signs a check, leaving the name of the payee blank, and instructs another to fill in the proper amount necessary to satisfy the debt of such signer to the payee named, is not bound by the check in the hands of such payee, if it is used by the person thus intrusted with it for the payment of his own debt to the creditor; the amount

of such debt being correctly filled in by the creditor. In that case, the person to whom the check was intrusted exceeded his authority in using it for the payment of his own debt, instead of the debt of the signer of the check, and in this respect we think the case is analogous to the one before us. There is language in the opinion with reference to another check which was fully completed as to name of payee and amount, but was also used by the person to whom it was intrusted in violation of his authority in the payment of his own debt, which is not in harmony with our conclusion that the payee to whom the instrument is first delivered cannot be a holder in due course; but in this respect we are not inclined to follow the Massachusetts case.

We do not mean to say that in no case can the person named as payee in a negotiable instrument be the holder thereof "in due course." If A, purchasing a draft to be transmitted to B, in payment of A's debt to B, causes the draft to be drawn payable to B, no doubt A is the holder of such draft, and B taking it for value becomes a holder in due course. This was true before the passage of the negotiable <sup>356</sup> instruments act: *Armstrong v. American Exchange Nat. Bank*, 133 U. S. 433, 10 Sup. Ct. Rep. 450, 33 L. ed. 747; *Watson v. Russell*, 3 Best & S. 34, affirmed in 5 Best & S. 968. There is no reason to think the situation of the parties to such a transaction is different under the act. No doubt the payee named in a promissory note might, under similar circumstances, be a holder in due course. This is the theory on which the court in *Boston Steel & Iron Co. v. Steuer*, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426, holds the payee named in the first of the checks considered in that case to be a holder in due course; but we are unable to understand how the rule is applicable under the facts of the case, for the check was not delivered by the drawer as a valid and complete instrument to the person intrusted with it, but it was given into his hands only for delivery to the payee in extinguishment of the drawer's debt to the payee. Until thus delivered to the payee, it had no validity for any purpose. Before such delivery, the person intrusted with it was not a holder. After such delivery, the payee was a holder, but not, as we think, a holder in due course.

The conclusion which we reach is perhaps different from what it would have been had the negotiable instruments acts not been passed. It has been regarded as well-settled law that one who intrusts an incomplete instrument to another to be completed by him and delivered is bound to anyone who

relies in good faith on the genuineness of such instrument, although the person intrusted with completing and delivering the instrument has exceeded his authority; and this rule has been held applicable in favor of the payee as well as the transferee of such an instrument: *Chariton Plow Co. v. Davidson*, 16 Neb. 374, 20 N. W. 256; *Androscoggin Bank v. Kimball*, 10 Cush. 373; *Johnson Harvester Co. v. McLean*, 57 Wis. 258, 46 Am. Rep. 39, 15 N. W. 177; *Fullerton v. Sturges*, 4 Ohio St. 529; *Diercks v. Roberts*, 13 S. C. 338; *Frank v. Lilienfeld*, 33 Gratt. (Va.) 377; *Davis v. Lee*, 26 Miss. 505, 59 Am. Dec. 357 267; *Russell v. Langstaffe*, 2 Doug. 514; 1 *Daniel on Negotiable Instruments*, 5th ed., secs. 142-147, 769-769a; 1 *Randolph on Commercial Paper*, 2d ed., sec. 181; 2 *Randolph on Commercial Paper*, 2d ed., sec. 986; 3 *Randolph on Commercial Paper*, 2d ed., sec. 1875; *Norton on Bills and Notes*, 2d ed., 181; *Clark & Skyles on Agency*, sec. 60. Indeed, it seems to have been thought immaterial whether or not the person to whom the instrument is made payable and delivered had knowledge that it had been filled out so as to make it an effectual instrument, by one to whom it was intrusted by a maker who had signed it to be filled out and delivered, for it is said that the holder is entitled to assume that the person in whose hands it was placed for final execution had authority to do what he did do in making it an effectual instrument, and is not charged with knowledge of any limitations upon such authority: *Johnson v. Blasdale*, 1 *Smedes & M.* (Miss.) 17, 40 Am. Dec. 85; *Joseph v. First National Bank*, 17 Kan. 256; *Huntington v. Branch Bank*, 3 Ala. 186; 1 *Daniel on Negotiable Instruments*, 5th ed., sec. 843; *Mechem on Agency*, sec. 394. This principle is illustrated by the rule, well settled in this state and elsewhere, that a surety who signs an instrument and intrusts it to the principal maker for delivery is bound, although the principal delivers it in violation of conditions or instructions imposed by the surety on the principal which were not known to the payee: *Sawyers v. Campbell*, 107 Iowa, 397, 78 N. W. 56; *Micklewait v. Noel*, 69 Iowa, 344, 28 N. W. 630; *Davis Sewing-Machine Co. v. Buckles*, 89 Ill. 237; *Smith v. Moberly*, 49 Ky. 266, 52 Am. Dec. 543; *Ward v. Hackett*, 30 Minn. 150, 44 Am. Rep. 187, 14 N. W. 578; *Craig v. Hobbs*, 44 Ind. 363; *Brandt on Suretyship*, 3d ed., sec. 457.

But we must take the negotiable instruments act as it is written, and, while the general purpose was to preserve the existing law so far as it was uniform, yet in many respects in which there was a conflict or doubt under the au-

thorities <sup>358</sup> the language of the statute lays down rules which are not to be ignored simply because in some respects a change in the law is effected. With reference to the language which we have been considering in this very case, taken substantially from section 20 of the English bills of exchange act, the court says, in *Herdman v. Wheeler* (1902), 1 K. B. 361: "We have been very reluctant to come to the conclusion that the judgment in favor of the defendant in this case was right, because it appears dangerous even to cast any doubt upon a payee's right to recover when he has taken a bill or note complete and regular on the face of it, honestly and for value; but, after carefully considering the matter, we have come to the conclusion that we should be unfairly straining the words if we did not hold that 'negotiated,' in the proviso at the end of the twentieth section, meant transferred by one holder to another. It is to be observed that the bills of exchange act, in section 2 [section 191 of our act] defines 'issue' as meaning 'the first delivery of a bill or note, complete in form, to a person who takes it as holder. . . .'. There is therefore a technical word defined and used in the act to mean that which [the person intrusted with the completion and delivery of the instrument] did here, and the appropriate words to have used in the proviso to section 20, if it had been intended to include this case, would have been, 'if such instrument after completion is issued or negotiated to a holder in due course.' Those are not the words, and, although we think that the present case might possibly have been decided in the plaintiff's favor before the bills of exchange act was passed, we think that we cannot consistently with the meaning of 'issue' and 'negotiate' in the act hold that the present case is covered by the words used in the proviso. That being so, it falls within the first part of the second subsection of section 20 [i. e., the sentence of our section preceding the last]; and, as the authority of the defendant was not strictly followed, he is not liable."

We see no escape from the conclusion that, under the statute, plaintiff, being not a holder in due course, but the person to whom the note was made payable, and to whom its delivery as an effective instrument was first made, took it <sup>359</sup> subject to the defense that Pothoven had no authority to fill in two thousand dollars as the amount of the note and deliver it to plaintiff.

The judgment of the trial court is therefore affirmed.

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*The Alteration of Instruments by Filling Blanks* therein is discussed in the note to *Burgess v. Blake*, 86 Am. St. Rep. 107. A check or

bill of exchange in which a blank is left as to amount is an complete instrument, and the rights of a purchaser depend upon real authority which the signer has in fact given in the matter, der the negotiable instruments act; and if delivered in payment a debt to one person, when the instructions of the signer were deliver it in payment of the debt of another, the application of check to the payment of the debt of the former cannot be sustain Boston Steel etc. Co. v. Steuer, 183 Mass. 140, 97 Am. St. Rep. One who indorses a note in blank and intrusts it to another to fill and have discounted for the indorser's benefit, is liable upon it t bona fide holder for value who receives it from the person to w it was intrusted, notwithstanding the latter filled it up for, fraudulently converted it to, a purpose entirely different from t for which he was authorized to use it: Mechanics' Bank v. Cha voyne, 69 N. J. L. 256, 101 Am. St. Rep. 701.

### KEIL v. WRIGHT.

[135 Iowa, 383, 112 N. W. 633.]

**INJUNCTION—Domestic Fowls.**—An injunction will lie restrain domestic fowls from trespassing upon the premises of other, when repeated invasions thereon by them have occurred the past and are threatened in the future. (p. 283.)

**APPEAL.**—Questions not Presented for the consideration the trial court cannot be reviewed on appeal. (p. 284.)

Yoss & Wallace, for the appellants.

Popham & Havner, for the appellee.

**384 BISHOP, J.** The parties to this action—the defendants being husband and wife—are farmers residing in Iowa county, and their respective farms are separated only by a public highway. Plaintiff complains, as against defendants, of repeated trespasses on his premises by domestic fowls owned by them and under their control, resulting in injury and damage to his growing crops, and he asserts that further and continued like trespasses are threatened by defendants for the future. The defendants, in answer, deny generally and specifically the acts of trespass as charged by plaintiff. They also challenge the right of plaintiff to sue in equity for an injunction, and this upon the ground that as they, defendants, are entirely solvent, plaintiff had an adequate remedy at law by way of an action for damages.

On the fact issue of trespass it must be said that the evidence preponderates in favor of the conclusion that the chickens did cross the road. So, too, it appears that the cross



was oft-repeated, and this in spite of the complainants and protests of plaintiff. And we think, as did the court below, that in view of the location of defendants' yards, and of their attitude toward plaintiff, and considering also the notion entertained by them of their legal rights in the premises, to which we shall make reference presently, continued trespasses are to be apprehended in the future unless means of restraint is afforded by the strong arm of the law. By its ruling on a motion of defendants to dismiss, and in its conclusions expressed on which the decree was predicated, the court below held that the facts made a case for an injunction, notwithstanding there had been no proof of defendants' insolvency; and in such conclusion we agree. It is true, as a general rule, that an apprehended trespass on real estate <sup>385</sup> will not be restrained by injunction, unless it is made to appear that the resulting injury would be irreparable, or that, by reason of insolvency, compensation could not be had in an action at law. But where, as in this case, it is disclosed to the court that repeated invasions have occurred in the past, and are threatened for the future, on familiar doctrine equity will interfere by injunction, to the end that a multiplicity of suits may be avoided. Without aiming to detract from the dignity and importance of the Iowa hen, it would be intolerable to require of this plaintiff that he sue separately for the damage done by each cackling hen and stately rooster upon the occasion of each predatory excursion across the fateful road. Accordingly, we are constrained to hold that the action in its present form is maintainable: *Halpin v. McCune*, 107 Iowa, 494, 78 N. W. 210; *High on Injunctions*, sec. 702.

Counsel for appellants in argument have gone beyond the matters of defense suggested by them in pleading, and present the thought that plaintiff's action will not lie, for the reason that the English common law relative to domestic fowls has never been adopted in this country—hence that such fowls are free commoners, and have the right to go whithersoever they will, and it is facetiously said that, "if this court should hold the English common law in force in this state, it would have a far greater damaging result to the interests of the state, and the people generally, than all the damage that all the chickens, geese and turkeys might commit in the state, for the reason that it means putting a curb upon the chicken industry." However alluring the field of inquiry and discussion we are thus invited to enter, we must decline, in virtue of our repeated holdings, to the effect that a question not

presented for the consideration of the trial court cannot be made the subject of argument in this court on appeal. It is true, as shown by the record, that several days after the decree had been entered the defendants appeared and filed ~~the~~ motion to set the same aside on the ground, among other "that under the Iowa law chickens, geese and turkeys can not be restrained, as the same are free commoners." The motion was overruled, and properly so, because presenting a matter of defense not pleaded, or suggested on the trial, and in so ruling it cannot be considered that the court intended to make any pronouncement on the abstract subject of legal right thus brought to its attention.

We conclude that there was no error in the decree; and it is affirmed.

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*An Injunction will lie* against continued and repeated acts of trespass in turning animals upon land to the destruction of the grass thereon: See the note to *Moore v. Halliday*, 99 Am. St. Rep. 75. But in *Healy v. Smith*, 14 Wyo. 263, 116 Am. St. Rep. 1004, it is held that as to animals wandering at large in a lawful manner, equity will not enjoin their owner from allowing them voluntarily to trespass upon and depasture uninclosed private premises.

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## CHRISTOPHERSON v. CHICAGO, MILWAUKEE AND ST. PAUL RAILROAD COMPANY.

[135 Iowa, 409, 109 N. W. 1077.]

**NEGLIGENCE—Railroads—Duty to Give Warning to Employé.**—It is the duty of railroad employés in charge of a construction train, to give to an employé who, in the course of his employment, is upon the railroad track, some warning that the train is to be moved in his direction especially when he has no reason to believe that such train will be moved toward him. (p. 286.)

**NEGLIGENCE, CONTRIBUTORY—Presumption.**—Unless contributory negligence is conclusively shown, the presumption arising from the instinct of self-preservation is sufficient to sustain the burden of proof in the first instance, that a person injured was not in fault for the accident. (p. 287.)

**NEGLIGENCE, CONTRIBUTORY—Railroads.**—If a railroad employé has reasonable ground to believe that a train will not be backed toward him, it is for the jury to say whether he was negligent in not looking for the train before attempting to cross the track. (p. 288.)

**EVIDENCE—Dying Declarations—Res Gestae.**—The proper test as to the admissibility of the declarations of a person since deceased, made soon after an accident, on the ground that they are part of the res gestae, is whether they relate to the principal transaction and are explanatory of it, and are made under such circumstances

excitement still continuing as to show that they are spontaneous, and not the result of deliberation or design; and the fact that such declarations are made in response to questions of an attending physician when such injured person is first restored to consciousness does not affect their admissibility. (p. 290.)

J. L. Bascom and Francis & Owen, for the appellant.

J. C. Cook and H. Loomis, for the appellee.

<sup>410</sup> McCLAIN, C. J. The evidence admitted on behalf of the plaintiff tended to show the following facts: The deceased was in defendant's employ as section foreman, at Milford, Iowa. On the day of the accident which resulted in the death of deceased, a construction train, consisting of an engine and tender, a flat car and a caboose, came north on defendant's line to Milford, the engine with tender backing, with the flat <sup>411</sup> car next south of it attached to the pilot, and the caboose at the south end. There was a crew of sectionmen on the train in charge of the roadmaster, and the object in view was to load some rails which were piled near the track into the flat car, to be transported to another place. The caboose was uncoupled and left standing a short distance south of the pile of rails, and the flat car, still attached to the engine, was stopped with its south end near the north end of the rails, in order that they might be loaded into the car from the south end instead of being thrown over the side. When the loading was about completed, the roadmaster had a conversation with deceased, west of the track and near the north end of the caboose, in which deceased was directed to proceed to a toolhouse, situated about four hundred feet to the north and on the east side of the track, for the purpose of securing some bolts for fish-plates, to be put on the car with the rails. About the time that deceased started north toward the toolhouse, walking on the west side of the track, the engine was started south, pushing the flat car, in order that it should be coupled to the caboose. The engine pulling the flat car and caboose was then backed northward, and deceased was struck by the north end of the tender, and thrown to the west side of the track, where he was found unconscious, about one hundred and forty feet north of the point from which he started. Deceased was carried to his home in an unconscious state, and died within forty-eight hours as the result of the injuries he had received. The grounds of the motion to direct a verdict were substantially that there was no evidence of negligence on the part of the defendant, nor of the exercise of care on the part of deceased, at the time of the

accident. Other items of evidence than those above stated will be noticed in discussing the grounds of the ruling on the motion which the court sustained, directing a verdict.

1. There is no real controversy as to the sufficiency of the evidence to sustain a finding of negligence on the part of defendant's employés in operating the train so as to <sup>412</sup> strike and injure deceased. According to the testimony of the witnesses, there was no signal given by ringing of bell or blowing of whistle when the train backed north, after the flat car was coupled to the caboose. The roadmaster, who, so far as the evidence discloses, was in charge of the operations of the train, knew that the deceased was proceeding northward along the track, and must necessarily cross the track north of the moving train in order to reach the toolhouse. So far as appears, there was no one at the north end of the tender keeping any lookout for the safety of deceased or any other person who might be along or upon the track, and the engineer was unable to see along the track to the north on account of the tender. Certainly, under these circumstances, the jury would have been justified in finding that, with reference to deceased, the defendant's employés were negligent in not taking some means to warn him of the approaching danger. For at the time he started northward the engine was moving southward toward the caboose, and there is nothing to indicate that deceased had any reason to suppose that after being coupled to the caboose the train would be moved toward the north. Indeed, if the statements of deceased, which will be referred to in the next division of this opinion, can properly be considered, the deceased supposed that, after the coupling was made, the train would proceed further south, and would not be backed up toward him.

Counsel argue that the roadmaster had charge of the work only, and not of the movement of the train, and that the conductor and engineer would have no knowledge of the fact that deceased was proceeding northward along or beside the track. But there is no evidence whatever as to these matters, and, so far as the testimony for the plaintiff discloses, the roadmaster was in charge of the movements of the train. We cannot take judicial notice of the assumed fact that the roadmaster had no control over the movements of the train, and therefore had no occasion to provide for a <sup>413</sup> warning to be given to deceased when the train started northward.

It is argued by counsel that a warning by blowing the whistle or ringing the bell would have been of no value, for

it would not have advised the deceased of anything which he did not already know. But certainly it was important that deceased, who had started north along the track while the engine was being moved toward the caboose for the purpose of making a coupling, should be warned when the engine was put in motion toward him after the coupling to the caboose had been made. It does not appear that he had any information as to how soon the engine might be expected to move after the coupling was effected, and it was the duty of defendant's employes when the engine was put in motion toward him, and so near him as to be reasonably likely to imperil his safety, to give him some warning. As we view the case, such warning would not have been necessarily futile, nor an act of supererogation.

2. The more difficult question is to determine whether the evidence of the freedom of deceased from contributory negligence was sufficient to take the case to the jury. As there were no eye-witnesses of the actual collision with deceased, the presumption arising from the instinct of self-preservation would be sufficient to sustain the burden of proof in the first instance, that deceased was not at fault for the accident: *Phinney v. Illinois Central R. Co.*, 122 Iowa, 488, 98 N. W. 358; *Morbey v. Chicago & N. W. R. Co.*, 116 Iowa, 84, 89 N. W. 105; *Bell v. Incorporated Town of Clarion*, 113 Iowa, 126, 84 N. W. 962. It is true that such presumption cannot prevail against evidence which shows that the injured party could not have exercised due care: *Crawford v. Chicago G. W. R. Co.*, 109 Iowa, 433, 80 N. W. 519. But unless the evidence conclusively shows contributory negligence, the presumption from the instinct of self-preservation should be taken into account; and the jurors, had the case been submitted to them, would have been justified in assuming <sup>414</sup> that deceased was not doing a negligent act when he was injured, if the injury could be accounted for without contributory negligence on his part. Therefore, under the evidence, it would have been proper for the jury to conclude that deceased was not negligent in walking along the track, but that he was crossing over from the west side to the east side of the track, as it was necessary to do in order to reach the toolhouse, and, without any notice of the approach of the train, was struck by the tender.

It is argued, however, that the very fact of being struck by the approaching engine, the presence of which on the track with steam up, ready to move, was known to him, conclusively showed that he did not take reasonable care for

his own safety. It is undoubtedly true that an employé, well as any other person about to cross a railroad track which trains are operated, should be on his lookout to avoid the danger of being struck or run over by a moving train, and that, in the absence of anything excusing such precaution or rendering reasonable precaution unavailing, the mere fact of being so struck or run over will show contributory negligence. But if the deceased had reasonable ground to believe that the train would not be backed to the north, then it would be for the jury to say whether, in view of such reasonable ground of belief, he was negligent in not looking for the train before attempting to cross the track. He had no other danger to apprehend from a train coming from the south. If, as the evidence tended to show, deceased was instructed by the roadmaster to proceed to the toolhouse to get bolts to be put on the train, and with the roadmaster's knowledge, started north along the track to the toolhouse, with the known necessity of crossing the track in order to reach the toolhouse, the engine having at the time commenced to move southward for the purpose of making the coupling of the caboose, we think it was a fair question for the jury to say whether deceased was negligent in assuming that the train would not be moved to the north so as to imperil <sup>415</sup> safety, without warning to him. These facts take the case out of the usual rule requiring one about to cross the track to look and listen for approaching trains. Deceased was entitled to rely on the operation of the train in a usual and proper manner, in view of the circumstances, known to him to be within the knowledge of the roadmaster in general charge of the operation of the train. In *Camp v. Chicago G. W. Co.*, 124 Iowa, 238, 99 N. W. 735, it was held that an employé walking along the track was justified in assuming that the train would approach behind him at more than a lawful rate of speed under a city ordinance; and so in this case we think it reasonable to say that deceased had the right to assume that the train would not be backed upon him without a signal being given when the engine was started, and that in view of this reasonable assumption the jury might have found that deceased was not guilty of contributory negligence. It appeared that the roadmaster had assured deceased that the train would not be moved to the north until deceased had turned, then certainly deceased would not have been negligent in failing to look out for the approach of the train, and the jury might well have found that such implied assurance

was involved in the direction given to deceased by the roadmaster.

Some of the facts assumed in the statement of the evidence were shown only by declarations of the deceased made about three-quarters of an hour after he was found in an unconscious condition beside the track, and it is contended by counsel for appellee that evidence of these declarations was improperly received, and that they should be excluded in our consideration of the case. There is no appeal on the part of defendant, and perhaps there is no necessity at this time for discussing the admissibility of this evidence; but as the question will arise in the event of a new trial, it is not improper that we should express our views on the question, which has been argued by counsel on each side. The fact that deceased, at <sup>416</sup> the time he was struck by the train, was going to the toolhouse under the direction of the roadmaster for the purpose of getting bolts to put upon the car with the rails, before the train proceeded to carry the rails to their destination, was shown only by the declaration of the deceased himself, and, as we view it, this was a very material fact in the case. The declaration of deceased to which reference is made, as testified to by two or three witnesses, was substantially as follows, referring to the action of those in charge of the train: "They backed up on me; no bell, no whistle. They had no business to do it"; and then, in answer to a question of the doctor in attendance as to how he was hurt or how the accident happened, he continued by stating that the roadmaster told him to go up to the toolhouse and get some bolts for some fish-plates and put them on the car, and he started in that direction to do this, and the next thing that happened he was knocked down. He also stated in the same connection that they were to set the car into the lower, or south, end of the switch, but instead of that they ran ahead and coupled on to the car and then backed over him. The statement that those in charge of the train should not have backed over him was of course a mere conclusion, and the statement that those in charge of the train were going to set it in at the south end of the switch was not admissible to show that the roadmaster had knowledge of any such belief on the part of the deceased. But the statement that the roadmaster directed the deceased to go to the toolhouse and get some bolts was material as showing not only knowledge on the part of the roadmaster that deceased was likely to be put in peril by a movement of the train to the north, but

also knowledge on the part of deceased that the entire situation was within the contemplation of the roadmaster. The material fact was stated by the deceased immediately after recovering from unconsciousness due to a hypodermic injection of morphine.

The first thing that he said after being aroused from the <sup>417</sup> continuous state of unconsciousness following his injury, during which he was moaning and making exclamations indicating pain, was to call for a drink of water, and, immediately following this call, he made the statements above set out.

It is clear that under the general hearsay rule these declarations could not be shown unless they fall within one of the classes of exceptions which are generally grouped together as declarations which constitute a part of the *res gestae*. To prove such declarations was practically to make the deceased a witness. Under the branch of the hearsay rule permitting declarations by an injured party soon after an accident to be shown, the proper test of their admissibility is whether they relate to the principal transaction and are explanatory of it, and are made under such circumstances of excitement, still continuing, as to show that they are spontaneous and not the result of deliberation or design. The declarations of the deceased are within this branch of the *res gestae* rule, unless by reason of the interval of time elapsing between the accident and the declaration; but the real test is not whether the declarations are, in point of fact, contemporaneous, but whether the circumstances exclude premeditation and design: *Hutcheis v. Cedar Rapids & M. C. R. Co.*, 128 Iowa, 279, 103 N. W. 779; *Rothrock v. Cedar Rapids & M. C. R. Co.*, 128 Iowa, 252, 103 N. W. 475; *Sutcliffe v. Traveling Men's Assn.*, 119 Iowa, 220, 97 Am. St. Rep. 298, 93 N. W. 90; *Alsever v. Minneapolis & St. L. R. Co.*, 115 Iowa, 338; *Key v. Cedar Rapids*, 107 Iowa, 509, 88 N. W. 841, 56 L. R. 748, 78 N. W. 227; *Fish v. Illinois Central R. Co.*, 96 Iowa, 702, 65 N. W. 995; *McMurrin v. Rigby*, 80 Iowa, 322, 45 N. W. 877; *State v. Jones*, 64 Iowa, 349, 17 N. W. 911, 20 N. W. 470; *State v. Murphy*, 16 R. I. 528, 17 Atl. 998; *Traveler's Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18; 3 Wigmore on Evidence, sec. 1745 et seq. Within this general rule, the admissibility of the declarations under the circumstances of the particular case is largely within the discretion of the trial judge. The facts and circumstances of no two cases can be precisely alike, and the exact length of time is not mathematically <sup>418</sup> controlling: *State v. Driscoll*, 72 Iowa, 583, 3



N. W. 428; *Kennedy v. Rochester City & B. R. R. Co.*, 130 N. Y. 654, 29 N. E. 141; *State v. Ah Loi*, 5 Nev. 99; *Leahey v. Cass Ave. etc. R. R. Co.*, 97 Mo. 165, 10 Am. St. Rep. 300, 10 S. W. 58; *Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. Rep. 118, 30 L. ed. 299. In this case the interval of time is immaterial, in view of the continued unconsciousness of the deceased until the very moment when, on first being restored to consciousness, he proceeded to make the declaration. Nor is the fact that a portion of the declaration was in response to a question by the attending physician of any significance, for the question was in no way leading or suggestive. What is said in *Guild v. Pringle*, 130 Fed. 419, 64 C. C. A. 621, with regard to responses to leading and suggestive questions, is not applicable.

The evidence for the plaintiff would, in our opinion, have sustained a verdict of the jury in her favor, and the trial court erred, therefore, in directing a verdict for the defendant.

Reversed.

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*Presumptions of Negligence* from the happening of accidents are discussed in the note to *Cincinnati Traction Co. v. Holzenkamp*, 113 Am. St. Rep. 986; and presumptions of the exercise of care in cases of personal injuries are discussed in the note to *Chicago etc. Ry. Co. v. Wilson*, 116 Am. St. Rep. 108.

*The Question of Res Gestae* is discussed in the note to *People v. Vernon*, 95 Am. Dec. 51. *Res gestae* are those circumstances which are the automatic and undisguised incidents of a particular litigated fact, and which, in contemplation of law, are a part of the act itself. To render circumstances and declarations a part of the *res gestae*, they generally must be substantially contemporaneous with the occurrence, but they need not be concurrent therewith: *State v. Miller*, 73 S. C. 277, 114 Am. St. Rep. 82, and cases cited in the cross-reference note thereto; *Taylor v. State*, 47 Tex. Cr. 122, 122 Am. St. Rep. 678; *Craven v. State*, 49 Tex. Cr. 78, 122 Am. St. Rep. 799.

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## STATE v. MEYER.

[135 Iowa, 507, 113 N. W. 322.]

**WITNESSES—Competency of Child.**—A child of tender years showing a sensibility of the wickedness of telling a falsehood and comprehending the danger of not telling the truth, and of sufficient capacity to understand the obligation of an oath, is competent as a witness. (p. 293.)

**WITNESSES—Competency of Child.**—To render a child of tender years competent as a witness, it is not necessary to show that it understands that the obligation to speak the truth on the witness-stand is greater than at other places. (pp. 293, 294.)

**WITNESSES—Competency—Discretion of Court—Appeal**  
The trial court must pass upon the capacity of a witness to testify, and unless there is a clear abuse of discretion, his decision will not be disturbed on appeal. (p. 294.)

**VENUE—Sufficiency of Proof of.**—Venue may be established like any other fact, and where the fair inference from the evidence adduced or the circumstances proven is that the transaction in question occurred within the county, the finding of the jury cannot be disturbed on appeal. (p. 295.)

W. H. Downing and O. H. Montzheimer, for the appellants.

H. W. Byers, attorney general, and C. W. Lyon, assistant attorney general, for the state.

**507 LADD, J.** 1. The child upon whom the assault is alleged to have been committed was but six years old. She was allowed to testify, and of this ruling and one other the defendant complains. On voir dire she testified to her age, to whom and where she lived, and in answer to questions, as follows:

**508 "Q.** Do you know what it is to tell a lie? **A.** Yes.

**"Q.** Is it right to tell a lie? **A.** It ain't.

**"Q.** Do you think you would be punished if you told a lie? **A.** Yes.

**"Q.** Did anyone ever tell you it is not nice to tell a lie? **A.** No.

**"Q.** Nobody told you that? **A.** No.

**"Q.** So you don't know? **A.** No.

**"Q.** Do you know what it is to come here and tell what you know about this case? **A.** I don't know. . . .

**"Q.** Can you tell me what an oath means? **A.** I don't know what it means. . . .

**"Q.** You know what it is to tell a lie? **A.** No.

**"Q.** You know what it is to tell the truth? **A.** Yes.

**"Q.** Is it right to tell the truth? **A.** Yes.

**"Q.** What would be done to you if you told a lie here to-day? **A.** I would be punished.

**"Q.** Who told you that? **A.** Mr. Locke.

**"Q.** All you know about it is what he told you, is it? **A.** Yes.

**"Q.** You can't tell what the word 'testimony' means? **A.** No. . . .

**"Q.** Has your mamma talked to you about telling the truth and not telling a lie? **A.** She told me it was a bad thing to tell a lie, and it was a good thing to tell the truth.

**"Q.** When you hold up your hand that way, does that mean that you shall tell the truth? **A.** Yes.

"Q. If I hold up my hand and tell you to hold up your hand, and you would swear to tell the truth, do you think it would be right for you to tell anything but the truth? After that what would you have to do if you held up your hand this way, and I swore you, what would you have to do, would you have to tell the truth? A. Yes. I would have to tell the truth.

"Q. You couldn't tell a lie, then? A. No.

"Q. You understand that is the obligation of an oath when you hold up your hand you will then tell the truth? A. Yes.

"Q. And, if I did that, you will tell nothing but the truth? A. Yes."

This was followed by an intelligent account of the transaction. It is apparent from what we have set out that the judge did not abuse his discretion in holding that the child, though of tender years, had "sufficient capacity to understand the obligation of an oath." She may have been unable to define the words "oath" and "testimony," but this was not determinative of her capacity. If, without being familiar with the use of the words, she had an adequate sense of the impropriety of falsehood, she understood <sup>509</sup> the nature of an oath, even though not able to state what those words meant: *Williams v. United States*, 3 App. D. C. 335; *Click v. State* (Tex. Cr.), 66 S. W. 1104; *Minton v. State*, 99 Ga. 254, 25 S. E. 626; *Scroggins v. State*, 30 Tex. App. 92, 16 S. W. 651; *State v. Goldman*, 65 N. J. L. 394, 47 Atl. 641. Her answers indicated an intelligence sufficient to satisfy the court that she was impressed that she ought to tell the truth upon such a solemn occasion rather than to tell a lie. In other words, she was sensible of the wickedness of telling a falsehood, and comprehended the danger of not telling the truth; and this, under the authorities generally and our statute, qualified her to speak as a witness: *Wharton on Evidence*, sec. 398; 4 *Blackstone's Commentaries*, 214; *State v. Blythe*, 20 Utah, 378, 58 Pac. 1108.

Appellant argues that, to render her competent to testify, it should have appeared that she understood the obligation to speak the truth on the witness-stand was greater than at other places. The statute exacts no more than the capacity stated, and reliance must be had upon the solemnity of the proceedings and the administration of the oath to impress the witness with the difference alluded to. A child cannot well be expected to appreciate fully the significance of testimony, and because of this and their immunity from punishment for per-

jury the reception of testimony by children of tender years after suitable caution to tell the truth without the administration of an oath has been frequently suggested: 1 Wigmore on Evidence, sec. 509; *Hughes v. Detroit etc. Ry. Co.*, 65 Mich. 10, 31 N. W. 603.

As the law stands, the judge is to pass upon the capacity of the witness to testify, and, save upon a clear abuse of discretion, his decision will not be disturbed on appeal: *State v. King*, 117 Iowa, 484, 91 N. W. 768. It is not unusual to receive the testimony of children under nine years of age, sometimes under <sup>510</sup> seven, if they appear of sufficient understanding, and it has been admitted of a child even at the age of five years: *Greenleaf on Evidence*, 14th ed., sec. 367; *State v. Nelson*, 132 Mo. 184, 33 S. W. 809.

Among the cases approving rulings by which the testimony of very young children has been received may be cited *Commonwealth v. Robinson*, 165 Mass. 426, 43 N. E. 121, where the child was a little over five years and five months old at the time of the assault, and but four months older when the trial occurred. In *Wheeler v. United States*, 159 U. S. 523, 16 Sup. Ct. Rep. 93, 40 L. ed. 244, a boy under five years and six months was held to possess sufficient intelligence to testify. In *Rex v. Braisier*, 1 Leach (C. C.), 199, the question was submitted to the twelve judges, and their opinion was unanimous that an infant under the age of seven years might be sworn in a criminal case if shown upon examination to possess sufficient knowledge of the nature and consequences of an oath. In *Scroggins v. State* (Tex. Cr.), 51 S. W. 232, a girl six years was held competent to testify, although she did not understand what she did when she held up her hand, but knew it was right to tell the truth and wrong to tell a lie, and that people who tell lies are put in jail: See, also, *McGuire v. People*, 44 Mich. 286, 38 Am. Rep. 265, 6 N. W. 669; *Commonwealth v. Ramage*, 177 Mass. 349, 58 N. E. 1078; *Shannon v. Swanson*, 208 Ill. 52, 69 N. E. 869; *People v. Swist*, 136 Cal. 520, 69 Pac. 223; *State v. Blythe*, 20 Utah, 378, 58 Pac. 1108. The above decisions strongly support our conclusion which is not inconsistent with the rulings in *State v. Michael*, 37 W. Va. 565, 16 S. E. 803, 19 L. R. A. 605; *Donnelly v. Territory*, 5 Ariz. 291, 52 Pac. 368; *Hughes v. Detroit etc. Ry.*, 65 Mich. 10, 31 N. W. 608; *Gains v. State*, 99 Ga. 703, 26 S. E. 760; *Holst v. State*, 23 Tex. App. 1, 59 Am. Rep. 770, 3 S. W. 757; and *Carter v. State*, 63 Ala. 52, 35 Am. Rep. 4, where children of tender years, owing to lack of comprehension, were held to be incompetent to testify. There <sup>511</sup> may

be some danger of the child being influenced by others to prevaricate, but such danger is fairly guarded against by the inability of one so inexperienced to keep up and sustain a false story throughout the various questions of a trial. To exclude their testimony would deprive them of the adequate protection of the law, for in cases wherein assault is charged conviction is ordinarily impossible without the aid of their evidence. We think it may be safely received, and that the ruling of the trial court was correct,

2. Appellant urges that the venue was not sufficiently proven. The child lived with her parents, and her father testified that he was a farmer, that Sheldon was his residence, and that he resided in Carroll township, and had for twenty-two years, and, further, that the transaction complained of occurred at his home. This was all the evidence tending to show where the crime had been committed. It was enough to sustain the jury's finding that the place was in O'Brien county. The court will take judicial notice that the city of Sheldon is in that county: *State v. Reader*, 60 Iowa, 527, 15 N. W. 423. The witness testified that his residence was there, and the jury might have so found. Moreover, the witness was testifying in O'Brien county, and it is fairly to be inferred that in mentioning Carroll township in connection with the city of Sheldon he had reference to the township of that name in the county in which the case was pending. The fact of venue may be established like any other fact, and, where the fair inference from the evidence adduced or the circumstances proven is that the transaction in issue occurred within the county, the finding of the jury cannot be disturbed on appeal: *Beavers v. State*, 58 Ind. 530; *People v. Manning*, 48 Cal. 335.

The court did not err in either of the respects complained of; and the judgment is affirmed.

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#### COMPETENCY OF CHILDREN AS WITNESSES.

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### I. Scope.

The limitation of discussion in this note is fairly well indicated by the subject itself. It may be proper, however, to say that, as the common-law rule, which presumes all children of fourteen and over to be competent to testify, is the law of the states, our discussion will be confined to the competency of those under that age, where the presumption is just the contrary.

### II. Ancient Doctrine.

At one period of time children under nine years of age could not be permitted to testify: *Rex v. Travers*, Strange, 700; *Rex v. Donnell*, 1 East's P. C. 442; it being also held in the latter case that it was discretionary with the court whether or not the testimony of a child between nine and twelve years should be received. But the rule fixed by these two early English cases, making age rather than intelligence the criterion of competency, did not exist very long for in *Rex v. Brazier*, 1 East's P. C. 554, and *Smith v. French*, 2 Atl. 245, 1 Leach C. C. 199, it was decided by all the judges that children of any age might be examined on oath if capable of distinguishing between good and evil, and possessing sufficient knowledge of the nature and consequences of an oath.

### III. Modern Doctrine.

The rule of the present day with respect to the competency of children as witnesses differs little, if any, from the one established by the judges in *Rex v. Brazier*, 1 Leach C. C. 199, 1 East's P. C. 443, decided one hundred and thirty years ago. Any rule which may be stated is necessarily theoretical, and subject to many variations; the basic principle, however, which was established in the *Brazier* case, and has been followed ever since, is that understanding and intelligence, rather than age, is the test to be applied in determining the competency of an infant to testify as a witness in either civil or criminal cases: *State v. Morea*, 2 Ala. 275; *Johnson v. State*, 6 Ga. 641; *McLain v. City of Chicago*, 127 Ill. App. 489; *Flannery v. Commonwealth (Ky.)*, 51 S. W. 572; *Washburn v. People*, 10 Mich. 372; *Chapman v. State (Tex. Cr. App.)*, 42 S. W. 559. See post, IV. There must, however, be some preliminary examination tending to show the intelligence of the witness, and his comprehension of the nature of an oath, or at least of his duty to tell the truth: *Olsen v. Olsen*, 130 Iowa, 353, 106 N. W. 758; *Howard v. Commonwealth*, 2 Ky. Law Rep. 950, 70 S. W. 295; *Commonwealth v. Reagan*, 17 Mass. 335, 56 N. E. 577; *McGuire v. People*, 44 Mich. 286, 38 Am. Rep. 265, 6 N. W. 669; *Den v. Vancleave*, 5 N. J. L. 589; *Commonwealth v. Wilson*, 186 Pa. 1, 40 Atl. 283; *Moore v. State*, 49 Tex. C. 449, 96 S. W. 327; *State v. Michael*, 37 W. Va. 565, 16 S. E. 803, 1 L. R. A. 605. See post, IV, b, c, d.

## IV. Rules for Determining Competency.

a. **General Rule.**—Although there is a certain incongruity in administering an oath to a child of such tender age that it cannot be convicted of perjury, still, it is laid down in all the text-books, and generally held by the cases, that there is no precise age within which children are absolutely excluded as witnesses. This doctrine is clearly sustained by the following cases: *Wade v. State*, 50 Ala. 164; *Kelly v. State*, 75 Ala. 21, 51 Am. Rep. 422; *McGuff v. State*, 88 Ala. 147, 16 Am. St. Rep. 25, 7 South. 35; *Flanigan v. State*, 25 Ark. 92; *United States v. Williams*, 3 App. D. C. 335; *Clinton v. State*, 53 Fla. 98, 43 South. 312; *Draper v. Draper*, 68 Ill. 17; *Shannon v. Swanson*, 109 Ill. App. 274, 208 Ill. 52, 69 N. E. 869; *Sokol v. People*, 212 Ill. 238, 72 N. E. 382; *Clark v. Finnegan*, 127 Iowa, 644, 103 N. W. 970; *State v. Denis*, 19 La. Ann. 119; *State v. Richie*, 28 La. Ann. 327, 26 Am. Rep. 100; *State v. Wilson*, 109 La. 74, 33 South. 85; *State v. Whittier*, 21 Me. 341, 38 Am. Dec. 272; *Commonwealth v. Hutchinson*, 10 Mass. 225; *Commonwealth v. Robinson*, 165 Mass. 426, 43 N. E. 121; *Commonwealth v. Ramage*, 177 Mass. 349, 58 N. E. 1078; *Ridenhour v. Kansas City Cable R. Co.*, 102 Mo. 270, 13 S. W. 889, 14 S. W. 760; *State v. Nelson*, 132 Mo. 184, 33 S. W. 809; *State v. Prather*, 136 Mo. 20, 37 S. W. 805; *Davis v. State*, 31 Neb. 247, 47 N. W. 854; *State v. Tolla*, 72 N. J. L. 515, 62 Atl. 675, 3 L. R. A., N. S., 523; *Territory v. De Gutman*, 8 N. W. 92, 42 Pac. 68; *State v. Edwards*, 79 N. C. 648; *State v. Jackson*, 9 Or. 457; *State v. Reddington*, 7 S. D. 368, 64 N. W. 170; *Vincent v. State*, 50 Tenn. (3 Heisk.) 120; *Brown v. State*, 2 Tex. App. 115; *Treasier v. State* (Tex. Cr. App.), 84 S. W. 360; *Wheeler v. United States*, 159 U. S. 523, 16 Sup. Ct. Rep. 93, 40 L. ed. 244. In Indiana the presumption of incompetency applies only to children under ten years, instead of fourteen, as at common law, but the rule in this state extends only to the question of when the child is *prima facie* incompetent, for a child under that age is permitted to testify as a witness if found competent upon examination by the judge: *State v. Blackwell*, 11 Ind. 196. And it is held in this state that, in testing the competency of an infant as to whether he understands the nature and obligation of an oath, the time he is called to testify, and not the date of the transaction about which he is to testify, is that which is material: *Foster v. Honan*, 22 Ind. App. 252, 53 N. E. 667. In California, Kansas, and Missouri, children under ten who appear incapable of receiving just impressions of the facts respecting which they are examined are incompetent as witness, but as in Indiana, they are not precluded from testifying if, upon examination, they are found competent: *People v. Craig*, 111 Cal. 469, 44 Pac. 186; *People v. Swish*, 136 Cal. 520, 69 Pac. 223; *State v. Douglass*, 53 Kan. 669, 37 Pac. 172; *State v. Scanlan*, 58 Mo. 204; *Brashears v. Western Union Tel. Co.*, 45 Mo. App. 433; *Ridenhour v. Kansas City C. Ry. Co.*, 102 Mo. 270, 13 S. W. 889, 14 S. W. 760.

The only state which seems to hold that age, rather than intelligence, is the test of competency is Arkansas, for in *St. Louis M. & S. Ry. Co. v. Waren*, 65 Ark. 619, 48 S. W. 222, it was held that under subdivision 2, Sandel & Hill's Digest, section 2916, a witness under ten years of age was incompetent to testify. The statute referred to has evidently been passed since the decision in the case of *Flanagan v. State*, 25 Ark. 92, heretofore cited, where it was expressly held that there was no age limit as to the competency of children as witnesses.

The rule for determining whether infants possess sufficient understanding and intelligence to qualify them to testify, which seems to have received the most practical support, may be stated thus: If they are of sufficient natural intelligence, and comprehend the nature and obligation of an oath, their testimony should be admitted. The following cases give practical support to this rule: *McGuff v. State*, 88 Ala. 147, 16 Am. St. Rep. 25, 7 South. 35; *Gordon v. State*, 14 Ala. 42, 41 South. 847; *Flanagin v. State*, 25 Ark. 92; *Williams v. United States*, 3 App. D. C. 335; *Clinton v. State*, 53 Fla. 98, 4 South. 312; *Johnson v. State*, 76 Ga. 76; *Draper v. Draper*, 68 Ill. 17; *Bright v. Commonwealth*, 120 Ky. 298, 117 Am. St. Rep. 590, 8 S. W. 527; *State v. Whittier*, 21 Me. 341, 38 Am. Dec. 272; *Hughes v. Detroit G. H. & M. Ry. Co.*, 65 Mich. 10, 31 N. W. 603; *Davis v. State*, 31 Neb. 247, 47 N. W. 854; *Commonwealth v. Furman*, 211 Pa. 549, 107 Am. St. Rep. 594, 60 Atl. 1089; *Holst v. State*, 23 Tex. App. 1, 59 Am. Rep. 770, 3 S. W. 757.

b. **Variations.**—But there are some variations to the rule above given. Thus in *People v. Bernal*, 10 Cal. 66, this is the rule stated: "It is essential that they should possess sufficient intelligence to receive just impressions of the facts respecting which they are examined, sufficient capacity to relate them correctly, and sufficient instruction to appreciate the nature and obligation of an oath." And in *Commonwealth v. Hutchinson*, 10 Mass. 225, it is said a child would be competent to testify if he "possess a sufficient sense of the wickedness and danger of false swearing, . . . although of never so tender an age." And in *State v. Reddington*, 7 S. D. 368, 6 N. W. 170, it is said that to entitle a child to testify as a witness "He is only required to be able to distinguish the moral difference between right and wrong; and where the law or the court says he must understand the obligation of an oath, it means only that, possessing such ability to discriminate, he understands that his position as a witness imposes upon him the moral and legal duty to tell only what is true."

c. **Inability to Define Meaning of Word "Oath."**—While all the cases agree that the competency of a child depends upon his capacity to understand the nature and obligation of an oath, this does not imply that he should be able to define the meaning of the word "oath," but an adequate sense of the impropriety of falsehood is all that is necessary. Thus, in *United States v. Williams*, 3 App.



335, it was said by the court: "A child that has an adequate of the impropriety of falsehood does understand the nature of th in the proper sense of the term, even though she may not the meaning of the word 'oath,' and may never have heard word before"; and a child of seven and one-half years was held tent to testify who stated, upon preliminary examination to her competency, that she did not understand the nature of an or what was meant by being sworn in court, but that she went nday-school and understood that if she did not tell the truth ould be whipped, and that it was wrong to tell anything that ot true. And in *Minton v. State*, 99 Ga. 254, 25 S. E. 626, the me court refused to reverse a ruling permitting a child of to testify, who stated on the preliminary examination that he ot know what an oath was, but also stated that he knew what "to go up into the courthouse and swear you have to tell the " and that the law would punish him if he told a story, and if he told a story he would go to hell. The general doctrine nced in the two last cases is also fully sustained in *State v. r*, 135 Iowa, 507, ante, p. 291, 113 N. W. 322; *Scroggins v. (Tex. Cr. App.)*, 51 S. W. 232; *Click v. State (Tex. Cr. App.)*, W. 1104; *State v. Blythe*, 20 Utah, 378, 58 Pac. 1108. in *State v. King*, 117 Iowa, 484, 91 N. W. 768, a girl of twelve of age who stated that the attorney for the state had told her minutes before being called that if she held up her right hand e the court it meant that she was to tell the truth, and that ould be punished if she did not, but that she did not know any- about it herself, had never been in court before, and did not what the word "testimony" meant; that the attorney had told meant what she said, and that she had been told if asked what th meant, to say it meant she should tell the truth, was held o show sufficient capacity to understand the obligation of an It is evident, however, that the ruling in this case is not upon the inability of the witness to define the meaning of the al words "oath" and "testimony," but rather from her in- ity to understand the obligation to tell the truth, or perhaps the fact that such knowledge as she displayed was too recently red and too clearly due to the drill given her by the prosecuting ey. In our judgment, both the recentness of her knowledge ts source were immaterial, and the action of the court in ex- g her as a witness is not worthy of consideration as a precedent, as was doubtless due to the impression that the words which she were merely the repetition of what the attorney had told her, ot indicative of the true state of her mind. In *Featherstone v. e*, 194 Ill. 325, 62 N. E. 684, it was held that a boy of six years e was not disqualified as a witness for the prosecution in a crim- ase by his lack of knowledge of the meaning of an oath, when he d a sufficient understanding on his preliminary examination y his testimony, the weight of which is, however, for the jury.

**d. Religious Belief as Test of Competency.**—There is some conflict among the cases, as to how far the competency of a child to understand the obligation of an oath depends upon belief with respect to the certainty of punishment after death. In some cases it is held that the child must feel the obligation of the oath from religious convictions, and not merely from the sense of impropriety of telling a falsehood or fear of bodily punishment. Thus, in *Carter v. State*, 63 Ala. 52, 35 Am. Rep. 4, a girl of nine years was held incompetent to testify as a witness who stated on the voir dire that "she did not know what the Bible was; had been to church once, and that was to her mother's funeral; did not know what book it was she laid her hand on when sworn; had heard of God, but did not know who it was; and that if she swore to a lie she would be put in jail, but did not know she would be punished any other way." And in the late case of *Jones v. State*, 145 Ala. 51, 40 South. 947, a child of nine years who stated on her voir dire, "I will be ten my next birthday. God made me. I have been to church and Sunday-school. It is wrong to tell a lie. It is wrong to swear to a lie. I am going to tell the truth," and further said, in answer to questions of the state's attorney, that if she swore to a lie the judge would put her in jail, and she reckoned God could put her in jail if he wanted, was held incompetent, because showing "no such religious training and instruction as excited a hope of future reward to the good and fear of punishment to the wicked."

In *State v. Washington*, 49 La. Ann. 1602, 22 South. 841, 42 R. A. 553, it was held that a child of seven years, who, on the voir dire examination, said she had no knowledge of God, "never heard of the devil, or the bad man, or what would become of her if she told a lie," was incompetent. It is here held that a belief in God and a sense of responsibility to Him for false swearing are indispensable to the competency of witnesses. The court, however, was careful to say that the test was to be applied without reference to the form of religious belief, but that there must exist an appreciation of a Supreme Being to punish sin and reward virtue in this life, to make a witness competent. "The basis on which testimony is received in courts is the oath administered to the witness, and the oath is an appeal to God by the witness, affirming that he will speak the truth to the witness-stand."

The American cases which make religious training a test of competency with reference to infant witnesses find support in the English case of *Rex v. Williams*, 7 Car. & P. 320, where it was held that before a child is examined as a witness, the judge must be satisfied that it feels the binding obligation of an oath from a general course of religious education, and the effect of the oath on the conscience of the child should arise from religious feelings of a permanent nature, and not from instructions recently communicated for the purpose of the trial.

but the weight of authority is opposed to testing the capacity of a child to comprehend the obligation of an oath, by the effect of an oath upon its conscience, as arising from religious feelings of a permanent nature. Thus, in *Moore v. State*, 79 Ga. 498, 5 S. E. 51, Judge Bleckley, speaking of the competency of a boy of ten, said: "For children to be competent as witnesses it is not requisite that they should profess to know what becomes of anyone who swears falsehood, or the effects of an oath. If they know their ignorance concerning these great mysteries and candidly avow it, there is the same reason to think they have some clear knowledge on other subjects and will be candid in communicating it. It is enough for the competency if they know the nature of an oath"; and in *Black v. State*, 11 Ind. 196, a child of ten was held competent who said she would tell the truth and the whole truth, and that her mother told her to tell the truth in this case, notwithstanding that she herself said she did not know whether the punishment for swearing a lie would be in this world or a future one. In *Cadmus v. St. Louis Bridge & T. Co.*, 15 Mo. App. 86, it is held that a child who is otherwise competent is not disqualified as a witness because of not having received religious instruction; and in *Commonwealth v. Furlong*, 211 Pa. 549, 107 Am. St. Rep. 594, 60 Atl. 1089, a boy of eight was held to be competent to testify without regard to his religious instruction. Said the court: "The truth is what the law, under the circumstances of evidence is seeking, and if a full and present understanding of the obligation to tell it is shown by the witness, the nature of his conception of the obligation is of secondary importance. . . . It is not for us to say that the crude and shadowy beliefs of small children concerning God and the hereafter are so uncertain, that the tests, based on religious instruction, even though given by the trial judge himself, are of little or no moment, and should rather be discarded than insisted upon in this enlightened age. The whole purpose of the trial is to ascertain the truth, and the oath is in pursuance of that object. If the witness understands that this is demanded and that punishment will follow its violation, it is sufficient." The case of *White v. Commonwealth*, 96 Ky. 180, 28 S. W. 340, goes even further than any of the cases above cited, and if it can be sustained at all, it would seem to do away with the necessity of administering an oath to a child of tender years. It is here held that a child under twelve is a competent witness, though "ignorant of God, and of the evil of lying, and of the punishment prescribed therefor, both here and hereafter," provided he have sufficient intelligence to truthfully narrate facts to which his attention is directed. This makes the test one of intelligence only, and total moral depravity under this rule would not disqualify. The practice of applying to children religious tests is employed, I think, more frequently in the south than elsewhere, and usually results in their displaying a very orthodox training, extending not only to a belief in God and immortality, but also to a state of future punishment. The following are referred to merely as cases

in which the belief was held to support the trial judge's view of competency and the exercise of his discretion in admitting the evidence: *Walter v. State*, 134 Ala. 86, 32 South. 703; *White v. State*, 136 Ala. 58, 34 South. 177; *Eastman v. State*, 139 Ala. 67, 36 South. 16; *Landthrift v. State*, 140 Ala. 114, 37 South. 287; *Reyna v. State* (Tex. Cr.), 75 S. W. 25; *North Texas C. Co. v. Bosteed* (Tex. Civ. App.), 80 S. W. 109. In Georgia the belief of the witness that if he did not tell the truth "the buggerman would get her" was apparently held fatal to the claim of her competency: *Miller v. State*, 109 Ga. 512, 35 S. E. 152. A reverse and more sensible ruling was made in *Missouri K. & T. Ry. Co. v. Johnson* (Tex. Civ. App.), 37 S. W. 771.

#### V. Question of Competency is Within Discretion of the Court.

Whatever difference of opinion may exist among the cases as to the tests to be adopted for determining the competency of children and witnesses they are all agreed that the question of competency rests within the sound discretion of the court, and is to be determined by the trial judge. This doctrine is so general that it would be useless to cite all the cases upholding it, but we give the following directly in point: *Carter v. State*, 63 Ala. 54, 35 Am. Rep. 4; *Castleberry v. State*, 135 Ala. 24, 33 South. 431; *People v. Berry*, 10 Cal. 67; *People v. Craig*, 111 Cal. 469, 44 Pac. 186; *People v. Swist*, 136 Cal. 520, 69 Pac. 223; *Williams v. United States*, 3 A. C. 355; *Hicks v. State*, 105 Ga. 627, 31 S. E. 579; *Epstein v. Berkowsky*, 64 Ill. App. 498; *Shannon v. Swanson*, 109 Ill. App. 208, 208 Ill. 52, 69 N. E. 869; *Simpson v. State*, 31 Ind. 90; *State v. Meyer*, 135 Iowa, 507, ante, p. 291, 113 N. W. 322; *State v. De La*, 19 La. Ann. 119; *State v. Washington*, 49 La. Ann. 1602, 22 South. 841, 42 L. R. A. 553; *State v. Whittier*, 21 Me. 347, 38 Am. Dec. 2; *Freeny v. Freeny*, 80 Md. 406, 31 Atl. 304; *State v. Doyle*, 107 Mo. 36, 17 S. W. 751; *Ridenhour v. Kansas City C. Ry. Co.*, 102 Mo. 270, 13 S. W. 889, 14 S. W. 760; *State v. Nelson*, 132 Mo. 133, 33 S. W. 809; *State v. Prather*, 136 Mo. 20, 37 S. W. 805; *State v. Cracker*, 65 N. J. L. 410, 47 Atl. 643; *Territory v. De Gutman*, 8 N. D. 92, 42 Pac. 68; *State v. Werner*, 16 N. D. 83, 112 N. W. 60; *State v. Jackson*, 9 Or. 457; *Burke v. Ellis*, 105 Tenn. 702, 58 S. W. 8. And in *State v. Walker* (Mich.), 71 N. W. 641, it was held that under a statute providing that a child under ten may testify where the court is satisfied that the child may be safely admitted to testify, a child under seven years may make her unsworn statement where from examination the judge is satisfied, unless it is plain that he could not legally reach such a conclusion.

#### VI. Instruction by Court or Others When Child Appears Incompetent.

In *Carter v. State*, 63 Ala. 52, 35 Am. Rep. 4, it was held that if a child, previously ignorant, is by instruction made to understand

nature of the obligation to speak the truth which is imposed on an oath, he is then a competent witness; and in the same case the court said that "when a child of tender years is produced as a witness, it is the duty of the presiding judge to examine him or her, without the interference of counsel further than the judge may choose to allow, in regard to the obligation of the witness' oath; and in proper cases, to explain the same to one intelligent enough to comprehend what he says, and then to determine whether or not the child shall be sworn and permitted to testify." And in *Day v. Day*, 56 N. H. 316, it was held that when a child offered as a witness appears not informed as to the nature of an oath, the judge should instruct him, and, if then satisfied that he understands, may receive his testimony. But the right to give instructions to a child when it appears that he is ignorant of the nature and obligation of an oath, so that he may qualify as a witness, is not confined to the judge, for in *Commonwealth v. Lynes*, 142 Mass. 577, 56 Am. Rep. 8 N. E. 408, where a girl of thirteen had been called as a witness in a criminal case, and withdrawn because apparently not informed as to the obligation of an oath, but was on the next day examined by the judge and found competent, it was held that the defendant could not object on the ground that she had been instructed by a Christian minister as to the nature of an oath since the last adjournment of the court.

#### VII. Character of Case as Affecting Competency.

In these cases, as a rule, make no distinction as to the competency of children as witnesses, so far as the character of the case in which their testimony is desired, may be concerned, but apply the general rules above stated to all cases alike. But two exceptions may be noted. Thus, in *Crowner v. Crowner*, 44 Mich. 180, 38 Am. L. 245, 6 N. W. 198, it was held that in a suit for divorce it was improper to call two children of the parties, the elder of whom was five years of age, to testify to the want of chastity on the part of their mother. Said the court: "It is a great wrong to them, not only as it touches them in their natural affections, but also as it tends to destroy their purity of mind and conduct. Moreover, the influence of such children to acts which will naturally be construed as their prepossessions and immature and incorrect notions, is of very little value, even when honestly called out and given, and is easily misled and perverted if a dishonest father shall be so inclined." The ruling in this case is evidently based on the impropriety of using infants as witnesses in such cases and the weight to be accorded their testimony, rather than the question of competency. In *Freasier v. State* (Tex. Cr. App.), 84 S. W. 360, it was held that under constitution, article 1, section 5, declaring that all oaths shall be taken subject to the pains and penalties of perjury, and under article 34 of the Penal Code of 1895, providing that no person shall in any case be convicted of an offense committed before he was

nine years old, that a person under nine years of age cannot be a witness in a case involving life or liberty.

#### VIII. Illustrations Showing Sufficiency of Tests as to Competency

The following illustrations will serve to show, in a practical way, how the different rules promulgated by the courts for testing the competency of children as witnesses have been applied.

In *McKelton v. State*, 88 Ala. 181, 7 South. 38, a boy of thirteen years of age, on being examined by the court as to his competency, stated: "I do not know who made me, I do not know what will be done with me if I lie and steal. I know it is wrong to lie and steal, but I do not know what will be done with me if I steal. I did not know that they would send me to jail if I swore to a lie. I do not know what will become of me when I die, if I swear to a lie. I know it is wrong to tell a lie, but I did not know I would be punished for it."

On this showing the trial court allowed him to testify, but the ruling was reversed on appeal, the supreme court saying that the boy "clearly did not have the requisite capacity." It was noticed in this case that the boy seemed to understand the moral obligation incident to an oath, and the supreme court must have considered him incapable only because of his ignorance of the punishment, either here, or hereafter, which would follow a violation of it. In other words, the Alabama court makes a rigid application of the test as bearing upon religious belief, for in a later case, *Williams v. State*, 109 Ala. 64, 19 South. 530—a child of ten years of age who, when asked in the voir dire what would become of her when she died, if she swore falsely, replied, "I will go to hell," and made the same reply when asked what would be done with her here, was held to be competent. And a child of nine years of age, who testified on the preliminary examination to test her competency as a witness, that she "understood the nature of an oath, and that if she did not swear the truth she would get into hell by fire," is competent according to the most rigid rule: *Draper v. Draper*, 68 Ill. 17.

In *Donnelly v. Territory*, 5 Ariz. 291, 52 Pac. 368, where a witness six years and eleven months of age, whom defendant was charged with assaulting, did not reveal on the voir dire much knowledge of the nature of an oath or the consequences of false swearing, except that people who lie would go to jail, was held incompetent; and in *Hunt v. Detroit, G. H. & M. Ry. Co.*, 65 Mich. 10, 31 N. W. 603, a boy of seven years of age, who was the plaintiff in an action for personal injuries, was not allowed to testify, when on examination as to competency, he merely said he must tell the truth, or he would go to hell, but when asked about any other consequences, he showed entire ignorance and only said that his mother told him the day before that he would go to hell if he did not speak the truth. In *Gibson v. State*, 99 Ga. 703, 26 S. E. 760, it appeared, upon examination conducted by the judge, for the purpose of inquiring into the com-

cy as a witness of a child of tender years, that he was ignorant of his own age, but knew his father's name and the number and names of the days of the week, and could count as high as 32, developed nothing further as to the competency of the child as a witness. Said Judge Lumpkin: "We do not think the examination was sufficiently comprehensive. It certainly did not show that the child, either from a moral or legal standpoint, understood the nature or obligation of an oath, or had the slightest degree of knowledge with reference to the legal consequences of committing perjury. While this court is not inclined to any great strictness on this subject, we feel constrained to hold that the test to which the witness now under consideration was subjected was hardly sufficient. In *Commonwealth v. Robinson*, 165 Mass. 426, 43 N. E. 121, on the denial of an indictment for assault upon a girl five years of age, it was held that there was no error in permitting the girl to testify as a witness; and to the same effect in *Commonwealth v. Ramage*, 165 Mass. 349, 58 N. E. 1078, with regard to a child of six years. The tests applied in these two cases, to ascertain the degree of intelligence possessed by the child, and their ability to comprehend the nature and obligation of an oath, is, unfortunately, not given in the reported cases, but they serve to show that there is no age limit at which children must have reached in order to be competent as witnesses. And, if further illustrations of this doctrine were necessary, they are found in *State v. Juneau*, 88 Wis. 180, 43 Am. St. Rep. 877, 1 N. W. 580, 24 L. B. A. 857, where it was held not error to permit a child of four years of age to testify in a case; and in *Wheeler v. United States*, 159 U. S. 523, 16 Sup. Ct. Rep. 93, 40 L. ed. 244, where the tests which were approved by the highest court of the land, in determining the competency as a witness of a boy of five years of age. The boy in this case was offered as a witness in a murder trial. In reply to questions put to him on his voir dire, he said, among other things, that he knew the difference between the truth and a lie; that if he told a lie the bad man would get him, and that he was going to tell the truth. When further asked what he would do with him in court if he told a lie, he replied that he would put him in jail. He also said that his mother had told him that morning to "tell no lie," and in response to a question as to what the clerk said to him, when he held up his hand, he answered, "Don't you tell no story." In response to a question, he stated that he had never been to school. Mr. Justice Brewer, speaking for the court, said: "That the boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness, is clear. While no one would think of calling as a witness an infant of two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. . . . As far as can be judged from the not very extended examination

which is found in the record, the boy was intelligent, understood the difference between truth and falsehood, and the consequences of telling the latter, and also what was required by the oath which he had taken. At any rate, the contrary does not appear. Of course, cases must be taken by the trial judge, especially where, as in this case, the question is one of life or death. On the other hand, to exclude from the witness-stand one who shows himself capable of understanding the difference between truth and falsehood, and who does not appear to have been simply taught to tell a story, would sometimes result in staying the hand of justice. We think, that, under the circumstances of this case, the disclosures on the voir dire were sufficient to authorize the decision that the witness was competent, and therefore there was no error in admitting his testimony.

In *Jones v. Brooklyn, B. & W. E. R. Co.*, 3 N. Y. Supp. 253, a boy of eleven years was held competent to testify who on his voir dire stated that he believed in Heaven, the home of God, and hell, the home of the devil; that at death the good will go to the former and the bad to the latter; that it was bad to lie, both in and out of court; for the former his parents would whip him, and for the latter he would be sent to prison. The ruling in this case was affirmed (121 N. Y. 683, 24 N. E. 1098).

In *Vincent v. State*, 50 Tenn. (3 Heisk.) 120, a colored girl, thirteen years of age, on being offered as a witness, upon preliminary examination by the court, stated that no one ever told her what would be done with her, in this world or the next, if she swore falsely, and she did not know what would become of her. Upon being asked further what would become of her hereafter if she swore to a lie, in this case, whether she would go to the good world or the bad world, she replied, if she swore to a lie, she would go to the bad world. It was held no abuse of discretion in allowing her to testify. In answer to the contention of counsel that the examination did not disclose a consciousness of the obligation of an oath, nor of the consequences of swearing falsely, the court said: "She seems not to have understood the signification of the word 'falsely,' but when the question was asked her in more familiar language, responded promptly and intelligently." In *Logston v. State*, 50 Tenn. (3 Heisk.) 414, a boy of eight years was held to be competent as a witness, and when asked by the court if he knew what would become of him if he swore to a lie, said, "Yes; the bad man will get me," and further said that his mother had told him so. The supreme court in this case, however, were of opinion that it might have been proper, as a general rule, to have further tested the witness, but that in this case, the remarkable intelligence of the boy, as disclosed by his testimony, justified the brevity of the preliminary examination.

In *State v. Belton*, 24 S. C. 185, 58 Am. Rep. 245, a boy of twelve years of age was held not to be a competent witness who had never heard of a God, or the devil, or of a heaven or hell, or of the Bible.



Davidson v. State, 39 Tex. 129, a child of ten years was held to be competent as a witness who, upon examination on her voir dire, said that she did not know what would become of her if she told a lie, and did not know what God or the laws of the country would do to her if she swore falsely, but that she would tell the truth. "Under and wiser persons," said the court, "might have answered the questions in the same manner without impeaching their intelligence. Precisely what the Creator will do to one who swears falsely is a question which may not be answered under oath." But in *Phy v. State*, 36 Tex. Cr. App. 24, 35 S. W. 174, it was held that where a boy of ten is offered as a witness, it should be shown

upon the preliminary examination as to his competency that understands the pains and penalties for perjury, as provided by notwithstanding he thought he would go to the bad place where died if he did not tell the truth. In *Gabler v. State*, 49 Tex. App. 623, 95 S. W. 521, it was held that the showing in a bill of exceptions that a boy of twelve, on his examination for competency as a witness, stated that he knew it was wrong to tell a story, did not know what would become of him if he did, and that he never seen the devil, was not sufficient to show that he was disqualified.

In *Scroggins v. State* (Tex. Cr. App.), 51 S. W. 232, a child of years when sworn, in answer to a question from the judge if she understood what she had done, replied, "No, sir"; and when again asked if she understood the meaning of what she had done when she held up her hand, again answered, "No, sir"; but in answer to further questions said it was right to tell the truth and wrong to tell a story. She was held to be a competent witness. Another good instance of the rule that a child is competent as a witness if he has an adequate sense of the impropriety of falsehood, although he does not understand the meaning of a judicial oath, is afforded by the case of *Sancedo v. State* (Tex. Cr. App.), 66 S. W. 1104. In this case a girl of eight years, in answer to questions to test her competency, said she knew it was wrong to tell a lie, and that if she should tell a story she would put her in jail, and she would go to the bad place. She said that she did not know why she had held up her hand, nor what was said to her when she held up her hand, and did not know what an oath was; that her parents had told her to tell the truth; that she had been one term at school, but did not know herself what would become of her if she told a story. She further said that she knew it was right to tell the truth, and wrong to tell what was false, true, and that if she testified she would tell the truth, and tell the facts as she saw them. It was held that no error had been committed in permitting her to testify. Another excellent illustration showing that neither the ability to define the meaning of the word "oath" or an understanding of future punishment for false swearing is a necessary test of the competency of a child witness is afforded in the case of *Sancedo v. State* (Tex. Cr. App.), 69 S. W. 142. The defendant here was on trial for rape committed upon a girl of ten years of age, who upon the preliminary examination testified that she was ten years old. I do not know what is meant by an oath. My mother has never told me what would be done to me if I did not tell the truth. I do not understand what it is to swear in court. I have been to school. I do not know what they teach in school about telling lies. I have heard of Heaven. I have never heard of hell. I do not know where I will go if I tell lies. I will be punished by the judge if I do not speak the truth here. I do not know how he will punish me. I suppose the grand jury will punish me if I don't tell the truth here to-day. I am going to

truth. She was held to be a competent witness; and in *Trim v. te* (Miss.), 33 South. 718, in a prosecution for murder a girl, little over five years of age, was held competent to testify who w it was wrong to tell stories; that she would go to Heaven he did not lie, and go to hell if she did; and that she would be ished if she did not tell the truth in court.

## EL DORADO JEWELRY COMPANY v. DARNELL.

[135 Iowa, 555, 113 N. W. 344.]

**CONTRACTS—Validity—Misrepresentation—Rescission.**—If a son is ignorant of the contents of a written instrument from in- ility to read it, and signs it through mistake and misrepresenta- , without negligence on his part, the contract is void, and he d not rescind it to avoid it. (p. 310.)

C. Percival, for the appellant.

Wilkinson, Smith & Wilkinson, for the appellee.

**MR. LADD, J.** The defendant signed an order for the pur- use of certain jewelry, and, upon suit for the price, set up a defense that it was procured by fraud, in that plaintiff's nt had represented that the order was for goods to be sold commission by defendant as agent, and for which <sup>558</sup> he s to remit only a percentage of the proceeds, after sale, he company, which should retain title. The evidence was h that the jury might have exonerated him from the charge negligence in signing the order, and have found the allega- as of fraud established. The agent who procured the order mitted it to the company immediately, and it was ac- ted the day after given. On the next day defendant wrote company not to send the jewelry. Four letters written by a were introduced in evidence, the last dated November 9, 4, in which he indicated his wish to avoid the order and take the property, but in none did he charge any dishon- y in the procurement of the order, or notify the company t he elected to rescind the contract. It will thus be seen t the order had been accepted before he undertook to ntermand it, and that he has never elected to rescind. eed, the purport of his letters was to recognize the order valid, rather than repudiate it. So that, although the court mitted the issue as to whether there was a rescission by the endant to the jury, there was no evidence to sustain such a

finding, and the only remaining question for our consideration is whether rescission is necessary in such a case.

It is conceded that, if the order was voidable merely, and when procured by fraud, defendant had his election to rescind and refuse to receive the goods, or accept them and recover in damages; but if, under the finding of the jury, the order was void, rescission was unnecessary to defeat plaintiff's claim. To render the order void, it must have been signed by mistake; that is, under the supposition that it was an instrument of another or different character. This would be no less a mistake because induced by fraud. The distinction should be kept in mind, for an agreement procured by fraud is voidable merely, while one signed by mistake is no agreement at all: 4 Am. & Eng. Ency. of Law, 2d ed., 157. The rule is found stated as far back as *Thoroughgood's Case*. Rep. 9b, in the time of Lord Coke: <sup>557</sup> "That although the party to whom the writing is made, or other by his procurements, doth not read the writing, but a stranger of his own head read it in other words than it in truth is, yet it shall not bind the party who delivereth it; for it is not material who readeth the writing, so as he who maketh it to be a layman, and being not lettered, be (without any covin in himself) deceived, and that is proved by the usual form of pleading in such a case; that is to say, that he was a layman and not learned, and that the deed was read to him in other words etc., generally, without showing by which it was read."

Numerous cases illustrate this principle. Thus in *Stoeve v. Weir*, 10 Serg. & R. 25, the defense that the signature to the single bill sued on was obtained by falsely reading it as a receipt was sustained. In *Foster v. MacKinnon*, L. R. 4 C. P. 70, the signature was procured by representing that a promissory note was an agreement appointing the defendant an agent for the sale of a patented machine, and in sustaining the defense Byles, J., said: "It seems plain on principle and on authority that if a blind man, or a man who cannot read, or for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper, which the blind or illiterate man afterward signs, then, at least, if there be no negligence, the signature so obtained is of no force, and it is invalid, not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore

contemplation of law, never did sign, the contract to which name is appended."

In *Gibbs v. Linabury*, 22 Mich. 479, 7 Am. Rep. 675, a promissory note was signed under the supposition that it was a contract making the defendant an agent for the sale of a tent hay-fork, and this was held such a mistake <sup>558</sup> as to relieve him from liability: See, also, *Briggs v. Ewart*, 51 Mo. 5, 11 Am. Dec. 445; *Walker v. Egbert*, 29 Wis. 194, 9 Am. Rep. 548; *Puffer v. Smith*, 57 Ill. 527; *Belden v. Meeker*, 2 N.Y. (N. Y.) 470; *Kagel v. Totten*, 59 Md. 447. The same principle was approved by this court in *Douglass v. Matting*, 10 Iowa, 498, 4 Am. Rep. 238, and in *Green v. Wilkie*, 98 Iowa, 60 Am. St. Rep. 184, 66 N. W. 1046, 36 L. R. A. 434. In the latter case the defendant was induced by fraud to sign a lease of one thousand dollars and a mortgage securing the same, when he supposed that the note was for one hundred dollars and the mortgage a lease. In *Trambly v. Ricard*, 130 Mass. 259, evidence was held admissible tending to show, in defense of the claim, that a written agreement stipulating that certain furniture was loaned plaintiff, on a promise to pay a weekly sum for the use of the same, with the privilege of buying it at a price named, was induced by the fraudulent representation that he was buying the furniture at a given price, part cash and the rest in installments; the court saying: "A party who is ignorant of the contents of a written instrument from inability to read, who signs it without intending to, and who is charged with no negligence in not ascertaining the character of it, is no more bound than if it were a forgery. There has been no intelligent assent to its terms, and it is fraud in one who with knowledge of the fact attempts to enforce it." In *Ginn v. Tobey*, 62 Mich. 252, 4 Am. St. Rep. 848, 28 N. W. 3, a deed signed under the supposition induced by fraud that it was a lease was adjudged void. In *Schuylkill County v. Copley*, 67 Pa. 386, 5 Am. Rep. 441, a party signed a bond under supposition that it was a petition, and was held not void. Enough has been said to indicate the trend of authority and to make clear the principle under consideration. It is said, the jury might have found that the defendant in signing the order was not negligent, as he was a man of advanced years, without his glasses, which had been broken, and could not read the instrument signed, which was long and in small type. The jury might also have found that <sup>559</sup> he signed the same under a mistaken supposition that it was merely a contract under which he was to receive the goods and the property of plaintiffs, and dispose of them on commis-

sion, with the obligation to remit a percentage of the proceeds only. If so, executing the order was by a mistake, and the instrument utterly void. This must be so, for in such a case the minds of the parties have never met. Under the finding of the jury, the judgment was rightly entered for the defendant.

Affirmed.

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*One is not Bound by a Contract* which he is induced to sign by false representations, he being ignorant of the true character of the instrument, and having no intention to sign such a paper, and not being guilty of negligence: *Keller v. Ruppold*, 115 Wis. 636, 95 Am. St. Rep. 974; *Willard v. Nelson*, 35 Neb. 651, 37 Am. St. Rep. 43. But if one is negligent in failing to read a contract before signing, he may be bound by it, though its terms are not what they have been represented: *Chicago etc. Ry. Co. v. Hamler*, 215 Ill. 525, 105 Am. St. Rep. 187; *Crim v. Crim*, 162 Mo. 544, 85 Am. St. Rep. 52. *Standard Mfg. Co. v. Slot*, 121 Wis. 14, 105 Am. St. Rep. 1016. It has been held, however, that the negligence of a party in failing to read a paper which he has signed does not preclude him from attacking its validity: *Wilcox v. American Tel. etc. Co.*, 176 N. H. 115, 98 Am. St. Rep. 650.

**CASES**  
**IN THE**  
**COURT OF APPEALS**  
**OF**  
**KENTUCKY.**

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**IN v. UNION CENTRAL LIFE INSURANCE COM-  
PANY.**

[123 Ky. 59, 93 S. W. 622.]

**RES JUDICATA.**—An Erroneous Judgment is Binding on the parties thereto though it is overruled by a subsequent decision of the highest court. (p. 314.)

**RES JUDICATA.**—Judgment on the Merits, What is.—A judgment on the demurrer to a reply to the defendant's answer to the complaint that the action cannot be maintained, and dismissing it absolutely, is a judgment on the merits, precluding any subsequent controversy on the same question between the same parties. (p. 315.)

John W. Ray, for the appellant.

Greene & Van Winkle, for the appellees.

<sup>1</sup> **HOBSON, C. J.** On March 6, 1899, appellant, Sallie Lee, who was then Sallie Lee, instituted an action in the Franklin circuit court against the appellee, the Union Central Life Insurance Company, on a contract of insurance made on September 24, 1894, whereby, as she alleged, the life of J. T. Lee was insured in the sum of two thousand dollars for her benefit. The defendant answered, pleading, among other things, a contract limitation of one year in bar of the action. She replied to the answer. The circuit court sustained a demurrer to so much of her reply as related to the contract limitation of one year, and, she declining to plead further, a judgment was entered that the action be dismissed absolutely, and that defendant recover its cost. From this judgment she appealed to this court, and by an equally divided court the judgment of the circuit court was affirmed: *Lee v. Union Cent. Life Co.*, 22 Ky. Law Rep. 1712, 56 S. W. 724. Subsequently, on March 23, 1905, she brought this <sup>2</sup> suit on the same cause

of action against the same defendant. The defendant pleaded the judgment in the former case in bar of the action. The circuit court held the plea good and dismissed the action. From this judgment she appeals.

After the decision of the former case this court in the case of *Union Central Life Ins. Co. v. Spinks*, 119 Ky. 261, 26 Ky. Law Rep. 1205, 83 S. W. 615, 84 S. W. 1160, 69 L. R. A. 201, overruled the opinion rendered in the former case. But although this is true, the judgment in that case is binding upon the parties to the action. In *Thompson v. Louisville Bank & Co.*, 21 Ky. Law Rep. 1611, 55 S. W. 1080, we had this precise question presented, and in disposing of it we said: "The opinion rendered in these cases is the law of the cases, however erroneous it may have been. The fact that it was overruled in a subsequent case between other parties destroys it as a precedent in other cases, but it is nevertheless binding upon the parties to this controversy. The rule is elementary that a matter once litigated and determined finally cannot be relitigated between the same parties. When these cases were returned to the court below, that court had no alternative but to obey the mandate of this court, and upon appeal from that judgment this court is as much bound by the mandate as the court below was. If this were not so, litigation would be interminable, and a judgment of this court finally settling the rights of the parties would be only the starting point for new litigation." In *Cincinnati etc. R. R. Co. v. Pemberton*, 9 Ky. Law Rep. 859, the plaintiff, after an opinion by the court, dismissed his action without prejudice and brought a new suit on the same cause of action. The same defense was interposed, and on appeal it was held that the court must regard it as the same case which was considered on the former appeal, and that the judgment then rendered was conclusive of all questions before the <sup>3d</sup> court. The same rule was applied by this court where, after an opinion by the supreme court, the plaintiff dismissed his action without prejudice and brought a new suit: *Jenkins v. Headley's Exr.*, 19 Ky. Law Rep. 290, 40 S. W. 460.

It is earnestly contended for the appellant that a judgment upon a plea of limitation is not a judgment on the merits, and does not bar the plaintiff in a subsequent suit on the same cause of action. We cannot accede to this view. The judgment on the former appeal determined that the plaintiff's cause of action was barred by limitation. The parties were before the court. The question whether she could maintain the action or not was the thing litigated and determined.



ing been determined then that she could not maintain the action by reason of the lapse of time, that judgment is conclusive upon the parties. In Freeman on Judgments, section 261, the rule as to what is a judgment on the merits is thus stated: "To create such a judgment, it is by no means essential that the controversy between plaintiff and defendant be determined 'on the merits,' in the moral or abstract sense of these words. It is sufficient that the status of the action be such that the parties might have had their lawsuit decided according to their respective rights, if they had properly presented all their evidence, and the court had properly understood the facts and correctly applied the law." Section 261, it is pointed out that the rule does not apply to judgments of nonsuit, nolle prosequi, etc., and in section 262 the rule as to judgments on matters of law is thus stated: "A judgment on demurrer to the plaintiff's complaint is conclusive of everything necessarily determined by such judgment. If the court decides that plaintiff has not stated facts sufficient to constitute a cause of action, or that his complaint is otherwise liable to any objection urged against it upon demurrer, such decision does not <sup>64</sup> extend to any issue not before the court on the hearing of the demurrer. It leaves the plaintiff at liberty to present his complaint in another action, corrected in form or in substance as to be no longer vulnerable to the attack made on it in the former suit. But a judgment upon demurrer may be a judgment on the merits. If so, its effect is as conclusive as though the facts set forth in the complaint were admitted by the parties or established by evidence submitted to the court or jury. No subsequent action can be maintained by the plaintiff, if the judgment be against him on the same facts stated in the former complaint." "If any court err in sustaining a demurrer and entering judgment for defendant thereon, when the complaint is sufficient, the judgment is nevertheless "on the merits." It is binding and conclusive until reversed on appeal. Until then the plaintiff cannot disregard it and maintain another action. The effect of a judgment still in force is never diminished on account of any mistake of law on which it is founded. A judgment in favor of defendant on demurrer to an answer is a bar to a subsequent suit for the same cause of action. In the former suit referred to, on the demurrer to the reply it was determined that upon the facts stated the plaintiff could maintain her action and that the action "be dismissed absolutely." This, under all the authorities, was a judgment on the merits. In 24 American and English Encyclopedia of

Law, page 796, the rule is thus stated: "A finding against a party, either upon final hearing or demurrer, that his cause of action as shown by him is barred by the statute of limitations or by laches, is a decision upon the merits concluding the right of action": See, also, *Francis v. Wood*, 81 Ky. 16, 4 L. Ed. 100, 101; *Law Rep.* 16; *Parkes v. Clift*, 9 Lea (Tenn.), 524; *People v. Preston*, 62 Hun, 185, 16 N. Y. Supp. 488, 131 N. Y. 644, 10 N. E. 866; *Price v. Bonnifield*, 2 Wyo. 80; 2 Black on Judgments, secs. 694, 699.

Judgment affirmed.

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*A Final Judgment on General Demurrer* renders the matter res judicata: *Connecticut Mutual Life Ins. Co. v. Smith*, 117 Mo. 261, 17 Am. St. Rep. 656; *Ellis v. Northern Pac. R. R. Co.*, 80 Wis. 27, 28 Am. St. Rep. 44; *Scherff v. Missouri Pac. Ry. Co.*, 81 Tex. 26, 27 Am. St. Rep. 828; *McLaughlin v. Doane*, 40 Kan. 392, 10 Am. St. Rep. 210. Compare, however, *Kleinschmidt v. Binzel*, 14 Mont. 43, 44 Am. St. Rep. 604.

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## WESTRUP v. COMMONWEALTH.

[123 Ky. 95, 93 S. W. 646.]

**HOMICIDE.**—Involuntary Manslaughter is the Killing of another Person in Doing Some Unlawful Act not amounting to a felony, nor likely to endanger life, but without the intention to kill, where one kills another while doing a lawful act in an unlawful manner. (p. 317.)

**HOMICIDE.**—Involuntary Manslaughter.—Where a husband neglects to provide necessaries for his wife or medical attendance in case of her illness, he is guilty of involuntary manslaughter, provided she is in a helpless state and unable to apply elsewhere for aid, and the death, though not intended or anticipated by him, was the natural and reasonable result of his negligence. (p. 317.)

**HOMICIDE.**—Involuntary Manslaughter.—Neglecting to procure Physician for Wife in Childbirth.—The failure of a husband to provide for the attendance of a physician on his wife in childbirth does not support his conviction for involuntary manslaughter though her death follows, where such failure was at her suggestion due to her and his belief that such attendance was unnecessary and might be harmful, and where he sent for a physician soon after the birth, at the suggestion of other women, on the occurrence of alarming symptoms, and was at all times a kind and affectionate husband. (p. 321.)

R. W. Nelson and A. M. Caldwell, for the appellant.

W. A. Burkamp, N. B. Hays and C. H. Morris, for the appellee.

<sup>96</sup> SETTLE, J. The appellant was indicted by the grand jury of Campbell county and tried in the circuit court of that county for involuntary manslaughter, alleged to have been committed by willfully neglecting to furnish his wife, then pregnant and about to be delivered of a child, with such care and attention as were necessary during her confinement and childbirth, thereby causing her death. Upon the trial the jury found appellant guilty as charged, and fixed his punishment at imprisonment in the county jail eight months, in conformity to which judgment was duly entered.

Waiving consideration of the objections made by appellant to the indictment, we will rest our decision of the case upon the second contention presented by the motion and grounds for a new trial, and now relied <sup>97</sup> on by appellant's counsel for a reversal, viz., that the verdict was contrary to, and not sustained by, the evidence. "Involuntary manslaughter is the killing of another person in doing some unlawful act not amounting to a felony, nor likely to endanger life, but without an intention to kill, or where one kills another while doing a lawful act in an unlawful manner": Robinson's Kentucky Criminal Law, sec. 198; Connor v. Commonwealth, 13 Bush, 44; Trimble v. Commonwealth, 78 Ky. 176; York v. Commonwealth, 82 Ky. 360, 6 Ky. Law Rep. 344. "Any person neglecting to discharge a duty required of him, either by law or contract, thereby causing the death of another, is guilty of involuntary manslaughter. Thus, if a parent or master neglects to supply food and clothing or medical attendance to a child or apprentice whom he is under a legal obligation to maintain, and the child or apprentice dies of the neglect, he is guilty of involuntary manslaughter": Robinson's Kentucky Criminal Law, sec. 204. Where the husband neglects to provide necessaries for his wife, or medical attention in case of her illness, he will be guilty of involuntary manslaughter, provided it appear that she was in a helpless state and unable to appeal elsewhere for aid, and that the death, though not intended nor anticipated by him, was the natural and reasonable consequence of his negligence: Robinson's Kentucky Criminal Law, sec. 204; Wharton's Criminal Law, sec. 332. Criminal intent is not necessary in involuntary manslaughter; and, there being no statutory punishment provided for the offense, it is therefore punishable by fine or imprisonment in jail, one or both, at the discretion of the jury, which is the common-law punishment for misdemeanors for which no punishment is provided by statute. After this brief statement of the law as to involuntary manslaughter, it remains

to be seen whether, under the evidence appearing in the record, appellant's conviction was authorized.

According to the evidence, appellant's wife, Florence Westrup, died February 27, 1905, about two hours after giving birth to a child. She and appellant were married in Chicago in the year 1900, but had been living in Newport but a few months before her death, and had formed very few acquaintances there. They were an affectionate couple, though both were reserved in disposition and positive in their beliefs. He is an artist, and previous to his wife's death was at work for the Donaldson Lithographing Company, earning twenty dollars per week, and his wages, when received by him, were delivered to his wife for safekeeping and use in the joint support. They were housekeeping in rented rooms of a house which was in part occupied by other renters, and the household work was done by the wife with such assistance as the husband could take time from his own work to give her. The evidence further showed that the wife became pregnant and was of opinion that the child would be born the 4th of March, 1905; that she was a woman of unusual intelligence and, though never before with child, had some peculiar ideas as to the care to be taken of herself during pregnancy and of the child after its birth, in which her husband seems to have shared; that she was a strong believer in the laws of nature and read many books on that subject and medicine, among which was one called "Tokology," written by Dr. Stockham, a female physician, of Chicago, with whom she corresponded before the birth of her child; that as a result of her reading and correspondence with the female doctor, appellant's wife conceived a great aversion to physicians, and contended that they were too ready to resort in cases of childbirth to the use of instruments, which often resulted in death or injury to both mother and child, and declared her purpose to do without the services of one at the birth of her child. Adhering to this view, she, by letter, requested a sister of her husband, living in another state, to be with her in her confinement, <sup>28</sup> naming March 4th as the date, and the sister promised to do so, and without knowing of the illness of appellant's wife, did in fact reach Newport on the day of, and a few hours after, her death. It also appeared from the evidence that appellant's wife was seized with labor pains early in the morning of the day on which she died; but, as she had previously suffered what appeared to be similar pains, which soon passed away, she and appellant remained, until shortly before the birth of the child, in the belief that she would not be confined before March 4th.

five days later than the one on which she died. But, contrary to their expectations, the birth of the child occurred between 2 and 3 o'clock P. M. of that day, February 27, 1906, and, though for a short while thereafter the mother seemed to be doing well, about 4 o'clock she became worse, alarmed at which appellant called in two women residing in the same house, and, upon being advised by one of them that a physician should be summoned, he immediately sent for one, who upon reaching his wife's bedside attempted to give her some medicine, which she refused to take. The doctor, by appellant's direction, and notwithstanding the patient's objection, made an examination of her person, and discovered that she had not been relieved of the afterbirth, which he attempted to remove; but finding that it could not be done without his instruments, he went to his office for them, and upon his return to appellant's residence found that the patient had died during his absence of postpartum hemorrhage, which, according to the testimony of the medical expert introduced in behalf of the commonwealth, sometimes follows childbirth, is nearly always fatal, and may be produced from many causes, such as retention of the afterbirth, laceration, weakness from disease, hygienic surroundings, or other causes. It does not appear from the evidence <sup>100</sup> what caused the hemorrhage in this instance as there was no postmortem examination held.

It is manifest from the evidence that the confinement of appellant's wife came five days sooner than they expected it; that she had resolved to do without the services of a physician at her confinement, and had influenced appellant to adopt her opinion that the services of a physician would be unnecessary at such a time; that during her labor he dutifully remained with her, and assisted her to the best of his ability, as she directed him; that when he discovered her peril he called in two women living in the same house to assist him in caring for both mother and babe; and that upon the suggestion of one of them he immediately, and over his wife's objection, sent for a competent physician to minister to her, and that the latter, in spite of her protestations, apparently did what he could, and all she would allow him to do, to relieve her, but failed to preserve her life. In view of the foregoing facts, and the further facts that appellant was an affectionate husband, and had never appeared indifferent to his wife or neglectful of any conjugal duty, and that in failing to call in a physician he acted in good faith and at her request, though he doubtless erred in so doing, we fail to

find any just or reasonable ground for the verdict of the jury. Indeed, we think it wholly without support from the evidence. It is manifest that the prosecution was bottomed upon the failure of the appellant to earlier provide his wife with a physician. Those of us who reverence the medical profession and implicitly trust the learning and skill of the family physician may be disposed to attribute to ignorance or prejudice such a lack of confidence in that profession as was manifested by appellant's wife, and wonder that he, in the face of such a crisis as confronted them, should have allowed himself to be influenced to trust to nature's laws, or supernatural aid, rather <sup>101</sup> than medical skill; but the fact remains that there are many who reject, as they did, both medicine and surgery for other means, or supposed means, of healing, and are perfectly sincere in doing so.

We may concede that appellant's wife made a grievous mistake in adhering to her purpose of rejecting medical aid, yet in view of the suffering, and, in the end, death, to which she subjected herself, her sincerity cannot be doubted. And certainly there was nothing in the evidence which tended to prove that appellant, though making the same mistake, was any less sincere than she, unless it was the fact of his sending for a physician after the birth of the child. This act, however, appears from the evidence to have resulted more from his desire to leave nothing undone for her relief than from a belief that benefit would result to the wife from the physician's presence or treatment. In any event, it was the very opposite of neglect, and should go to the credit, instead of the debit, side in appellant's accounting for the offense charged in the indictment. One cannot be said in any manner to neglect or refuse to perform a duty unless he has knowledge of the condition of things which require performance at his hands. In volume 21, page 199, *American and English Encyclopedia of Law*, it is said: "Under the common law no conviction of manslaughter predicated upon an omission to provide medical attendance upon conscientious motives has been reported, and none can probably be had or sustained. Opinions have widely differed in all ages as to the proper mode of ministering to the sick, and, in the absence of a statute declaring it a positive duty upon a parent to call in a medical practitioner, the omission to do so can scarcely be considered negligence so gross and wanton as to be criminal when the fact is admitted that the defendant acted in good faith, doing the best he could according to his light. In a note at the bottom of the same page <sup>102</sup> and volume

It will be found the following from the case of Regina v. Waggoner, 10 Cox C. C. 530, quoting Willes, J., who said to the jury: "That at different times people had come to different conclusions as to what might be done with a sick person. Two hundred years ago, if a child was afflicted with the king's evil, the popular feeling was, regardless of medical science, to have it touched with the royal hand, because that might result in effecting a cure. Again, in some Catholic countries a custom obtained of taking a child, laboring under disease, to a particular shrine, under a belief that it was the best course to adopt with a view to effect a cure. In such cases a man might be convicted of manslaughter because he lived in a place where all the community were of a different opinion; and in another might be acquitted, because they were all of the same opinion. There was a very great difference between neglecting a child in respect to food with regard to which there could be but one opinion, and neglect of medical treatment, to which there might be many opinions."

It was argued for the commonwealth on the trial that the life of appellant's wife might or could have been saved if she had been attended by the physician during the birth of the child. We cannot say whether or not such would have been the result. It may also be claimed that if the physician had not been sent for at all she might have lived to rear her child, which is still alive and likely to continue so; for who can say that the hemorrhage of which the mother died was not caused by the attempt of the physician to remove the child at birth without his instruments, or that if he had not returned to his office for the instruments he would have been present when the hemorrhage occurred, and might have prevented or checked it? The testimony throws no light on these matters. Therefore they cannot be solved, and to attempt to do so would be as idle as to invade the realm of <sup>108</sup> speculation in quest of any other unknown or unknowable thing. It may well be asked why some women die in childbirth, though attended by physicians, and others without their assistance often pass through that ordeal unharmed. We cannot determine from the record before us the questions that are capable of solution, and, if correct in the conclusion heretofore expressed, that there was no evidence to support the verdict of the jury, it follows that the trial judge should have summarily instructed the jury to find appellant not guilty. Each being our view of the case, it is unnecessary to pass upon the other questions presented.

Wherefore the judgment is reversed, and case remanded a new trial and further proceedings as directed by the opinion.

### HOMICIDE BY INATTENTION OR NEGLECT OF DUTY.

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#### I. Scope and Explanations.

It is our purpose to limit the discussion in this note to homicide which results solely from inattention to or neglect of duty—that is, from the negligent omission to perform a duty owed by one person to another, or, to the public, as distinguished from all other kinds of negligent homicide, whether in the commission of a lawful or unlawful act. For a discussion of unintentional homicide generally, the note appended to *Johnson v. State*, 90 Am. St. Rep. 571. The distinction between homicide which ensues from the mere negligent omission of duty, and that resulting from other forms of carelessness is sometimes difficult to observe, but in the former, criminal liability is predicated entirely upon the nonperformance of some duty which is either directly or impliedly imposed by law, and is, therefore, never excusable, though unintentional; while homicide resulting from other forms of carelessness is not only unintentional but may result from the performance of an act which is perfectly lawful, and, being purely accidental, is frequently excusable. The cases which pertain to homicide, as here discussed, are not numerous but we have thought them of sufficient importance to justify a note on the particular subject to which they refer.

#### II. Introductory.

While a mere naked neglect to perform a duty is a passive, rather than a positive, act, still, it is evident that the general principle upon which the law fixes criminal responsibility upon one who neglects a duty is upon the theory that such neglect constitutes an unlawful act; and hence the homicide is perpetrated in the commission of an unlawful act. Therefore, in a state where common-law crimes are not recognized, and no act is criminal unless made so by positive law, as in Ohio, for example (*Johnson v. State*, 66 Ohio St. 59,



St. Rep. 564, 63 N. E. 607, 61 L. R. A. 277), it necessarily follows that an unintentional homicide resulting from neglect of duty would be criminal unless such act had been expressly declared a crime by the laws of the state. But in those states where common-law crimes are recognized, homicide ensuing from a breach of duty is a branch of the criminal law. It is not every neglect or omission of duty, however, which results fatally to others, that will charge the person so omitting with criminal responsibility. There are certain well-defined rules established by the cases, in reference to homicides of this class. We will give these general rules and show their application to the particular classes of neglect of duty from which homicides have resulted.

### III. General Rules.

Where one person owes another a legal or contractual duty, any omission of the duty resulting in the death of the party to whom it is owing will render the other guilty of manslaughter: *People v. Wardsley*, 150 Mich. 206, 121 Am. St. Rep. 617, 113 N. W. 1128, 13 L. R. A., N. S., 1020.

Wherever there is a legal duty, and death comes by reason of any omission to discharge it, the party omitting it is guilty of a felonious homicide. And it is immaterial whether the action be of the mind or of the body; whether it operates solely or concurrently with other acts; whether it was consented to by the person on whom it operates or not: *Territory v. Manton*, 8 Mont. 95, 19 Pac. 387. And if several parties enter into a joint undertaking, imposing upon each a personal duty in respect to its performance, and upon all alike, and the neglect or omission of such duty a casualty occurs, resulting in the death of a third party, an indictment will lie against all jointly: *Ainsworth v. United States*, 1 App. D. C. 518. So, too, where a person is indicted for a homicide resulting from his neglect to do a particular thing, the duty must be a plain one, requiring no discussion to establish its obligatory force, and concerning it there must be a general consensus of opinion. It is likewise essential that the party charged must be obligated to do what he omitted to perform under the terms of some contract by which he is bound, or the law must have cast on him the obligation of performance: *Thomas v. People*, 2 Colo. App. 513, 31 Pac. 349. And to render one responsible for the fatal consequences of the malperformance or nonperformance of duty, the duty must have been a plain one, which he was bound by law or contract to perform personally: *People v. Smith*, 56 Misc. Rep. 1, 105 N. Y. Supp. 1082. To the same effect is *Anderson v. State*, 27 Tex. App. 177, 11 Am. St. Rep. 189, 11 S. W. 33, 3 L. R. A., where the rule is thus stated: To constitute negligent homicide an omission, "there must be a violation of some duty imposed by law, directly or impliedly, and with which duty the defendant is specially charged," for such crime is predicated upon the nonperformance of duty.

Express intent is not a necessary element of manslaughter, but it is enough that there was negligent and reckless indifference to the

lives and safety of others: *State v. Moore*, 129 Iowa, 514, 106 N. W. 16. But a charge of involuntary manslaughter resulting from omission involves death by reason of some gross neglect of a plain duty which rested upon the defendant under the law: *State v. Young* (1891), 56 Atl. 471. And the duty omitted must be one which the party is bound to perform by law or contract, and not one, the performance of which depends simply upon his humanity or sense of justice or propriety; and the death which follows the duty omitted must be the immediate and direct consequence of the omission; where doubt exists as to what conduct shall be pursued in a particular case, and intelligent men differ as to the proper action to be had, the law does not impute guilt to anyone; if from the omission to adopt one course instead of another, fatal consequences follow to others: *United States v. Knowles*, 4 Saw. 517, Fed. Cas. No. 15,540. So, too, there must be reasonable grounds for believing that the natural consequences of the neglect will result fatally to others, for "a man cannot be said in any manner to neglect or refuse to perform a duty unless he has knowledge of the condition of things which require performance at his hands": *State v. Smith*, 65 Me. 257. And the same effect is *Westrup v. Commonwealth*, 123 Ky. 95, ante, p. 31, 93 S. W. 646, 6 L. R. A., N. S., 685.

#### IV. Degree of Homicide.

While there is no doubt but that when death results to another from a neglect of duty the party so omitting is criminally liable under the above rules, it is not always clear with what degree of homicide he can be charged. "It has never been doubted," said Lord Campbell in *Rex v. Hughes*, 3 Jur., N. S., 696, "that, if death is the direct consequence of malicious omission to perform a duty, as of a mother to nourish her infant child, this is a case of murder. If the omission was not malicious, and arose from negligence only, is a case of manslaughter." In *Lewis v. State*, 72 Ga. 164, 53 A. Rep. 835, the above language of Lord Campbell is quoted with approval, and the rule is laid down that "death ensuing in consequence of a willful omission of duty will be murder; and death ensuing from the negligent omission of a duty will be manslaughter"; and in *State v. Smith*, 65 Me. 257, it was said that the naked neglect and omission of a known duty, when it causes or hastens the death of a human being, constitutes manslaughter, and a criminal intent on the part of the party carelessly causing the death need not be alleged or proved. In the comparatively recent case of *State v. Gilliam*, 66 S. C. 419, 45 S. E. 6, the supreme court of South Carolina sanctions the rule laid down in Clark's Criminal Law, 172, that "involuntary manslaughter is where death is unintentionally caused by culpable neglect of a known duty, as (1) by negligence in performing a lawful act; (2) by neglect to perform an act required by law." It follows from the above cases that manslaughter is the highest degree of crime which could be charged against one whose naked neglect to perform a duty resulted in the death of another.

ut whether the manslaughter would be voluntary or involuntary, seems to depend upon the character of the neglect or omission, and the reasonable probability that such omission would result fatally.

#### 7. Illustrations Showing Application of General Rules to Different Classes of Negligent Omission.

The rule above given, both as to the essential and the degree of homicide by omission, control in all cases and classes of cases which have arisen where death ensued from neglect of duty, and the following illustrations will show how they have been applied in each of the different classes.

##### a. In Failure of Duty to Dependents.

1. Parent and Child.—While there have been a number of cases of murder arising from the wanton and malicious neglect of duty, by parents toward their children, with intent that death should ensue, we have been able to find only one case in our courts relating to parent and child, which may be said to illustrate, to some extent at least, the limited question discussed in this note. In *Gibson v. Commonwealth*, 106 Ky. 360, 90 Am. St. Rep. 230, 50 S. W. 532, an unmarried woman placed her two months old baby in a basket covered with a shawl or other wrap, and left it at night in a yard in front of a residence in the city of Louisville. The child was found dead the next morning. She was indicted for murder. It appeared on the trial that the child probably died either from starvation or exposure. There was also evidence that she left it there hoping it would be rescued. The jury were charged that "if they believed from the evidence, beyond a reasonable doubt, that the defendant, without malice, but unlawfully, willfully and feloniously cast her child upon an open lot, without sufficient shelter or clothing to protect it from the inclemency of the weather, but that said act was done with the hope that it would be rescued or taken care of by some other person before it should freeze to death, then, in that event, the defendant was guilty of voluntary manslaughter." This charge was held to be a correct statement of the law of voluntary manslaughter, and a conviction for that offense was sustained, the court saying: "The law imposed upon the defendant the duty of protecting and caring for her offspring to the best of her ability; and when she willfully abandoned it on a cold, raw night, and left it to die from exposure, she was guilty of a felony whatever may have been her purpose in leaving it." Speaking of the degree of the homicide, the court continued: "Wharton, in his work on Homicide (section 304), says: If a person do or omit to do an act toward another, who is helpless and dependent, which act or omission, in usual, natural sequence, leads to the death of that other, the crime amounts to murder, if the act or omission be intentional; but if the circumstances are such that the person would not be, or could not have been, aware that the result would be death, that would reduce the crime to manslaughter, provided the death was occasioned

by an unlawful act, but not such an act as showed a malicious mind. Thus, where a woman left her child, a young infant, at a door or other place, where it was liable to be found or taken care of, and the child died it would be manslaughter only; but if the child was left at a remote place, where it was not liable to be found, and the death of the child ensued, it would be murder." The question of the criminal responsibility resting upon parents who neglect to provide medicines and medical aid to their children, when sick on account of certain religious beliefs seems never to have been finally settled in this country, though cases involving the point have several times been before the superior courts. In England, however, the question has been adjudicated and the case of *Regina v. Senior* (1899), 1 Q. B. 283, affords an illustration of much importance. A father was convicted of manslaughter for causing the death of his infant child by not supplying it with medical aid or medicine, while sick, though able to do so, and aware that the case was of great gravity, and that the child would probably die. The defendant was the father of twelve children, and was shown to have been a good and kind father in all other respects, and bore an excellent character for general good conduct. His excuse for failing to summon medical aid was that, to do so, would indicate a want of faith in the Lord, and would be contrary to the doctrines of the "Peculiar People," a religious sect to which he belonged. The conviction was sustained, Lord Russell saying: "Neglect is the want of reasonable care—that is, the omission of such steps as a reasonable parent would take, such as are usually taken in the ordinary experience of mankind—that is, in such a case as the present, provided the parent had such means as would enable him to take the necessary steps. . . . At the present day, when medical aid is within the reach of the humblest and poorest members of the community, it cannot reasonably be suggested that the omission to provide medical aid for a dying child does not amount to neglect. Mr. Sutton [prisoner's counsel] contended that because the prisoner was proved to be an affectionate parent, and was willing to do all things for the benefit of his child, except the one thing which was necessary in the present case, he ought not to be found guilty of manslaughter, on the ground that he abstained from providing medical aid for his child in consequence of his peculiar views in the matter; but we cannot shut our eyes to the danger which might arise if we were to accede to that argument, for where is the line to be drawn." It is true that the conviction in this case was secured under a statute making it penal to assault, ill-treat, neglect, abandon or expose a child under sixteen years of age, by anyone having the custody, care or charge of such child, and the question whether the conviction would be justified at common law was not decided; but as the homicide resulted from a bare naked neglect of duty, and the courts of this country, as we have seen, declare such neglect is criminal, the case is clearly one of importance in the question under discussion.

**Husband and Wife.**—An excellent illustration of the criminal liability which the law imposes upon a husband for the fatal consequences of neglect of duty toward his wife is afforded by the case *Territory v. Manton*, 7 Mont. 162, 14 Pac. 637, where a husband was convicted of murder in the second degree for negligently allowing his wife to lie out on the ice, poorly clad, during a cold winter night, her death having thereby resulted from the cold and exposure. The indictment was vigorously attacked by defendant's counsel upon the ground that it charged no crime known to the law. In sustaining the indictment Chief Justice McConnell, speaking for the court, said: "The proximate means of her death were the cold and inclemency of the weather. These were allowed to do their work of destruction by the criminal negligence of the defendant to do the duty of protection, which he owed to her as husband. The point is made by the counsel of defendant that this indictment charges no crime known to the law, that a husband, having the ability to protect his wife may stand passively by, and see her sick and weak and helpless, refuse to help her, and allow her to perish under the influence of the cold and inclemency of the weather; and this negligence was the result of malice, this refusal to help the product of a malicious, willful premeditated purpose. There is no charge of an assault made; none that he exposed her to the inclemency of the weather; but he finds her exposed to the unpropitious elements, and criminally leaves her there to die. If the defendant had, by his acts, subjected her to the inclemency of the weather, there would be no doubt, but that he would be guilty of murder if she had died from the exposure, and he had so subjected her unlawfully and with malice aforethought. But the question is, when he absolutely does nothing, when the very gravamen of the charge is his failure to do something, can he be guilty of murder or manslaughter either? She perishes of cold. It is the agent which causes death. He might have prevented it, but wickedly refused, and lets her die. This is the question we have to consider; . . . the very volition of the defendant by which he was led to refuse aid to his wife when the law imposed the duty upon him to protect her, is transferred to the violence of the elements, and he is made to use their forces, and is responsible for the death which they immediately caused." Murder in the second degree was held proper, so far as the degree of the crime concerned, but the case was reversed because of error, in the charge of the trial court to the effect that the jury should find the defendant guilty of one of the three degrees of felonious homicide. In the second trial, reported in 8 Mont. 95, 19 Pac. 387, the defendant was convicted of manslaughter, and in answer to the contention that the evidence did not sustain the verdict, the same judge of justice who delivered the opinion on the former appeal said: "The prisoner allowed his wife to lie out on the ice, poorly clad, and within easy calling distance of the house, all night, and perish with cold. He had a hired man living with him, who was willing to help, and they could have brought her to the house, notwithstanding

the snow was from two to three feet deep. The best evidence this is that they did do it the next morning, when it was too late. She languished speechless until the next day, and died. No effort was made to get her medical aid. It is true the deceased had been drinking, and that was probably the reason she was not able to reach the house herself; but the proof shows that they had gone together to Philipsburg that day, a distance of seven miles, on foot, and that they both drank together, and the prisoner was himself more or less intoxicated when he left her on the ice to spend the night, while he remained in the house nearby. His drunkenness does not excuse him from the discharge of his duty to his wife as husband; nor does her drunkenness excuse him from the discharge of his duty, especially when he drinks with her, and by example and precept contributes to her degradation." The judgment was affirmed. In *State v. Smith*, 65 Me. 257, a husband was convicted of manslaughter for causing the death of his wife by negligently allowing her to remain in a cold room insufficiently clad, thereby causing sickness and feebleness of body, from which she died. The evidence tended to show that the wife was insane and had been for some years; that she was confined in a cold room with a broken window pane in the ell part of defendant's house, day and night for about three weeks without fire, with no garment on her, nothing to sleep on but husks and rags in a filthy condition, and no covering but a piece of canvas. In the opinion of medical men death was caused by freezing. The defendant contended that if his wife suffered from the alleged cause it was without his knowledge and contrary to his intention, but admitted that he knew the condition of the room, had passed through it often during her confinement there to fasten the doors; that even in winter before when she had been kept there, he had warmed the room by a stove, and intended to do so the winter she died, but not having the money on hand, he had put it off, and the only examination he had made of his wife's condition, when in the room, was to look and see if the canvas was over her. The conviction was sustained, the court saying: "It is settled beyond a question that the naked negligent omission of a known duty, when it causes or hastens the death of a human being, constitutes manslaughter;" but further said: "There is a difference between the negligent doing of an act and the careless omission to perform one's duty—the negligence in the former case being greater in degree; that many acts of blamable negligence for which one would be liable in a civil action will not support an indictment for injury or death resulting from such negligence; that it is not every degree of carelessness or negligence upon which death ensues that will render the negligent person liable for manslaughter; that whether or not the accused is guilty of such acts and intent as to make him criminally liable to conviction of manslaughter, therefore, is purely a question for the jury."

Another excellent illustration showing that a husband who neglects to provide necessaries for his wife, or medical attention, in case

ess, will be guilty of involuntary manslaughter if she dies, if was helpless and unable to appeal elsewhere for aid, though her death was not intended or anticipated by him, if it was the natural and reasonable consequences of his negligence, is found in *Westrup v. Commonwealth*, 123 Ky. 95, ante, p. 316, 93 S. W. 646, 6 L. R. A., S., 685.

**Other Relations.**—In *People v. Beardsley* 150 Mich. 206, 121 L. St. Rep. 617, 113 N. W. 1128, 13 L. R. A., N. S., 1020, the defendant, a married man, was convicted of manslaughter for the death of his paramour, resulting from an alleged neglect of duty he owed her. It appeared that the defendant during the temporary absence of his wife from the city, arranged with his paramour to go to his apartments with him. He had been acquainted with her for some time, and they knew each other's habits and character. They drank liquor together, and had on previous occasions spent the night together in houses of assignation. They began to drink together on the night of her visit to his apartments and continued to drink freely, and remained together day and night for three days. During a short absence from the house by defendant, the woman procured morphin tablets, which she concealed, but defendant afterwards discovered her putting them in her mouth, and struck some of them from her hand, crushing them on the floor. About an hour afterwards the woman, being in a stupor, was carried at defendant's request into a basement room, he being too intoxicated to render any assistance in moving her. Defendant requested the waiter who had attended her to look after her. A few hours after, the woman died. It was the theory of the prosecution that under the circumstances defendant owed a duty to care for the woman and take steps for her protection, the failure to do so constituting such culpable neglect of duty as to render him responsible for her death. There was no claim on the part of the people that defendant was in any way an active agent in bringing about the death, but simply that he owed his paramour a duty which he failed to perform, resulting in her death. The verdict of conviction was set aside, the court saying: "The law recognizes that under some circumstances the omission of a duty owed by one individual to another, where such omission results in the death of the one to whom the duty is owing, will make the other chargeable with manslaughter. This rule of law is well established and is based upon the proposition that the duty neglected must be a legal duty, and not a mere moral obligation. It must be a duty imposed by law or contract, and the omission to perform the duty must be the immediate and direct cause of death. Although the literature upon the subject is quite meager and the cases few, nevertheless the authorities are in harmony as to the relationship which must exist between the parties to create the duty, the omission of which establishes the legal responsibility. . . . It is urged by the prosecutor that the respondent 'stood toward this woman for the time being in the place of her natural guardian and protector, and that he thus owed her a clear duty which he completely failed to per-



form.' . . . No such legal duty is created based upon a mere moral obligation. The fact that this woman was in his house created no such legal duty as exists in law and is due from a husband toward his wife. . . . Respondent had assumed either in fact or by implication no care or control over his companion. Had this been a case where two men, under like circumstances, had voluntarily gone on a debauch together, and one had attempted suicide, no one would claim that this doctrine of legal duty could be invoked to hold the other criminally responsible for omitting to make effort to rescue his companion. How can the fact that in this case one of the parties was a woman change the principle of law applicable to it? Deriving and applying the law in this case from the principles of decided cases, we do not find that such legal duty as is contended for existed in fact or by implication on the part of respondent toward the deceased, the omission of which involved criminal liability."

b. In the Practice of Medicine, Surgery, etc.—Where a physician is charged with criminal responsibility for the death of one whom he has attended, as the result of alleged neglect of duty, it is often difficult to determine whether it was really inattention or neglect of duty on his part that caused the fatal result, or whether it resulted from ignorance or an honest mistake of judgment. In *State v. Hardister*, 38 Ark. 605, 42 Am. Rep. 5, carelessness seems to have been given to the rule applicable in such cases, and after reviewing the authorities, the rule there stated seems to be the one generally followed, viz., that for a mere mistake of judgment in the selection of remedies and appliances, a physician is not criminally liable if fatal results ensue, but if grossly negligent or inattentive to duty, he would be. Thus in *Hampton v. State*, 50 Fla. 55, 39 South. 421, two physicians were charged with manslaughter, for having negligently caused the death of a female patient by "unskillful acts and procurement, and culpable negligence, and the exercise of gross ignorance and lack of ordinary knowledge and skill in surgery, and with other disregard for the health, safety and life" of deceased. The contention of the defendants was that, where unintentional death is brought about through gross ignorance or carelessness of a physician whose intention was to cure instead of to kill, there would be no criminal liability. "We do not agree," said the court, "with this contention of the able counsel for the defendant. The law seems to be fairly well settled, both in England and America, that where the death of a person results from the criminal negligence of the medical practitioner in the treatment of the case, the latter is guilty of manslaughter, and that this criminal liability is not dependent on whether or not the party undertaking the treatment of the case is a duly licensed practitioner, or merely assumes to act as such, acting with good intent in administering the treatment, and did so with the expectation that the result would prove beneficial, and that the real question upon which the criminal liability depends in such cases



whether there was criminal negligence; that criminal negligence is merely a matter of degree, incapable of precise definition, and whether or not it exists to such a degree as to involve criminal liability is to be determined by the jury; that criminal negligence exists where the physician or surgeon, or person assuming to act as such, exhibits gross lack of competency, or gross inattention, or gross indifference to the patient's safety, and that this may arise from his gross ignorance of the science of medicine or surgery and the effect of the remedies employed, through his gross negligence in the application and selection of remedies and his lack of proper skill in the use of instruments, or through his failure to give proper instructions to the patient as to the use of the medicines; that where the person treating the case does nothing that a skillful person might not do, and death results merely from an error of judgment on his part, or an inadvertent mistake, he is not criminally liable. And it seems that a physician cannot relieve himself of a duty to perform his duty, upon the ground that such omission was with his patient's consent; for in *State v. Gile*, 8 Wash. 12, 35 (1877), a physician was indicted for causing the death of a patient through negligence in the performance of a surgical operation. It was held by the state that the operation was unnecessary, and death was sought to avoid this, upon the ground that the deceased had consented to it. Said Judge Anders: "Consent is only a good defense in such cases, where the operation is performed with due care and skill. It is no excuse for recklessness, or even want of skill." And under the Penal Code of Texas, a physician is criminally liable for death ensuing from his want of proper care and caution, when the danger of causing death by reason of negligence is apparent. Thus, where a female patient was suffering from some affection of the womb, and an examination was necessary to determine what the trouble was, and the physician inserted two fingers in her vagina for this purpose, and while so broke the partition wall between the womb and the intestines, the verdict of negligent homicide was reversed, the court saying that the physician would only be guilty of negligent homicide "when there is an apparent danger of causing death of the person upon whom the operation is performed": *Gorden v. State* (Tex. Cr. App.), 90 Tex. 636.

**In the Management of Railroads, Locomotives, etc.**—The most important application of the general rules relating to homicide by intention or neglect of duty are furnished by prosecutions against persons charged with the management of railroads, locomotives, street cars, and such other dangerous agencies, constantly used by the public. Some of these cases clearly illustrate the rule that no criminal liability attaches to death resulting from the nonperformance of duty, unless the duty so omitted is one with which the party so charged is especially charged—that is, his personal duty. Thus in *Person v. State*, 27 Tex. App. 177, 11 Am. St. Rep. 189, 11 S. W.

83, 3 L. E. A. 644, two brakemen on a railway locomotive were convicted of negligent homicide, in striking with such engine killing a child while the engine was being backed. In reversing judgment Willson, J., speaking for the court, said: "These appellants were brakemen. They had no control whatever of said engine and tender. They were riding upon the same for the purpose merely of performing their specific duty as brakemen, which duty had no connection with or relation to the homicide. It was the exclusive duty of the engineer and fireman to operate said engine fully; to look out for obstructions upon the track; to give signal of danger when necessary. With these duties appellants were in no way concerned. They had no right to start the engine in motion, to blow the whistle, to ring the bell, to stop the engine otherwise to control its movements. They performed no act which connected them with the death of the child. It is only for a supposed omission of duty on their part that they have been convicted of negligent homicide. They omitted to look out for obstructions on the track. They might have seen the child in time to save its life, but they omitted to see him. Or if they did see him, they omitted to stop the train, or to signal the engineer to stop it. Were these omissions criminal, within the meaning of the statute defining negligent homicide? We think not, because to constitute criminal negligence or carelessness there must be a violation of some duty imposed by law, directly or impliedly, and with which the defendant is especially charged."

In *State v. O'Brien*, 32 N. J. L. 169, a switch-tender in the employ of a railway company was convicted of manslaughter for failing to perform his duty in adjusting, and keeping adjusted, switches of the road at a certain point, whereby a passenger train drawn by a locomotive engine was unavoidably diverted from main track and thrown upon the ground, by means whereof a passenger was killed. There was no dispute in this case as to the omission on the part of the defendant to perform his duty, but it was insisted in his behalf that he could not legally be convicted unless his will concurred in his omission of duty. The trial judge refused to so charge the jury, and his refusal was held to have been right. Speaking of alleged error in the court's charge, Dalrimple, J., said: "The error complained of is, that the jury were instructed that a mere act of omission might be so criminal or culpable as to be the subject of an indictment for manslaughter. Such, we believe, is the prevailing current of authority. . . . Wharton, in his *Treatise on Criminal Law*, page 382, says: 'There are many cases in which death is the result of an occurrence, in itself unexpected, but which arose from negligence or inattention. How far in such cases the agent of such misfortune is to be held responsible depends upon inquiry, whether he was guilty of gross negligence at the time. Inferences of guilt are not to be drawn from remote causes, and the degree of caution requisite to bring the case within the limits of manslaughter must be proportioned to the probability of danger.'

ding the act immediately conducive to death.' The propositions well stated by the eminent writers referred to, we believe to be entirely sound, and are applicable to the case before us. . . . The defendant in this case omitted his duty under such circumstances as amounted to gross or culpable or criminal negligence. The court charged the jury, that if the defendant, at the time of the accident, was intending to do his duty, but in a moment of forgetfulness omitted something which any one of reasonable care would be likely to omit, he was not guilty. The verdict of guilty finds this question of fact involved in this proposition against the defendant, and convicts him of gross negligence. He owed a personal duty not only to his employers, but to the public. . . . His conviction was sustained."

In *State v. Dorsey*, 118 Ind. 167, 10 Am. St. Rep. 111, 20 N. E., an indictment against a railway engineer charging that he carelessly and negligently ran his engine into a passenger-car standing on said railroad, thereby causing the destruction of the car and the death of a certain passenger therein, was held sufficient as charging the offense of involuntary manslaughter—in the commission of an unlawful act. It will be noticed that the unlawful act in this case was predicated solely on the negligence of the defendant, and not on the act of operating the engine. The court was careful to say, however, that it did not mean to be understood, as holding that every careless or negligent act constitutes manslaughter, but that "the act causing death must be of such character as to show recklessness or reckless disregard of the rights and safety of others." In *People v. Thompson*, 122 Mich. 411, 81 N. W. 344, we have a good illustration of the doctrine that to constitute neglect of duty criminal, the ordinary consequences of the neglect must be such as would cause death. Here an engineer in charge of an engine using kerosene for fuel had negligently left his engine unattended, and during his absence the boiler of the engine exploded killing a number of people. A verdict of manslaughter was set aside, upon the ground that it appeared that the defendant had reason to believe, and did believe, that it was consistent with safety for him to be absent from the boiler-room for the length of time he was absent. It was further held in this case, however, that it would be competent to show the effect of the use of oil as fuel, as bearing upon the question of defendant's negligence in leaving the boiler-room.

The comparatively recent case of *State v. Young* (N. J.), 56 Atl., affords an excellent illustration of the degree of negligence, in the omission of duty, which must be proven against the executives of common carriers, in order to charge them with criminal responsibility for deaths resulting from accidents in the operation of their lines. In this case the president, vice-president, executive committee, general superintendent, assistant superintendent and roadmaster of a street railway company were indicted for manslaughter in causing the death of a girl passenger in a collision at a grade crossing. The principal specifications of neglect of duty relied on

by the prosecution were, first, the absence of a derailing switch or near the crossing; second, that the inability of the employe to control the car was due to the unclean condition of the tracks, the crowded condition of the front platform, and that the defendants, by virtue of the offices which they held, were charged with the duty of providing a safe road, safe conveyances, and safe method of operating its cars, and with the duty of supervising the management of the road, its methods of operation, and the performance of its agents and employes of their respective duties. It was contended that there was no such negligent omission of a plain duty on the part of the defendants as to render them criminally responsible. Answering the different contentions of the state's attorney as aforesaid, Chief Justice Gummere said: "The undisputed facts, as admitted by the state, show that at the crossing of trolley road and steam railroads it is not the universal practice to put in what has been called 'derailing switches,' and that, so far as the case before us closes, not more than perhaps ten per cent of all crossings in this country are so protected. That suggests, at least, the idea that there must be a great difference of opinion among men who operate these trolley roads at such points as to the advisability, the wisdom, of such a method of protection, as to whether or not it really does add to the safety of the crossing, or whether it does not, in fact, make it more, rather than less, dangerous. I say that it is a question, and, where a question is presented of that kind, it is being reasons for and against the adoption of a scheme, it does not follow that, because one method is discarded, rather than adopted, the act is a negligent one. . . . In order to provide for unexpected contingencies, such as a bad track, or a slippery rail, specific instructions with relation to the management of the brake under these conditions were supplied to the motormen, and they were required to observe them; and as a further precaution, sand was required to be supplied to all of the cars, under the rules, for the still further protection of people riding on the cars, to be used when the brake failed to stop the car on account of the slippery condition of the rail. . . . It is said in answer to that, by the prosecutor, that the inability to use the brakes in the way required by the rules was due to the fact that the car was so crowded on the front platform as to interfere with the motorman, . . . if it be conceded—that I do concede it for the purpose of disposing of this application—though I doubt whether it can be legally conceded—that these defendants are chargeable with the knowledge of the fact that children were permitted to ride on the front platform, . . . there is nothing in that condition of affairs to justify them in the conclusion that the presence of these children on the platform in number not sufficient to interfere with the motorman in the operation of the car added to any danger to the lives or limbs of those who were riding thereon. . . . It seems to me, therefore, that, as this question is presented, it cannot be said that any one of the defendants failed in the performance of any duty which the law imposes upon

with relation to the care of the passengers who were riding upon the car at that time; that manifestly there is nothing in the testimony which shows such gross negligence on the part of any of them as to render him criminally responsible for the death of this child"; and the jury were instructed to render a verdict for the defendants. It is plain that the decision in this case rests on the ground that the evidence failed to show any gross negligence (if, indeed, any at all), on the part of the defendants, and so it must be inferred that, the executive officers of transportation companies are relieved of criminal responsibility for deaths resulting from neglect of duty in providing same methods or proper rules for the guidance of their employes, upon the ground that no such personal liability is imposed upon them by law or contract; for in the late case of *People v. Smith*, 56 Misc. Rep. 1, 105 N. Y. Supp. 1082, the vice-president and general manager of the New York Central and Hudson River Railroad Company was indicted for manslaughter, in causing the death of a passenger by running one of its trains at too great a speed in charge of an inexperienced engineer, around a curve in its track. Omitting the formal parts, the indictment alleged, in substance, that it was the duty of the said vice-president and general manager to ascertain and know at what speed it was safe for the train to pass along the railroad and around the curve, and exercise proper measures to prevent the train from passing around the curve at a speed faster than was safe, and to place its train under the control of an engineer competent to run it with safety around the curve, and that defendant had neglected his duty in both of these respects. The indictment was demurred to upon the ground that it failed to allege that the defendant omitted any personal act imposed upon him by law or contract. Said the court: "Upon the general proposition of law there seems to be no dispute; the controversy being upon the application of the principles. It is recognized by both that, to render one responsible for the fatal consequences of the malperformance or nonperformance of duty, the duty must have been a plain one, which he was bound by law or contract to perform personally." Speaking to the contention that there was no allegation of the omission of a personal duty by defendant, the court continued: "In this I cannot agree. That the control of the train and selection of the engineer fell within the province of the defendant's duty is sufficiently alleged. . . . Such omission was clearly the neglect of a personal act of management, which, by the nature of his duties, was incumbent upon him to perform. So, too, the allegation that he placed the train in the control of an untrained and inexperienced engineer not competent to run it with safety around the curve in question is an allegation of a personal act of negligence on his part. . . . Duties of supervision and management are just as much personal as are the manual duties of the least skilled employe of the road."

**In the Management and Navigation of Vessels.**—More or less frequent applications of the rules pertaining to homicide by neglect

of duty are found in cases of deaths at sea by falling overboard ship, and the failure of the commander of the vessel to perform duty in rescuing those who thus fall. The leading case is that of *United States v. Knowles*, 4 Saw. 517, Fed. Cas. No. 15,540. Here conviction of manslaughter was sought against the commander of the ship, for neglect of duty in omitting to stop his ship and lower boats, to rescue a seaman who fell overboard and was drowned. The case was carefully considered by Circuit Justice Field, who, in stating that before a conviction could be had it was necessary, first, that the duty omitted must be a plain one; second, that it must be one which the party is bound to perform; and, third, that the death which follows the omitted duty must be the immediate and direct consequence of the omission,—continued: "He [the commander] is bound, both by law and contract, to do everything consistent with the safety of the ship and of the passengers and crew necessary to rescue the person overboard, and for that purpose to stop the vessel, lower the boats, and throw to him such buoys or other articles which can be readily obtained, that may serve to support him in the water until he is reached by the boats and saved. No matter what delay in the voyage may be occasioned, or what expense to the owners may be incurred, nothing will excuse the commander for any omission to take these steps to save the person overboard provided they can be taken with a due regard to the safety of the ship and others remaining on board. Subject to this condition, every person at sea, whether passenger or seaman, has a right to all reasonable efforts of the commander of the vessel for his rescue, in case he should by accident fall or be thrown overboard. Any neglect to make such efforts would be criminal, and if followed by the loss of the person overboard, when by them he might have been saved, the commander would be guilty of manslaughter." And in *United States v. Warner*, 4 McLean, 463, Fed. Cas. No. 16,643, where the captain and first and second mates of a steamboat were indicted for manslaughter, for inattention to duty, whereby a collision occurred, the ship was sunk and lives were lost, and also for inattention to duty in not causing an immediate examination after the collision to ascertain the extent of the injury to the boat, and neglect to run her ashore at the nearest and most convenient point with delay. The defendants were acquitted because the evidence did not sustain the allegations, but speaking of the duties of the captain, Leavitt, District Judge, said: "It was clearly the duty of the captain as the best mode of securing the lives of the passengers, as soon as it was ascertained there was danger the boat would go down, to run her ashore, with as little delay as circumstances would allow. In the adoption of this course, the law will hold him to reasonable promptitude. And if, from indecision or gross neglect of duty, he omits to give the proper order in time, and, as a consequence, the lives of the passengers were lost, he is responsible for that result." In *United States v. Holmes*, 104 Fed. 884, it was held that Revised Statute section 5344, as revised in 1871, which subjects to prosecution

manslaughter "every captain, engineer, pilot, or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his or their respective duties on such vessel the life of any person on board of said vessel may be destroyed" is not restricted in its application to vessels propelled in whole or in part by steam, as was the original statute enacted in 1838, but applies to sailing vessels as well as steam vessels and steamboats. It was further held in this case that, in order to constitute the offense under this statute, it is not necessary to charge and prove any criminal intent, but only to charge and prove misconduct, negligence or inattention which results in the loss of human life.

a. *Miscellaneous Instances.*—The general rules heretofore given are not confined in their application to any particular classes of cases, but control in all classes of cases of homicide by neglect of duty. Thus in *State v. Noakes*, 70 Vt. 247, 40 Atl. 249, a husband and his wife were convicted of manslaughter for death of an infant, resulting from their alleged criminal carelessness and neglect. The mother of the infant was a hired servant in the employ of defendants, and the child was born in their house. It appeared from the evidence that defendants learned of the pregnancy of the servant and proposed to discharge her before the birth of the child, but upon the advice of a physician, and without any conversation with the woman, concluded to let her remain in his house until after her confinement, as she had nowhere else to go; that defendants had nothing to do in regard to caring for her at her confinement, or for the child, except thus permitting her to remain at their house, and procuring a physician to attend at the birth of the child, and the defendant husband was not in her room during the confinement and never saw the child alive. The evidence further showed that the defendants, the woman and the doctor, were the only persons, except two young children, in the house at the time the child was born, and that the doctor left about a half hour after its birth, leaving the others there; that during the night of the confinement, and in which the child died, the defendant wife was quite ill, and that what assistance she rendered or attempted to render the mother and the child was, on her part, solely a matter of kindness and charity; that she then assisted both before and at the time the child was born, but was so completely exhausted after its birth that she sat down to rest and fell asleep, and while she was sleeping the child, who was wrapped up and lying at the foot of the bed on which the mother was lying, bled to death or died from some other cause; and that the carelessness and negligence, if any, causing its death, consisted in not properly washing, dressing and caring for it, while the defendant wife was asleep. The jury were charged that: "There is no attempt on the part of these respondents to show that any endeavor was made to get anybody else to be present at the birth of this child and help this wife, who says she was sick. There was no attempt at all, so far as shown, to have

anybody else present. They took the whole thing upon themselves and after a short time they say the child was dead, and was taken off, as they say, and buried." They were further instructed that "The child was helpless and unable to care for itself. The respondents consented that it might be born at their house. They took means to secure any person to take care of it. They took that care voluntarily upon themselves. They were under legal duty to take such care of the child as the well-being of the child reasonably and fairly required. If the respondents recklessly, or in great and manifest disregard of this duty, neglected to care for the child, and the child's death was caused by such neglect, the death so caused would be caused by the criminal neglect of such respondents, whether or not he or she intended to cause the death of the child." Said Judge Thompson, speaking for the court: "To render criminal the neglect of parents and others having charge of children or other dependents there must be capacity, means and ability to provide support and care or to prevent the threatened harm, as well as the legal duty to provide an act. If there is not capacity, means and ability to perform the legal duty, the omission to perform it is not criminal. . . . From the language of the charge, . . . the jury must have understood that they might rightly find, from the fact that the respondents permitted the child to be born in their house, that it was criminal negligence on their part not to have procured some one to be present at the birth of the child, to assist the respondent, Sarah Noak, without regard to the means and ability of the respondents to procure such assistance, and without regard to whether the situation and attendant circumstances of the confinement of its mother were such that a careful, prudent person ought to have foreseen that the omission to procure such assistance was likely to cause the death of the child, as a natural and ordinary result. This is clearly erroneous even though it were conceded that the respondents were under a legal duty to care and provide for the child." Whether or not there was any duty imposed by law upon the defendants in this case, under the facts disclosed by the record, was unfortunately not passed upon by the supreme court.



## CLEMONS v. MEADOWS.

[123 Ky. 178, 94 S. W. 13.]

**RESTRAINT OF TRADE.**—A Contract Between the Proprietors of the Only Two First-class Hotels in a town of five thousand inhabitants that one of them shall close during the period covered by the contract in consideration of a sum to be paid monthly by the proprietor of the other, the intention being to give a monopoly of the business, is in unreasonable restraint of trade, against public policy and void, and no recovery can be had of the amount thus agreed to be paid. (p. 343.)

Herschel T. Smith and Shelbourne & Kane, for the appellant.

Robbins, Thomas & Tyler, Ed Thomas and Hazelrigg, Chenault & Hazelrigg, for the appellee.

<sup>179</sup> **PAYNTER, J.** This action was instituted upon a writing which reads as follows: "This agreement entered into this 12th day of July, 1904, by and between W. W. Meadows, of the New Meadows Hotel, and Clemons & Wade Bros., of the Usona Hotel, both of Fulton, Ky., witnesseth: That for a period of three years from date hereof W. W. Meadows, who agrees to close and keep closed his hotel, known as the 'New Meadows Hotel,' reserving to himself the right to rent the same for offices of all kind and description, and also to all roomers for one week or more, when opportunity may occur. That for and in consideration of the aforesaid elimination of the New Meadows Hotel as a factor in the hotel situation for the time named, of Fulton, Ky., Clemons & Wade Bros. agree to pay in advance to W. W. Meadows one hundred dollars cash, and one hundred dollars additional on the 12th day of each succeeding month for three years from this date. It is agreed by both parties that, should any rush of patronage greater than the Usona Hotel can accommodate occur, W. W. Meadows agrees to entertain, for lodging only, any and all guests sent to him by Clemons & Wade Bros., and to receive therefor as compensation 50 per cent. of any revenue derived therefrom. It is further agreed that the price for said lodging shall never be less than \$1 per person. However, it is agreed and understood that absence from home or any other good reason shall be sufficient <sup>180</sup> and good reason for W. W. Meadows declining to take such guest. All rooms occupied by guests at the New Meadows Hotel to be cared for by W. W. Meadows."

The appellants claim that the contract is not enforceable and that they cannot be required to pay the sums of money therein stipulated to be paid, because the contract is against public policy and without consideration. It is averred in answer that at the time of the execution of the contract Fulton was a town of five thousand inhabitants; that it was situated at the crossing of the Illinois Central Railroad, running from Chicago to New Orleans and from Louisville to Memphis and New Orleans; that it was the headquarters of the Kentucky and Tennessee division of the road, and a large number of local and transient persons stopped at the hotels for meals and lodging; that the New Meadows and Usona Hotels were first-class hotels, and were the only hotels of that class in the town; that they were rivals and competitors; that there was no consideration for the execution of the contract, except that which is stipulated therein; that it was entered into between the parties for the purpose of removing competition that existed in the hotel business in Fulton, for the purpose of giving the Usona Hotel a monopoly of the hotel business of its class; and that the contract is against public policy. The court sustained a demurrer to the answer, and, the appellants failing to plead further, judgment was rendered against them.

So far as we are aware, the exact question presented by this record has never been decided by this court. This court has upheld contracts which were in partial restraint of trade. *Pyke v. Thomas*, 4 Bibb, 486, 7 Am. Dec. 741; *Grund v. Edwards*, 7 J. J. Marsh. 368, 23 Am. Dec. 409; *Sutton v. Head*, 86 Ky. 156, 9 Am. St. Rep. 274, 9 Ky. Law Rep. 453, 5 S. W. 410; *Western D. Warehouse Co. v. Hobson*, 16 Ky. Law Rep. 869, 29 S. W. 308. It was said in *Sutton v. Head*, 86 Ky. 156, 9 Am. St. Rep. 274, 9 Ky. Law Rep. 453, 5 S. W. 410: "Indeed, a particular <sup>181</sup> trade may be permitted being limited for a short period to a few persons, and the public benefitted by preventing too many from engaging in the same calling at the same place. If, therefore, the limitation be a reasonable one, it will be upheld." Beach on Contracts, section 1575, announces the rule as follows: "The modern doctrine, is well-nigh universal that when one engaged in any occupation sells out his stock in trade and goes away, or his professional practice, he may contract with a purchaser and bind himself not to engage in the same occupation in the same locality for a time named, and he may be joined from violating this contract. This is about as true as contracts in restraint of trade have been upheld by

American courts, or those of England. While the law, to a certain extent, tolerates contracts in restraint of trade or business, when made between vendor and purchaser and will uphold them, it does not treat them with any special indulgence."

The cases in which this and other courts have recognized this rule as correct, are where parties sell their business or trade, together with goodwill. For instance, cases where a merchant sells to his partner, or to a stranger, or where one being a professional man, with an established business as a physician or dentist, sells it, and as part of the consideration the vendor agrees not to engage in the business for a time, in that locality, and in such cases the courts have sustained such a contract, although they be in partial restraint of trade. Such contracts are intended to secure to the purchaser the goodwill of the trade or business, and as a guaranty the vendor agrees not to engage in like business or trade at that place for a specified time. In these cases the restraint, to be valid, must be more extensive than is reasonably necessary for the protection of the vendee, in the enjoyment of the business which he has purchased. In this class of cases the court recognizes that the vendor has received an equivalent for his agreement to partially <sup>182</sup> abstain from business at the place where his business was formerly conducted. In such cases the agreement does not contemplate that the business or trade purchased shall be discontinued, and thus perhaps throw out of employment those whose services were necessary to carry on the business, but, on the contrary, it is contemplated that the business will be carried on and that the public will continue to receive benefits which may accrue from the conduct of the business. It results that the agreement does not have the effect of depriving the public of any benefits which it has enjoyed from the conduct of the business, or pursuit of the trade which has been transferred to another. Such contracts do not have the effect of destroying the competition which existed by reason of which the public enjoyed benefits. From the answer it is perfectly manifest that the purpose of entering into the contract was to eliminate the New Meadows Hotel from the hotel business in Fulton, and prevent competition between it and the Usona Hotel conducted by the appellants, and to give to the latter a monopoly of the hotel business of the class to which these hotels belong. They were the only first-class hotels in town, and the effect of the contract was to enable the Usona Hotel to serve all the patrons

whose tastes and financial condition induce them to stop at first-class hotels.

The question for our solution is, Is the contract against public policy and without consideration? Hotels are established and maintained for the purpose of serving the public. The opening of a hotel is an invitation to the public to become its guests. Hotels are not conducted for the social enjoyment of the owners, but for the convenience of the public—that those whose business or pleasure may render it necessary that they shall ask and receive food and shelter at a place of public entertainment for compensation. A hotel is a quasi-public institution. Those who desire to conduct a hotel must first obtain <sup>183</sup> a license from the commonwealth allowing them to do so. Laws have been enacted for the purpose of protecting the proprietors of hotels because of the public character of the business. It is the duty of hotel proprietors to receive guests of good character, well demeaned and who are free from any contagious or infectious disease, and who have the financial ability to pay the charges. When a hotel agrees not to perform a duty imposed upon them by law, and agrees not to serve the public with a view of giving a competitor in business a monopoly of the hotel business, its act is in contravention of a sound public policy. The contract relied upon in this case is plainly in restraint of trade, the only consideration being the payment of money for such an agreement. If the property is sold or goodwill transferred. The business is destroyed, not continued for the benefit of the public. The laborers that were necessary to run the hotel are thrown out of employment, and the public is deprived of the benefit which would accrue should the competition continue. The contract was not for the purpose of protecting the appellants in the legitimate use of something, which they acquired by paying for nothing was conveyed to them. The purpose and effect of the contract was to enable the appellants to enjoy an illegitimate use of something which they already had. Our conclusion is that the contract is against public policy, and that demurrer to the answer should have been overruled: *Chapman v. Brown*, 83 Iowa, 156, 32 Am. St. Rep. 297, 48 N. W. 107; 12 L. R. A. 428; *Clark v. Needham*, 125 Mich. 84, 84 Am. St. Rep. 559, 83 N. W. 1027, 51 L. R. A. 785; *Tuscaloosa Lumber Mfg. Co. v. Williams*, 127 Ala. 110, 85 Am. St. Rep. 125, 19 South. 669, 50 L. R. A. 175. In *Anderson v. Jett*, 89 Ky. 375, 11 Ky. Law Rep. 570, 12 S. W. 670, 6 L. R. A. 390, the court well said: "Rivalry is the life of trade. The trade and welfare of the people depend upon it. Monopoly is a

posed to it all along the line. The accumulation of wealth out of the brow sweat of honest toilers, by means of combinations, is <sup>184</sup> opposed to competing trade and enterprise. That public policy that encourages fair dealing, honest thrift and enterprise among all the citizens of the commonwealth, and is opposed to monopolies and combinations because unfair to fair dealing, thrift and enterprise, declares all combinations whose object to destroy or impede free competition between the several lines of business engaged in utterly void. The combination or agreement, whether or not in the particular instance it has the desired effect, is void. The vice is in the combination or agreement. The practical evil effect of the combination only demonstrates its character; but if its object is to prevent or impede free and fair competition in trade, and may, in fact, have that tendency, it is void as being against public policy."

The judgment is reversed for proceedings consistent with this opinion.

Petition for rehearing by appellee overruled.

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*Contracts in Restraint of Trade* are discussed in the note to *Harding v. American Glucose Co.*, 74 Am. St. Rep. 235. The mere covenant on the part of a manufacturer not to continue his business, the sole consideration being the payment of money for the obligation itself, the business not being sold, is unreasonable and vicious as being in restraint of trade, since neither its purpose nor effect is to protect the covenantee in the enjoyment of a business which he has purchased: *Tuscaloosa Ice Mfg. Co. v. Williams*, 127 Ala. 110, 85 Am. St. Rep. 125. And a contract in the form of a lease, whereby one manufacturer agrees with another engaged in the same business not to manufacture certain articles during a specified period, is void as against public policy: *Clark v. Needham*, 125 Mich. 84, 84 Am. St. Rep. 559. In fact, any combination of competing companies, the necessary consequence of which is the controlling of prices, or limiting production, or suppressing competition, in such a way as to create a monopoly, is contrary to public policy and void. An agreement tending to prevent competition and create a monopoly is void as against public policy: *Charleston Gas Co. v. Kanawha Gas Co.*, 58 W. Va. 22, 112 Am. St. Rep. 936.

**BEREA COLLEGE v. COMMONWEALTH.**

[123 Ky. 209, 94 S. W. 623.]

**THE POLICE POWER** is the Power and Obligation of Government to secure and promote the public welfare, comfort and convenience of the citizens, as well as the public peace, health, morals and safety. (p. 347.)

**POLICE POWER** and the Bill of Rights.—Even the things reserved to the people by the constitution in the Bill of Rights impliedly subject to the police power. (p. 347.)

**POLICE POWER** and the Duty of the Court with Respect Thereto.—The duty is upon the courts, upon proper application, to declare void an attempted exercise of the police power which is not fairly and reasonably related to a proper end. (p. 348.)

**CONSTITUTIONAL LAW**—Prohibition of Receiving and Teaching White and Colored Persons in Branches of an Institution Within Twenty-five Miles of Each Other.—A statute prohibiting the maintenance of any institution of learning, or of distinct branches thereof within twenty-five miles of each other, where white and colored persons are received or taught, is an unreasonable exercise of the police power, and void. (p. 355.)

**POLICE POWER**—Statute Void in Part Only.—A statute prohibiting the receiving or teaching in an institution of persons of the white or colored races, or in any branch of the same institution kept within twenty-five miles of each other, though unconstitutional as to the latter provision, may be regarded as valid as carried into effect with respect to its other prohibitions. (p. 355.)

**CONSTITUTIONAL LAW**—Prohibition of the Teaching White and Colored Children in the Same School.—A statute prohibiting and penalizing the receiving for instruction or teaching of white and colored persons in the same school, or the attendance by a white person in a school where negroes are received as pupils, or by negroes where white persons are so received, does not violate the constitution either of the state of Kentucky or of the United States. Such legislation is a justifiable exercise of the police power. (p. 355.)

J. G. Carlisle, G. W. Mallon and C. F. Burnam, for the appellants.

N. B. Hayes, attorney general, for the appellee.

**213 O'REAR, J.** There were two indictments against the appellant in the Madison circuit court, for alleged infractions of an act of the legislature, approved March 22, 1904, entitled "An act to prohibit white and colored persons from attending the same school." The first indictment, which was numbered 6009 on the circuit court calendar, charged the appellant with operating a school for whites and negroes in violation of the act. The second indictment, numbered 6045, charged the appellant with the offense of "maintaining and operating a college, school and institution of learning where persons of

the white and negro races are both received, and within a distance of twenty-five miles of each other, as pupils for instruction." The act alluded to, the title to which has been given above, is in the following words:

"Section 1. That it shall be unlawful for any person, corporation or association of persons to maintain or operate any college, school or institution where persons of the white and negro races are both received as pupils for instruction; and any person or corporation who shall operate or maintain any such college, school or institution shall be fined \$1,000, and any person or corporation who may be convicted of violating the provisions of this act shall be fined \$100 for each day they may operate said school, college or institution after such conviction.

"Sec. 2. That any instructor who shall teach in any school, college or institution where members of <sup>214</sup> said two races are received as pupils for instruction, shall be guilty of operating and maintaining same, and fined as provided in the first section hereof.

"Sec. 3. It shall be unlawful for any white person to attend any school or institution where negroes are received as pupils or receive instruction, and it shall be unlawful for any negro or colored person to attend any school or institution where white persons are received as pupils or receive instruction. Any person so offending shall be fined \$50 for each day he attends such institution or school; Provided, that the provisions of this law shall not apply to any penal institution or house of reform.

"Sec. 4. Nothing in this act shall be construed to prevent any private school, college or institution of learning from maintaining a separate and distinct branch thereof, in a different locality, not less than twenty-five miles distant, for the education exclusively of one race or color.

"Sec. 5. This act shall not take effect, or be in operation, before the 15th day of July, 1904": Acts 1904, p. 181, c. 85.

Appellant was found guilty, and fined one thousand dollars in each case. These appeals involve the constitutionality of the statute. The cases are heard and disposed of together. Appellant Berea College is a private nonsectarian school. It was founded some fifty years ago, for the purpose, it is said, of "promoting the cause of Christ," and to give general and nonsectarian religious instruction to "all youth of good moral character." With a large endowment, extensive buildings and grounds and educational paraphernalia, it had for nearly fifty years before the act in question maintained a school at

Berea, in Madison county, this state, presumably upon substantially the same basis as it was doing when the statute was enacted, and the indictments in these cases returned. The circuit court sustained the constitutionality of the act in every particular. <sup>216</sup> Appellant assails its constitutionality upon the ground that it violates the Bill of Rights embraced in the constitution of this state, as well as that it is in conflict with the fourteenth amendment to the constitution of the United States.

It is claimed that the act is repugnant to the Bill of Rights, in that it violates the following, which are guaranteed to every citizen: 1. The right of enjoying and defending their liberty; 2. The right of worshiping Almighty God according to the dictates of their own consciences; 3. The right of seeking and pursuing their safety and happiness; 4. The right of freely communicating their thoughts and opinions; 5. The right of acquiring and protecting property; 6. That every person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty.

The twenty-sixth section of the Bill of Rights concludes: "To guard against transgression of the high powers which we have delegated, we declare that everything in this Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this constitution, shall be void."

Appellant's contention is: "This act violates the letter and spirit of every one of the provisions referred to. It destroys the rights of the teachers and pupils of Berea College to enjoy their liberties and the right of seeking and pursuing their safety and happiness. It denies the right to worship God according to the dictates of their own consciences by attending and participating in nonsectarian religious exercises in school or institution of their own choice. It denies to the trustees, the teachers, and all others connected with the institution, the right to freely communicate their thoughts and opinions, and it denies to the institution itself and to its assistants and employes of every grade the right of acquiring and protecting <sup>216</sup> property, and the right to follow their usual and innocent occupations."

We understand appellant's argument to reach to the conclusion that the exercise of police power by the state is prohibited concerning the subjects enumerated in the Bill of Rights; at least it is beneath those rights, and must be exercised so as not to conflict with them. No jurist has dared attempt to state the limit in law of that quality in government



which is exercised through what is termed the "police power." All agree that it would be inadvisable to attempt it. Yet very broadly and indefinitely speaking, it is the power and obligation of government to secure and promote the general welfare, comfort and convenience of the citizens, as well as the public peace, the public health, the public morals and the public safety: Cooley's Constitutional Limitations, 704; Tiedeman's Limitations of Police Power, 212; 1 Hare's American Constitutional Law, 766. It is not inaptly regarded in some of its most important features as the right of self-protection in government, the right of self-preservation in society. It inheres in every state, is fundamental in the existence of every independent government, enabling it to conserve the well-being of society, and prohibit all things hurtful to its comfort or inimical to its existence. In view of these definitions of the principle, unsatisfactory as they must be conceded to be, it is apparent that even those things reserved by the people in the Bill of Rights from the powers delegated to their magistrates are impliedly subject also to this power, to preserve the state. It has always been so regarded, except wherein its exercise in a particular manner or of a particular thing is expressly excluded, or necessarily so by the language used. It would be more tedious than difficult to enumerate instances. But some of those most readily occurring to the mind which are held subject to this power are, that life and liberty, either or both, <sup>217</sup> may be forfeited by the citizen under laws enacted under it. The right of worshiping Almighty God according to the dictates of our own consciences—probably the first great moving cause of our early colonial civilization—yields to the proper exercise of this power. For example, the practices of polygamy, so inimical to the well-being of society, though deemed a religious rite, must yield to the police power of the state. If it were held here by some, as it is in some countries, a religious duty that mothers should worship God by sacrificing their babes, throwing them into the rivers to appease His supposed wrath, it would not be tolerated by the state, however conscientious the votary of the right. The pursuit of happiness in any useful and innocent employment, or the free movement of one's person, even when done under considerations of his own safety, are subject to this same power. The most familiar instance, probably, is the application of quarantine and health laws. Yet this power itself fortunately has its limitations. To be exercised exclusively within the discretion of the political branch of government, it must have a just and real relation to one of the ends for

which that power may be lawfully employed. Mere declaration that the proposed exercise is in behalf of such end is enough. The action must be cognate to one of the subjects to which the power properly pertains. The duty is upon courts, upon a proper application, to declare void an attempted exercise of such power, which is not fairly and reasonably related to a proper end. Thus balanced, there is no danger that oppression can result from its arbitrary employment. The good sense and the honest judgment of each generation must, after all, furnish the real limit to the power of government. For each age must judge—and judge—of what is hurtful to its welfare, of what endangers the existence of society, or what threatens to destroy the rights of people who are applying this primal law of self-protection to their own case.

Because of the undefined extent, of its overpowering quality, of its unmeasurable value, of the great danger of oppression under its guise, and of its abuse by those intolerant of the restraints of law, any new application of the police power of government is regarded with closest scrutiny, not unmixed with apprehension. It can be abused, to the hurt of the people. It can be neglected, to the hurt of the state. The application of it by the statute above quoted is new. It has never before been so applied so far as we are certainly aware. The question is, Is it a fair exercise of the police power to prohibit the teaching of the white and negro races together? Is it a fair exercise of the power to restrain the two races from voluntarily associating together in a private school, to acquire a scholastic education? The mingling of the blood of the white and negro races by interbreeding is deemed by the political department of our state government as being hurtful to the welfare of society. Marriage by members of one race with those of the other is prohibited by statute: Stats. 1903, secs. 2097, 2098, 2111, 2114. It is admitted freely in argument that the subject of marriage is one of the very first importance to society; that it may be regulated by law even as among members of the same race. Inbreeding is known to lower the mental and physical vigor of the offspring. So incestuous marriages are prohibited. Others, though incestuous, but involving the probable effect upon the vitality of the offspring, are prohibited also, as marriages by individuals of the same blood. Still other inhibitions, such as age, and so forth, are imposed, all of which look to the well-being of the future generation. No one questions the validity of such statutes, enacted as they are, confessedly are, under the police power of the state. Upon

the same considerations this same power has been exercised <sup>219</sup> to prohibit the intermarriage of the two races. The result of such marriage would be to destroy the purity of blood and identity of each. It would detract from whatever characteristic force pertained to either. Such statutes have been upheld in the foregoing cases: *Ex parte Hobbs*, 1 Woods (U. S.), 537, Fed. Cas. No. 6550; *State v. Gibson*, 36 Ind. 389, 10 Am. Rep. 42; *State v. Jackson*, 80 Mo. 175, 50 Am. Rep. 499; *State v. Hairston*, 63 N. C. 451; *Brook v. Brook*, 9 H. L. 193; *Green v. State*, 58 Ala. 190, 29 Am. Rep. 742; *Lonas v. State*, 3 Heisk. (Tenn.), 287. Another exercise of the police power with respect to the separation of the two races, which has been upheld, is the requiring them to use separate coaches in traveling upon railroads, as adopted by certain of the states. These statutes and regulations of a similar kind, even without statute, have been upheld wherever their validity has been questioned. The opinions in the following cases show the unanimity of holding and reasoning on this subject: *West Chester etc. R. R. Co. v. Miles*, 55 Pa. 209, 93 Am. Dec. 744; *Smith v. State*, 100 Tenn. 494, 46 S. W. 566, 41 L. R. A. 432; *Louisville etc. R. R. Co. v. Mississippi*, 133 U. S. 587, 10 Sup. Ct. Rep. 348, 33 L. ed. 784; *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. Rep. 1138, 41 L. ed. 256; *Chesapeake etc. Ry. Co. v. Kentucky*, 179 U. S. 388, 21 Sup. Ct. Rep. 101, 45 L. ed. 244. We have such statute in Kentucky: Ky. Stats. 1903, sec. 795. The validity of this statute has been upheld by this court in *Louisville etc. R. R. Co. v. Commonwealth*, 99 Ky. 663, 18 Ky. Law Rep. 491, 37 S. W. 79; *Quinn v. Louisville etc. R. R. Co.*, 98 Ky. 231, 17 Ky. Law Rep. 811, 32 S. W. 742; *Wood v. Louisville etc. R. R. Co.*, 101 Ky. 703, 19 Ky. Law Rep. 924, 42 S. W. 349; *Ohio Valley R. R. Co. v. Lander*, 104 Ky. 431, 20 Ky. Law Rep. 913, 47 S. W. 344, 882, 48 S. W. 145; *Chesapeake etc. Ry. Co. v. Commonwealth*, 21 Ky. Law Rep. 228, 51 S. W. 160.

In the provisions for public education made by the government <sup>220</sup> of the United States for the District of Columbia, and by many of the states, a separation of the races is enforced by requiring separate schools to be provided for each, and prohibiting members of either race from attending the school provided for the other. In every instance in which the question has arisen as to the validity of such legislation, it has been upheld as a valid exercise of its police power by the state: 13 U. S. Stats. 191, secs. 16, 17, c. 156; Ky. Const., sec. 187; Ky. Stats. 1903, sec. 4428; *Lehew v. Brummell*, 103 Mo. 546, 23 Am. St. Rep. 895, 15 S. W. 765, 11 L. R. A. 828;

Cory v. Carter, 48 Ind. 362, 17 Am. Rep. 738; Martin v. Board of Education, 42 W. Va. 515, 26 S. E. 348; State of Ohio v. McCann, 21 Ohio St. 198; Cisco v. School Board, 161 N. E. 598, 56 N. E. 81, 48 L. R. A. 113; Bertonneau v. Board of Directors, 3 Woods (U. S.), 171, Fed. Cas. No. 1361.

Distinguished counsel for appellant, while conceding the correctness of the application of the principle being discussed to public schools and common carriers, seek to distinguish that application from the one contended for by the state in the case at bar upon the ground that in the cases of common schools and railroad travel the state was merely preventing an enforced association by the two races; whereas under the statute now being considered the power is tempted to be extended so as to prevent the voluntary association by the two races. We cannot agree that the ground distinction noted could form a proper demarcation between the point where the power might be exercised and the point where it might not be. The thing aimed at by all this legislation was not that of volition. It was not until recently that attendance upon common or public schools was compulsory. It has nearly always been voluntary. All this legislation was aimed at something deeper and more important than the matter of choice. Indeed, if the mere choice of the person to be affected were the <sup>221</sup> only object of the statutes, it might well be doubted whether that was at all a permissible subject for the exercise of the police power. The separation of the human family into races, distinguished no less by color than by temperament and other qualities, is as certain as anything in nature. Those of us who believe that all of this was divinely ordered have no doubt that there was wisdom in the provision; albeit we are unable to say with assurance why it is so. Those who see in it only nature's work must also concede that in this order, as in all others in nature, there is an unerring justification. There exists in each race a homologous genesis by which it will perpetually reproduce itself, if undisturbed or adulterated. Its instinct is gregarious. As a check there is another, an antipathy to other races, which some call racial prejudice. This is nature's guard to prevent amalgamation of the races. A disregard of this antipathy to the point of mating between the races is unnatural, and begets a reservation in the normal mind. It is incompatible to the continuance of the being of the races, and is repugnant to their instincts. In such mating is universally regarded with disfavor. In the lower animals this quality may be more effective in the preservation of distinct breeds. But among men convention

decrees in the form of governmental prescripts are resorted to in aid of right conduct to preserve the purity of blood. No higher welfare of society can be thought of than the preservation of the best qualities of manhood of all its races. If, then, it is a legitimate exercise of the police power of government to prevent the mixing of the races in cross-breeding, it would seem to be equally within the same power to regulate that character of association which tends to a breach of the main desideratum—the purity of racial blood. In less civilized society the stronger would probably annihilate the weaker race. Humane civilization is endeavoring to fulfill nature's edicts as to the preservation <sup>222</sup> of race identity in a different way. Instead of one exterminating the other, it is attempted to so regulate their necessary intercourse as to preserve each in its integrity.

The maxims of liberty and the pursuit of happiness which are familiar to the common law, wherefrom the idea found in our Bill of Rights is probably borrowed, are the principles worked out by the Anglo-Saxon race for its own government. In no other country has it ever been attempted before, at least on so important a scale, to apply such principles alike to so many different races, types and creeds of men. The experiment is great in its importance. It forms now one of the biggest questions being worked out by this great North American republic. That much bitterness has appeared, and some oppression has been practiced, are among the inevitable attendants upon the adjustment by people of different races of the rights justly belonging to each. Clashing of antipathies resulting in outbreaks of violence tends to disturb the public peace; threatens the public safety, and so disrupts the serenity of common purpose to promote the welfare of all the people, that the question is become one of the first importance to the section where the two races live in the greatest numbers. That it is well within the police power of government to legislate upon this question so far as to repress such outbreaks and to prevent disturbances of the public tranquillity, we have no sort of doubt. The seriousness of the situation is not new. Even before the abolition of slavery it was keenly and intelligently anticipated. Since the emancipation of the negro it has not been the least of the grave problems of government which have been presented to some of the states for solution. As the outcome of discussion, of agitation, of too frequent conflicts, of violent turbulence that set even the law at defiance in some localities and in times of great popular excitement, this species of legislation has <sup>223</sup> been evolved as tending to

a solution of the trouble by removing as far as possible the cause. Is not this situation one, if ever there was one, which calls for and amply justifies the exercise of police power by the government? Or should this irritating cause be left without restraint or control, till by the exhaustion of one side or the other it is settled by the sheer force of superiority of numbers or physical power? It is idle to talk of controlling ideas by legislation, or even by force. You cannot bind an idea by a statute. The attempt should be made, and we believe is being made in good faith, to so control this situation through the law that neither race can have just cause for complaint; so that each may have every lawful privilege and right that the other has; so that equality of rights before the law shall be a fact, as well as a high-sounding theory; yet so as to conserve the very best of the characteristics of each race, to develop its idea of morality, its thrift, independence and usefulness. Observation and study at close hand of both the theory and practical working of this problem of social existence, of the collaboration of two races so different as the white and black in the same state upon a plane of legal equality where the government is by the people for the people, it has been found, so the legislative department declares, as evinced by the public policy indicated by the statutes discussed in this opinion, that the very bottom of all the trouble is the racial antipathy to the destruction of its own identity; and, that, that danger is removed, the friction practically disappears. A separation of the races under certain conditions is therefore enforced, where it is believed that their mingling would tend to produce the very conditions which it is found, lies the base of the trouble. In its application it becomes all the more necessary that the overmastering principles included in the police power of the government be firmly recognized <sup>224</sup> so that a clashing of race prejudices, or race destruction may be lawfully averted.

Counsel resort to conjecture concerning other legislation of this character which they fear might follow that now involved. It is suggested that the state might attempt to regulate, under the same power, the right of the races to work together in the same fields or factories, or to mingle together at all. A sufficient present answer to this is that each proposed application of the power is to be determined upon the circumstances under which it is sought to be applied. If it is arbitrary, unreasonable or oppressive, it will be denied. Nor is it a legitimate argument to prove a negation of power by showing wherein it may be abused. If it be conceded, a

we think the fact is, that the ultimate object of this legislation providing separate schools for the two races was to separate the youth of each during the most impressible and least responsible period of their lives, and until ripened judgment and observation can have set them well in the safe ways of thinking, much of the dangers of the shame and distress which errors of immaturity might entail would be avoided. The legislation above enumerated is all of a kind. It has two great objects. One, the preservation of the identity and purity of the races; the other, the avoidance of clashes between the races by preventing their most fruitful sources.

In upholding this character of legislation in a separate coach regulation the supreme court of Pennsylvania, in *West Chester etc. R. R. Co. v. Miles*, 55 Pa. 209, 93 Am. Dec. 744, thus stated the principal thought: "The danger to the peace engendered by the feeling of aversion between individuals of the different races cannot be denied. It is the fact with which the company must deal. If a negro takes his seat beside a white man or his wife or daughter, the law cannot repress the anger or conquer the feeling of aversion <sup>225</sup> which some will feel. However unwise it may be to indulge the feeling, human infirmity is not always proof against it. It is much wiser to avert the consequences of this repulsion of race by separation, than to punish afterward the breach of the peace it may have caused. . . . The right to separate being clear in proper cases, and it being the subject of sound regulations, the question remaining to be considered is whether there is such a difference between the white and black races within this state, resulting from nature, law and custom, as makes it a reasonable ground of separation. The question is one of difference, not of superiority or inferiority. Why the Creator made one black and the other white, we know not; but the fact is apparent, and the races distinct, each producing its own kind, and following the peculiar law of its constitution. Conceding equality, with natures as perfect and rights as sacred, yet God has made them dissimilar, with those natural instincts and feeling which He always imparts to his creatures when He intends that they shall not overstep the natural boundaries he has assigned to them. The natural law which forbids their intermarriage, and that social amalgamation which leads to a corruption of the races, is as clearly divine as that which imparted to them different natures. The tendency of intimate social intermixture is to amalgamation, contrary to the law of races. The separation of the white and

black races upon the surface of the globe is a fact equally apparent. Why this is so, it is not necessary to speculate, but the fact of a distribution of men by race and color is visible in the providential arrangement of the earth as to climate of heat and cold. The natural separation of the races is therefore an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature. From social amalgamation it is but a step to illicit intercourse and but another to intermarriage. <sup>226</sup> But to assert separation is not to declare inferiority in either; it is not to declare one a slave and the other a freeman—that would be to declare the illogical sequence of inferiority from difference only. It is simply to say that following the order of Divine Providence human authority ought not to compel these widely separated races to intermix. The right of such to be free from social contact is as clear as to be free from intermarriage. The former may be less repulsive as a condition, but not less entitled to protection as a right. When, therefore, we declare a right to maintain separate relations, so far as is reasonable and practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice, nor can it be injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts." Appellant's counsel construe this opinion as supporting the theory that the power being discussed may be exercised only where it forbids the enforced association of the races. While such enforced association is more easily distinguished as falling within the power, yet the main idea is that such association at all, under certain conditions, leads to the main evil which is amalgamation of the races, and incidentally to the conflicts between their members naturally engendered by too close personal contact under conditions which are bound to excite prejudices and race animosities. If such evil falls within the police power to prevent, then whatever naturally contributes to them may also be regulated, provided the regulation is itself reasonable. The act in question is within the legitimate exercise of the police power of the state, provided it is not unreasonable in its provisions as to be oppressive and obnoxious to the limitations of the power.

<sup>227</sup> It is argued for appellant that the act quoted makes it a misdemeanor to teach white and negro pupils in the same institution anywhere in the state (but for the proviso contained in the fourth section of the act), although there might not be a mingling of the races at all. This would be out-



harmony with the spirit of the law. It would be an unreasonable and unwarranted interference, indeed, with the citizens' right to teach, and the pupils to be taught. Under the rule for the construction of a statute to resolve any ambiguity in its language in favor of that meaning which is not repugnant to the constitution, if the language admits of more than one construction, we have no doubt that the intention of this act was to prevent the two races from attending the same school at the same place and the same time, whereby there would result an intermingling, or close personal association between them. Such is the fair, reasonable meaning of the whole act, including title and context. Section 4 of the statute makes it a misdemeanor not only to teach pupils of the two races in branches of the same institution, even though one race exclusively is taught in one branch and the other in another branch, provided the two branches are within twenty-five miles of each other. This section is added as a proviso to the previous sections. Without this section as we construe the act, the teaching of the two races in the same school at the same time and place is prohibited. But if the same school taught the different races at different times, though at the same place, or at different places at the same time, it would not be unlawful. It evidently was thought that the effect of the statute might be nullified by teaching the two races in the same school at the same time and place in fact, but perhaps in different rooms of the same building, or in different buildings of the same college plant, constituting to all intents one building. A teaching in different <sup>228</sup> rooms of the same building, or in different buildings so near to each other as to be practically one, would violate the statute, as it was such intimate personal association of the pupils that was being prohibited. It was attempted by the fourth section to make this impossible, by prohibiting such teaching in branches of the same school if done within twenty-five miles of each other. This last section, we think, violates the limitations upon the police power. It is unreasonable and oppressive. We must look to the object of the legislation as well as to the words of the statute to divine the true meaning. It is not to prevent either race from being taught by an institution which also teaches the other. Nor is it to prevent persons of one race from teaching persons of the other, or employing their means for that purpose. The state itself teaches both races, but in separate schools. They are both taught within twenty-five miles of each other, and within very short distances of each other. But this section can be ignored and the remainder

of the act is complete notwithstanding. The remaining question is whether the act as construed by this court violates the fourteenth amendment to the constitution of the United States. That amendment guarantees the equal protection of the laws to all citizens of the United States, and prohibits a state from depriving any citizen of the United States of property, life or liberty without due process of law. The act involved applies equally to all citizens. It makes no discrimination against those of either race. The right to teach white and negro children in a private school at the same time and place is not a property right. Besides, appellant, as a corporation created by this state, has no natural right to teach at all. Its right to teach is such as the state sees fit to give to it. The state may withhold it altogether, or qualify it. *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. Rep. 427, 41 L. ed. 832. We do <sup>229</sup> not think the act is in conflict with the federal constitution.

Wherefore, we conclude that the judgment in case 6045 should be affirmed, and that the judgment in case 6045 should be reversed and be remanded, with directions to dismiss the indictment.

Cantrill, J., absent.

Barker, J., dissents, except in case No. 6045.

A Writ of Error having been Prosecuted from the State Court to the supreme court of the United States, it affirmed the judgment in an opinion concurred in by four of the judges, two others dissenting, and the remainder apparently expressing no opinion. The judgments of dissent and of affirmance are as follows:

“Mr. Justice Brewer delivered the opinion of the court:

“There is no dispute as to the facts. That the act does violate the constitution of Kentucky is settled by the decision of the highest court, and the single question for our consideration is whether it conflicts with the federal constitution. The court of appeals discussed at some length the general power of the state in respect to the separation of the two races. It also ruled that ‘the right to teach white and negro children in a private school at the same time and place is not a property right. Besides, appellant, as a corporation created by this state, has no natural right to teach at all. Its right to teach is such as the state sees fit to give to it. The state may withhold it altogether, or qualify it: *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. Rep. 427, 41 L. ed. 832.’

“Upon this we remark that when a state court decides a case upon two grounds, one federal and the other nonfederal, this court will not disturb the judgment if the nonfederal ground, fairly con-

strued, sustains the decision: *Murdock v. Memphis*, 20 Wall. 590, 23 L. ed. 429; *Enstis v. Bolles*, 150 U. S. 361, 14 Sup. Ct. Rep. 131, 37 L. ed. 1111; *Giles v. Teasley*, 193 U. S. 146, 24 Sup. Ct. Rep. 359, 48 L. ed. 655; *Allen v. Arguimbau*, 198 U. S. 149, 25 Sup. Ct. Rep. 622, 49 L. ed. 990.

"Again, the decision by a state court of the extent and limitation of the powers conferred by the state upon one of its own corporations is of a purely local nature. In creating a corporation a state may withhold powers which may be exercised by and cannot be denied to an individual. It is under no obligation to treat both alike. In granting corporate powers the legislature may deem that the best interests of the state would be subserved by some restriction, and the corporation may not plead that, in spite of the restriction, it has more or greater powers because the citizen has. 'The granting of such right or privilege [the right or privilege to be a corporation] rests entirely in the discretion of the state, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy': *Home Ins. Co. v. New York*, 134 U. S. 594, 10 Sup. Ct. Rep. 593, 33 L. ed. 1025; *Perrine v. Chesapeake & D. Canal Co.*, 9 How. 172, 13 L. ed. 92; *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 36 L. ed. 164, 4 Int. Com. Rep. 57, 12 Sup. Ct. Rep. 403. The act of 1904 forbids 'any person, corporation or association of persons to maintain or operate any college,' etc. Such a statute may conflict with the federal constitution in denying to individuals powers which they may rightfully exercise, and yet, at the same time, be valid as to a corporation created by the state.

"It may be said that the court of appeals sustained the validity of this section of the statute, both against individuals and corporations. It ruled that the legislation was within the power of the state, and that the state might rightfully thus restrain all individuals, corporations and associations. But it is unnecessary for us to consider anything more than the question of its validity as applied to corporations.

"The statute is clearly separable, and may be valid as to one class while invalid as to another. Even if it were conceded that its assertion of power over individuals cannot be sustained, still it must be upheld so far as it restrains corporations.

"There is no force in the suggestion that the statute, although clearly separable, must stand or fall as an entirety on the ground the legislature would not have enacted one part unless it could reach all. That the legislature of Kentucky desired to separate the teaching of white and colored children may be conceded; but it by no means follows that it would not have enforced the separation so far as it could do so, even though it could not make it effective under all the circumstances. In other words, it is not at all unreasonable to believe that the legislature, although advised beforehand of the constitutional question, might have prohibited all organizations and

corporations under its control from teaching white and colored children together, and thus made at least uniform official action. The rule of construction in questions of this nature is stated by Chief Justice Shaw in *Warren v. Charlestown*, 2 Gray, 84, quoted approvingly by this court in *Allen v. Louisiana*, 103 U. S. 80, 3 L. ed. 318.

"But if they are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them.' See, also, *Loeb v. Columbia Twp.*, 179 U. S. 472, 21 Sup. Ct. Rep. 174, 45 L. ed. 280, in which this court said: 'As one section of a statute may be repugnant to the constitution without rendering the whole act void, so one provision of a section may be invalid by reason of its not conforming to the constitution, while all the other provisions may be subject to no constitutional infirmity. One part may stand, while another will fall, unless the two are so connected or dependent on each other in subject matter, meaning, or purpose, that the good cannot remain without the bad. The point is not whether the parts are contained in the same section, for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance—whether the provisions are so interdependent that one cannot operate without the other.'

"Further, inasmuch as the court of appeals considered the act separable, and, while sustaining it as an entirety, gave an independent reason which applies only to corporations, it is obvious that it recognized the force of the suggestions we have made. And when a state statute is so interpreted, this court should hesitate before it holds that the supreme court of the state did not know what was the thought of the legislature in its enactment: *Missouri K. & N. R. Co. v. McCann*, 174 U. S. 580, 19 Sup. Ct. Rep. 755, 43 L. ed. 1093; *Tullis v. Lake Erie & W. R. Co.*, 175 U. S. 348, 20 Sup. Ct. Rep. 136, 44 L. ed. 192.

"While the terms of the present charter are not given in the record, yet it was admitted on the trial that the defendant was a corporation organized and incorporated under the general statutes of the state of Kentucky, and of course the state courts, as well as this court on appeal, take judicial notice of those statutes. Further in the brief of counsel for the defendant is given a history of the incorporation proceedings, together with the charters. From this it appears that Berea College was organized under the authority of an act for the incorporation of voluntary associations, approved March 9, 1854 (2 Stanton's Rev. Stat. [Ky.] 553), which act was amended by an act of March 10, 1856 (2 Id. 555), and which in terms reserved to the General Assembly 'the right to alter or repeal the

charter of any associations formed under the provisions of this act, and the act to which this act is an amendment, at any time hereafter.' After the constitution of 1891 was adopted by the state of Kentucky, and on June 10, 1899, the college was reincorporated under the provisions of chapter 32, article 8, Kentucky Statutes (Carroll's Stat. [Ky.] 1903, p. 459), the charter defining its business in these words: 'Its object is the education of all persons who may attend its institution of learning at Berea, and, in the language of the original articles, "to promote the cause of Christ."' The constitution of 1891 provided in section 3 of the Bill of Rights that 'every grant of a franchise, privilege or exemption shall remain, subject to revocation, alteration or amendment': Carroll's Stat. (Ky.) 1903, p. 86. So that the full power of amendment was reserved to the legislature.

"It is undoubtedly true that the reserved power to alter or amend is subject to some limitations, and that, under the guise of an amendment, a new contract may not always be enforceable upon the corporation or the stockholders; but it is settled 'that a power reserved to the legislature to alter, amend or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right: *Inland Fisheries Commra. v. Holyoke Water Power Co.*, 104 Mass. 446, 6 Am. Rep. 247; *Holyoke Water Power Co. v. Lyman*, 15 Wall. 500, 21 L. ed. 133'; *Close v. Glenwood Cemetery*, 107 U. S. 466, 2 Sup. Ct. Rep. 267, 27 L. ed. 408.

"Construing the statute, the court of appeals held that 'if the same school taught the different races at different times, though at the same place, or at different times at the same place, it would not be unlawful.' Now, an amendment to the original charter, which does not destroy the power of the college to furnish education to all persons, but which simply separates them by time or place of instruction, cannot be said to 'defeat or substantially impair the object of the grant.' The language of the statute is not in terms an amendment, yet its effect is an amendment, and it would be resting too much on mere form to hold that a statute which in effect works a change in the terms of the charter is not to be considered as an amendment, because not so designated. The act itself, being separable, is to be read as though it, in one section, prohibited any person, in another section any corporation, and, in a third, any association of persons to do the acts named. Reading the statute as containing a separate prohibition on all corporations, at least, all state corporations, it substantially declares that any authority given by previous charters to instruct the two races at the same time and in the same place is forbidden, and that prohibition, being a departure from the terms of the original charter in this case, may properly be adjudged an amendment.

"Again, it is insisted that the court of appeals did not regard legislation as making an amendment, because another prosecution instituted against the same corporation under the fourth section of the act, which makes it a misdemeanor to teach pupils of the two races in the same institution, even although one race is taught in one branch and another in another branch, provided the two branches are within twenty-five miles of each other, was held could not be sustained, the court saying: 'This last section, we think, violates the limitations upon the police power: it is unreasonable and oppressive. But, while so ruling, it also held that this section could be ignored and that the remainder of the act was complete notwithstanding. Whether the reasoning of the court concerning the fourth section is satisfactory or not is immaterial, for no question of its validity was presented, and the court of appeals, while striking it down, sustained the balance of the act. We need concern ourselves only with the inquiry whether the first section can be upheld as coming within the power of a state over its own corporate creatures.

"We are of opinion, for reasons stated, that it does come within that power, and, on this ground, the judgment of the court of appeals of Kentucky is affirmed."

Justices Harlan and Day Dissented, and the former wrote a dissenting opinion. This dissent was based mainly upon the ground that the court should meet the broad question whether the statute as a whole, "is or is not unconstitutional in that it makes it a crime against the state to maintain or operate a private institution of learning, where white and black pupils are received at the same time for instruction," and the judge was of opinion that, in its essential part, the statute was an arbitrary invasion of the rights of liberty and property guaranteed by the fourteenth amendment against hostile state action, and was therefore void. In conclusion he said: "The capacity to impart instruction to others is given by the Almighty for beneficent purposes; and its use may not be forbidden or interfered with by government,—certainly not, unless such instruction is, in its nature, harmful to the public morals or imperils the public safety. The right to impart instruction, harmless in itself or beneficent to those who receive it, is a substantial right of property,—especially, when the services are rendered for compensation. But even if such right be not strictly a property right, it is, beyond question, part of one's liberty as guaranteed against hostile state action by the constitution of the United States. This court has more than once said that the liberty guaranteed by the fourteenth amendment embraces 'the right of the citizen to be free in the enjoyment of all his faculties,' and 'to be free to use them in all lawful ways': *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. Rep. 427, 41 L. ed. 832; *Adair v. United States*, 208 U. S. 161, 442, 28 Sup. Ct. Rep. 277, 52 L. ed. 436. Pupils, of whatever race—certainly, if they be citizens—choose, with the consent of their parents, or voluntarily, to sit together in a

vate institution of learning while receiving instruction which is not in its nature harmful or dangerous to the public, no government, whether federal or state, can legally forbid their coming together, or being together temporarily, for such an innocent purpose. If the commonwealth of Kentucky can make it a crime to teach white and colored children together at the same time, in a private institution of learning, it is difficult to perceive why it may not forbid the assembling of white and colored children in the same Sabbath school, for the purpose of being instructed in the Word of God, although such teaching may be done under the authority of the church to which the school is attached as well as with the consent of the parents of the children. So, if the state court be right, white and colored children may even be forbidden to sit together in a house of worship or at a communion table in the same Christian church. In the cases supposed there would be the same association of white and colored persons as would occur when pupils of the two races sit together in a private institution of learning for the purpose of receiving instruction in purely secular matters. Will it be said that the cases supposed and the case here in hand are different, in that no government, in this country, can lay unholy hands on the religious faith of the people? The answer to this suggestion is that, in the eye of the law, the right to enjoy one's religious belief, unmolested by any human power, is no more sacred nor more fully or distinctly recognized than is the right to impart and receive instruction not harmful to the public. The denial of either right would be an infringement of the liberty inherent in the freedom secured by the fundamental law. Again, if the views of the highest court of Kentucky be sound, that commonwealth may, without infringing the constitution of the United States, forbid the association in the same private school of pupils of the Anglo-Saxon and Latin races respectively, or pupils of the Christian and Jewish faiths, respectively. Have we become so inoculated with prejudice of race that an American government, professedly based on the principles of freedom, and charged with the protection of all citizens alike, can make distinctions between such citizens in the matter of their voluntary meeting for innocent purposes, simply because of their respective races? Further, if the lower court be right, then a state may make it a crime for white and colored persons to frequent the same market places at the same time, or appear in an assemblage of citizens convened to consider questions of a public or political nature, in which all citizens, without regard to race, are equally interested. Many other illustrations might be given to show the mischievous, not to say cruel, character of the statute in question, and how inconsistent such legislation is with the great principle of the equality of citizens before the law.

"Of course, what I have said has no reference to regulations prescribed for public schools, established at the pleasure of the state and maintained at the public expense. No such question is here presented and it need not be now discussed. My observations have ref-

erence to the case before the court, and only to the provision of the statute making it a crime for any person to impart harmless instruction to white and colored pupils together, at the same time, in the same private institution of learning. That provision is, in my opinion, made an essential element in the policy of the statute, and, regard be had to the object and purpose of this legislation, it cannot be treated as separable nor intended to be separated from the provisions relating to corporations. The whole statute should therefore be held void; otherwise, it will be taken as the law of Kentucky, to be enforced by its courts, that the teaching of white and black pupils at the same time, even in a private institution, is a crime against that commonwealth, punishable by fine and imprisonment.

"In my opinion, the judgment should be reversed upon the ground that the statute is in violation of the constitution of the United States": *Berea College v. Kentucky*, 100 U. S. 1000, 29 Sup. Ct. Rep. 33, 100 L. ed. 1000.

## THOMPSON v. COMMONWEALTH.

[123 Ky. 302, 94 S. W. 654.]

**TAXATION by the State of Spirits in a Bonded Warehouse.** Whisky contained in a government warehouse though before the payment of taxes due thereon to the United States is property, and as such, subject to taxation by the state. (pp. 363, 364.)

John B. Thompson, for the appellant.

John W. Ray, for the appellee.

303 O'REAR, J. The sole question presented on this appeal is whether the statutes of this state imposing tax on distilled spirits in bonded warehouses violate the federal constitution, and particularly the fourteenth amendment thereof. The question as to whether the statutes are valid under the constitution of this state has been thoroughly considered by this court in numerous cases, and in every instance decided in favor of their constitutionality: See *Commonwealth v. Taylor*, 101 Ky. 325, 19 Ky. Law Rep. 552, 41 S. W. 11; *Commonwealth v. Walker*, 25 Ky. Law Rep. 2122, 80 S. W. 185; *Commonwealth v. Rosenfield Bros. & Co.*, 118 Ky. 37, 25 Ky. Law Rep. 2229, 80 S. W. 1178, 82 S. W. 433. It is not necessary to restate the propositions disposed of by these opinions. Appellant in his brief filed on this appeal says: "It is not necessary on this appeal that the court shall either overrule, modify or change in any manner its opinion re-



dered in the case of the commonwealth against Rosenfield. In accordance with the previous opinion of the court in the case of *Commonwealth v. Taylor*, 101 Ky. 325, 19 Ky. Law Rep. 552, 41 S. W. 11, it was held in the *Rosenfield* case (118 Ky. 374, 80 S. W. 1178, 82 S. W. 433); that the law which imposed the tax and interest—the matter in controversy in this action—is not in conflict with the constitution of the state of Kentucky. It has never been held that this law is not in conflict with the constitution and laws of the United States, and this is the question we now present."

It is the contention of appellant that whisky contained in the government warehouses before the payment <sup>304</sup> of the taxes thereon due the United States government is not property within the jurisdiction of the state; that it is in the hands of the federal government and its officers, not subject to the control or dominion of the warehouseman, and that if he is compelled to pay this tax, he is denied the equal protection of the law, his property is taken without due process of law, and for public purposes without just compensation. Taxes levied by the state are imposed upon property and against the owner of the property primarily. It is not argued, and cannot be supposed, that the federal government owns the whisky in question. It does not. Nor is it the bailee of the whisky. It has a superior lien upon it to secure the payment of the internal revenue tax due to the United States government. But further than that the federal government does not claim an interest in or a lien upon the whisky. Consequently, the title to it is in the owner of it, whoever he may be, subject to the lien of the federal government for its taxes. It is undoubtedly property; it is situated within the state; it receives the benefit of protection from the state laws; it ought to pay, and by the express provision of the constitution it, in common with all other property in the state, is required to pay taxes, to be made to bear its equal share of the public burden. The imposition of a tax upon property is not taking the property. The assessment of it and its subsequent distraint for taxes in arrears is not a taking of property without due process of law, if the owner or person charged with the payment of the taxes has had (as he confessedly has had in the case at bar) notice of the assessment and the amount due, with an opportunity to be heard on the assessment before it becomes final. We are unable to see where, in being compelled to pay taxes upon his property, the owner of distilled spirits or the warehouseman is denied the equal protection of the law. As a matter of fact, everybody else in the <sup>305</sup> state owning prop-

erty in the state, and all other property in the state, is required to pay taxes at the same rate that distillers and warehousemen are. No discrimination whatever is to be found in the tax statutes of this state against distillers or warehousemen of distilled spirits in favor of any other taxpayer or class of taxpayers.

Great stress is laid in the argument upon the fact that there is an attempt on the part of the state to impose and collect a tax upon property in custody of the federal government; that this would lead to a conflict of jurisdictions, as such, is an interference with the sovereignty of the federal government. In the first place, there is no such conflict, the state does not propose to collect the taxes so long as spirits are in the custody or under the lien of the federal government. In the next place, if there was such conflict, it would be a question between the state and the federal government, and not one that the taxpayer could take advantage of. In *Carstairs v. Cochran*, 193 U. S. 10, 24 Sup. Ct. Rep. 48 L. ed. 596, the question of the power of the state to impose a tax upon distilled spirits in bond, but to be collected after the government lien was satisfied, was before the supreme court. In the course of the opinion of the court delivered by Justice Brewer, it was said: "Under federal legislation distilled spirits may be left in a warehouse for several years, and that there is no specific provision in the statute in question giving to the proprietor who pays the tax the right to recover interest thereon, and that for spirits so in bond negotiable warehouse receipts have been issued, do not affect the question of the power of the state. The state is under no obligation to make its legislation conformable to contracts which proprietors of bonded warehouses may make with those who store spirits therein, but it is their business if they wish further protection than the lien given by the statute, <sup>306</sup> to make their contracts accordingly." This question was recently before the United States circuit court for the eastern district of Kentucky. It came up in the case of *Anderson County v. Kentucky Distillers & Warehousemen*, 146 Fed. 999. That court, by Judge Cochran, district judge, in an opinion filed February 28, 1906, held that the state taxes were collectible from the warehousemen according to the terms of our statutes.

Such was the ruling of the circuit court in the case at bar, and the judgment is affirmed, with damages.

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*A State has an Unquestionable Right to Tax all subjects within its jurisdiction, and this right may, in the discretion of the legisla-*

be exercised over all property coming temporarily within the state, whether for trade, business or convenience, unless such exercise of power conflicts with some constitutional limitation: *Hall v. American Refrigerator Transit Co.*, 24 Colo. 291, 65 Am. St. Rep. 223; *Kelley v. Rhoades*, 7 Wyo. 237, 75 Am. St. Rep. 904.

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### COMMONWEALTH v. EVERSON.

[123 Ky. 330, 96 S. W. 460.]

**EVIDENCE—Communication Between Husband and Wife Overheard by a Third Person.**—Though neither husband nor wife is permitted to testify to any communication between them, yet if such a communication is overheard by a third person, his testimony with respect thereto is admissible. (p. 366.)

**EVIDENCE of Other Crimes is Admissible on a Criminal Prosecution** where its tendency is to show the motive on the part of the accused for the commission of the crime for which he is on trial. (p. 367.)

N. B. Hays, attorney general, Joe Huffaker, Loraine Mix, O'Neal & O'Neal, and Isaac T. Woodson, for the commonwealth.

<sup>331</sup> HOBSON, C. J. H. J. Everson was indicted in the Jefferson circuit court on the charge of housebreaking. He was tried and acquitted. The commonwealth has prosecuted an appeal on certain questions of law arising on the trial. Only so much of the facts of the case will be stated as is necessary for a proper understanding of the questions of law. Everson was in the employ of the Moran Flexible Steam Joint Company, as bookkeeper. The president and treasurer found the corporation was short of its cash, and not knowing what had become of it, decided to discharge the bookkeeper, which was done. After this, the corporation set about making an investigation of its affairs, to ascertain what had become of the money, and about this time its warehouse was broken into, its books and <sup>332</sup> checks were all stolen, and it charged Everson with the breaking. There was money in the drawer. This was left, but the papers were taken, showing that the thief was not in search of money. The places where the books and papers were kept were all ransacked as though by a person who knew where everything was kept. Everson's wife boarded with Mrs. Delara. He and his wife had separated, and there was a suit pending between them. He came to see

his wife the evening before the breaking. That night, and the next morning, he left, his wife acted singularly. He came again to see his wife the next evening, and Mrs. Delara went to the door of the room in which they were, to hear what passed, as his wife had acted singularly the night before. She testified that while eavesdropping there, she heard his wife ask him: "Did you do what you were going to do last night?" He said: "Yes, it is all clear." She said: "Did you get the books?" He answered: "Yes, I got the books, all but one, and I am going back after that. I left the place a total wreck. When W. Jenkins goes there in the morning he will think a cyclone has struck the place." She said: "Did you get the money?" He said: "I wasn't out for money. There was seven dollars or eighteen dollars in the safe." C. H. Jenkins was the secretary and treasurer of the company. The house was entered by a door to which Everson had a key, and he was shown to have had a key made which unlocked a door necessary to be opened to get into this door. He claims to have had this key made to unlock a door at his home.

The court refused to admit the evidence of Mrs. Delara on the ground that a communication between husband and wife was confidential. While neither the husband nor wife can testify as to any communication between them, the authorities, so far as we can find, are unanimous in holding that third persons may testify to communications overheard by them between husband and wife: *State Bank v. Hutchinson*, 62 Kan. 9, 61 Pac. 443; *State v. Center*, 35 Vt. 379; *Allison v. Barrow*, 3 Cold. (Tenn.) 414, 91 Am. Dec. 291; *Gannon v. People*, 127 Ill. 507, 11 Am. St. Rep. 147, 21 N. E. 525; *Commonwealth v. Griffin*, 110 Mass. 181; *Rex v. Simons*, 6 Cal. P. 542. In the last case, Alderson, B., said: "What a person is heard saying to his wife, or even to himself, is evidence." The rules as to private communications between husband and wife is by all the authorities put on the same plane as private communications between attorney and client; and it has been said that if persons wish the communications they have with their attorneys to be kept secret, they should be careful not to talk in the hearing of others: 4 *Wigram on Evidence*, 2339; 1 *Greenleaf on Evidence*, sec. 254. A contrary rule was not laid down in *Scott v. Commonwealth*, 94 Ky. 511, 11 Am. St. Rep. 371, 15 Ky. Law Rep. 251, 23 S. W. 219. There the prisoner had written a letter to his wife, and the letter was obtained from her. It was held that it could not be given in evidence against the prisoner. To have allowed the letter to be given in evidence against the prisoner, under the circumstances,

stances, would have been in effect to allow her to disclose the communication which the husband had made to her. The commonwealth also offered evidence tending to show that Everson had placed to his individual credit, at the American National Bank, two checks of the Steam Joint Company, amounting to about six hundred dollars, and that these checks had not been issued by the company; that the defendant had obtained from the bank the bundle of checks containing these two checks. The court also ruled out this evidence.

The defendant could not be convicted of forging the checks, or of embezzling the money of his employer; but proof that he had embezzled the money of his employer, and that this fact was shown by the books and checks which were stolen when the warehouse was <sup>334</sup> broken open, was competent evidence against him upon the question of motive. The court should have admitted the evidence, and should have instructed the jury as to the purpose for which it might be considered by them: *O'Brien v. Commonwealth*, 89 Ky. 354, 11 Ky. Law Rep. 534, 12 S. W. 471; *Bess v. Commonwealth*, 116 Ky. 927, 25 Ky. Law Rep. 1091, 77 S. W. 349. If the defendant had embezzled the money of his employer, and if he had cashed the checks made out to himself, which had not been given to him by the company, and the books and the papers in the office showed these facts, there would be a strong motive prompting him to destroy the evidence of his guilt; and in cases of this sort, depending upon circumstantial evidence, proof of this character, showing a motive on the part of the defendant to commit the crime, is universally held competent.

We are therefore of the opinion that the circuit court erred in the rulings above indicated, and it is ordered to be so certified.

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*A Third Person Hearing a Conversation between husband and wife may give evidence thereof:* See the note to *Commonwealth v. Sapp*, 29 Am. St. Rep. 414. And statements made by clients in the presence of third persons, or of the opposite party and his solicitor, are not of that confidential nature which the client may insist shall not be disclosed by an attorney or solicitor: *Scott v. Aultman Co.*, 211 Ill. 612, 103 Am. St. Rep. 215.

*The Admissibility of Evidence of Other Crimes* in criminal prosecutions is the subject of a note to *Sykes v. State*, 105 Am. St. Rep. 967.

## COMMONWEALTH v. JOHNSON.

[123 Ky. 437, 96 S. W. 801.]

**CLERK OF COURT, Liability of.**—The clerk of a court is responsible for his errors unless he can show that he used reasonable care and diligence to avoid such error. (p. 369.)

**ACKNOWLEDGMENT OF DEEDS—Liability of Officer Certifying to the Identity of the Person Executing.**—If a clerk takes the acknowledgment of an instrument exercises that diligence which a reasonably prudent and cautious man will exercise under like circumstances, he is not liable to the person injured by relying on certificate of such acknowledgment, though in fact the person whose identity is certified to is an imposter, and not the party named on the instrument. (p. 370.)

**OFFICER AND DEPUTY, Liability of the Former for Negligence of the Latter.**—The clerk of a court is liable for damages resulting from the careless or negligent act of his deputy. (p. 371.)

**ACKNOWLEDGMENT OF DEED, Duty of Officer in Certifying to the Identity of the Person, When Sufficiently Performed.**—If a deed is produced to the proper officer for the purpose of obtaining his certificate showing its execution and acknowledgment by the person named therein, and a business man of long standing and good reputation introduces to such officer the person as the one named on the certificate and who executed the writing, this is competent evidence to show that the officer exercised due care and diligence on the part of the officer, and supports a finding of judgment relieving him from liability for damages resulting to a person from acting on the certificate of such acknowledgment, the person thus introduced having in fact been an imposter. (p. 371.)

James T. A. Baker and John Roberts, for the appellants.

Bodley, Basken & Flexner, for the appellees.

<sup>439</sup> NUNN, J. Appellee, William P. Johnson, was for many years clerk of the Jefferson county court, and Walter Ratcliffe, during all those years, was his deputy. On December 21, 1900, E. D. Fryer, a real estate agent, went to the county clerk's office and introduced to Mr. Ratcliffe a woman as Mrs. Mary E. Schneider, and presented to him a mortgage which purported to be a mortgage from Mary E. Schneider to Margaret Green. The woman thus introduced acknowledged the mortgage as the act and deed of Mary E. Schneider, making her mark instead of writing her signature, and the signature thus made was witnessed by E. D. Fryer and Walter Ratcliffe then, as deputy clerk, appended a certificate that it had been acknowledged by Mary E. Schneider, and handed it back to the woman, and some time thereafter delivered it, through E. D. Fryer, to James T. A. Baker, who was attorney for <sup>440</sup> appellant, Margaret Green. Upon this pretended mortgage, the woman referred to being an imposter,

the appellant, Green, made a loan of six hundred dollars. The mortgage debt not being paid at maturity, the appellant brought suit against the real Mary Schneider, who defended upon the ground that the mortgage and note were not executed by her. Judgment was rendered in her favor. Thereupon Mrs. Green brought this action against the clerk, William P. Johnson, and his bondsman, alleging in substance the making of the false certificate of acknowledgment, her reliance upon same in loaning her money, and her loss of it. An issue was formed, the law and facts were tried by the court without a jury, and judgment was rendered in behalf of appellees.

The parties do not disagree upon the point that the woman who actually acknowledged the mortgage was an imposter. The appellant contends that, as the certificate of the clerk was untrue, and she, relying on the truth of it, lost six hundred dollars, the clerk should make good to her the loss. The appellee contends that the clerk and his bondsman are not liable for the negligence of the deputy clerk; that the county alone is responsible therefor; second, that, even if the clerk was liable for the deputy's wrongful or negligent acts, the deputy, Ratcliffe, was not guilty of any wrongful or negligent act in the matter referred to; that he used reasonable diligence and proper care in ascertaining the identity of the mortgagor; and that he was imposed upon by the woman and B. D. Fryer.

We will consider these questions in the order stated.

We cannot agree with appellant's claim that the clerk is liable because his certificate is untrue; that he is an insurer of the identity of persons who execute conveyances. If the county clerk, in taking such acknowledgments, is to be charged with such a responsibility and held liable for all losses, it matters not how careful and diligent he may be, then it would<sup>441</sup> be extremely difficult to get an intelligent person to accept the office. It is conceded that the clerk in this state, in taking the acknowledgment of conveyances, acts in a ministerial, and not in a judicial, capacity. If they acted in a judicial capacity, of course, they would not be responsible for a mere error of judgment, but, acting in a ministerial capacity, they are responsible for their errors unless they can show that they occurred notwithstanding the use of reasonable care and diligence on their part to prevent same. The appellant's counsel refers to the case of *Samuels v. Brand*, 26 Ky. Law Rep. 948, 82 S. W. 977, in support of their position.

that the clerk is an insurer of the identity of a grantor or mortgagor. In that case the clerk certified to the genuineness of the signature of one of his deputies. It turned out, as a matter of fact, that the indorsement on the deed and the signature of the deputy were forgeries, and the court held that the clerk was chargeable with the duty of knowing the signature of his own deputy, whose acts in effect were the acts of the clerk. That case is unlike this. There is no case where we have been able to find which supports the contention that the clerk must know at his peril every man and woman who acknowledges a conveyance before him, but, on the contrary, the authorities are to the effect that, if a clerk in taking an acknowledgment exercises that diligence which a reasonable prudent and cautious man would exercise under like circumstances, he performs faithfully the duties of his office, and complies with the terms of the bond and oath of office.

We cannot agree with the appellant's counsel in their claim that the clerk is not liable in damages resulting from the negligent and careless act of his deputy. It is true that there is authority in support of the contention that in certain cases the clerk is not liable for the acts of his deputy, but this court has never announced this principle. In American and English Encyclopedia of Law, volume 9, second edition, page 381, it is said: <sup>442</sup> "The principal is liable civiliter for the malfeasance, malfeasance or nonfeasance of his deputy in the performance of his official duties, and this, it has been held, whether the deputy is regarded as a district and independent officer or as the mere agent or servant of the principal," and it refers to many cases in support of the text, and several of them Kentucky decisions. In our opinion, when the appellant proved that the clerk or his deputy took the acknowledgment of this woman, the imposter, as Mrs. Schneider, there was a prima facie case of negligence was made out against the clerk and it devolved upon him to show that his deputy, in taking the acknowledgment, used care and diligence to prevent fraud and imposition.

The only remaining question is, Was there any evidence tending to show care and diligence on the part of the deputy clerk to prevent the fraud perpetrated in this case? It appears, and it is conceded, that Fryer, who brought the woman, the imposter, to the clerk's office, was a business man of long standing and good reputation in the city of Louisville; that he introduced this woman to the clerk as Mrs. Schneider; that he attested her signature as that of Mrs. Schneider; that, in the manner followed in the general course of business,



vouched to the clerk for the identity of the person who was present as Mrs. Schneider. The clerk accepted this introduction and took the acknowledgment and made the certificate. In our opinion this was competent evidence tending to show care and diligence on the part of the clerk; whether it was sufficient to overcome the prima facie case made out by appellant was a question peculiarly within the province of the court trying the case.

The parties waived a jury and submitted the law and facts to the court, and its judgment upon the facts is entitled to the same force and effect as the verdict of a jury, and should not be disturbed unless flagrantly against the evidence.

For these reasons, the judgment is affirmed.

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*On the Acts of Public Officers for which their sureties are liable, see the note to Feller v. Gates, 91 Am. St. Rep. 497. The liability of notaries in reference to acknowledgments is discussed in the note to Joost v. Craig, 82 Am. St. Rep. 382.*

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## CITIZENS' INSURANCE COMPANY v. HENDERSON ELEVATOR COMPANY.

[123 Ky. 478, 96 S. W. 601, 97 S. W. 810.]

**INSURANCE AGENT, Implied Powers of as to Permitting Policy to Remain in Force After Receiving Instruction to Cancel.**—It is within the apparent scope of the authority of an agent of an insurance company with the power to write insurance and issue policies to determine how long the policy shall remain in force in the absence of some restriction on his authority, and the assured has the right to deal with the agent upon the faith of such apparent authority, unless he has notice of restrictions placed on the agent. (p. 374.)

**INSURANCE—Waiver—Cancellation of Policy.**—Though an agent of the insurer notifies the assured that the former is instructed to cancel the policy, yet if the agent tells the assured that the policy may remain in force until such agent gets the assured another policy for the same amount, then the cancellation is waived, unless the assured knows that the insurer directed the agent to cancel the policy immediately. (p. 375.)

**INSURANCE—Principal and Agent.**—As an insurance company selects its own agent, it must be held bound by his acts within the apparent scope of his authority, except as against persons who have notice of restriction thereon. (p. 375.)

Lockett & Worsham, for the appellant.

Clay & Clay, for the appellee.

<sup>480</sup> HOBSON, C. J. On October 8, 1903, appellant's local agent issued to appellee a policy of insurance for twelve hundred dollars on hay and grain in its warehouse at Janesville, Illinois. The policy, among other things, contained the following clause: "This policy shall be canceled at any time at the request of the insured or by the company by five days' notice of such cancellation." On October 16th the company wrote to its local agent the following letter: "We are obliged to rescind this policy as we are not writing hay, or building containing the same, under any condition. Kindly take up, and return the policy for cancellation immediately." The local agent, Cox, received the letter on the 17th, and on that day submitted the risk to another company. The risk was declined. On the 19th he submitted it to a second company, and on the same day he went to Janesville to get the policy he had issued to appellant. He there met Gordon, the agent of the Northern. What Cox says took place between them is as follows: "I just tell as near as you can what passed between you and him in respect to the policy on that day? A. I stated to him the order from the Citizens' Insurance Company to cancel, and also that he had submitted it to the Northern, and that I had come down to get the policy, and he said he couldn't give it to me because it had been sent to the Henderson company. I went with him around the building, and made a diagram of the building, and used it afterward with the other insurance companies. He asked then if he wasn't entitled to some time—five days' notice. I said: 'Yes, I can give you the five days' notice right now. But,' I said, 'I have submitted it to the Northern.' 'Well,' he said, 'I will waive that; that is, I won't require that; I will write to the company and get another policy.' Q. That was in response to your request to deliver it to you? A. Yes, sir; I went for the policy, and asked him for it." Gordon says that the conversation between them after the diagram of the building was made was as follows: "He said: 'The company is dissatisfied with this insurance; they are going to cancel it.' 'Well,' I spoke up, 'They have a right to cancel it, but the Henderson Elevator Company don't want to be without insurance, and there are plenty of other companies that will carry it.' Mr. Cox said: 'We want the policy; we don't want it to leave our agency, and this policy is good until I send you another policy.' And then we negotiated on those terms, about; that is my recollection about that was said about the insurance. We may have passed some compliments after that. Q. Did you say until you sent another policy; for how much—was anything said about h

much the other policy would be? A. It was to be the same amount as the one we had, twelve hundred dollars."

The company to which application had been made to take the risk declined to take it. Cox then applied to a third company to take the risk. This company agreed to take the risk for six hundred dollars, but declined to take it for twelve hundred dollars. On October 30th a policy for six hundred dollars in this company was issued, and mailed to appellee. That night the property burned. The next morning Gordon brought the policy issued by appellant to Cox's office and delivered it, saying nothing about the fire. He was told that the policy that had been sent him was for only six hundred dollars, and that they were trying to place the other six hundred dollars, but had not been able to do so. He said that if it was placed, he would expect them to divide the commission with him as before. Gordon says that he did not tell them about ~~the~~ the fire because he thought they were trying to trick him, and did not know that the policy sent the day before was for only six hundred dollars until after he delivered up the first policy. On this evidence the court instructed the jury as follows:

"1. Gentlemen of the jury: The court instructs you to find for the plaintiff the sum of twelve hundred dollars, with six per cent interest thereon from the twenty-third day of February, 1904, unless you believe from the evidence that prior to the time of the fire that destroyed plaintiff's property covered by the policy of insurance sued on and mentioned in evidence, the agent or agents of the defendant canceled said policy of insurance and so notified the plaintiff's agent Gordon of its cancellation by giving said agent five days' notice before said fire of such cancellation; or if you believe from the evidence that defendant's agent or agents prior to the time said fire occurred canceled said policy, and also believe from the evidence that the said agent of plaintiff, upon being notified of such cancellation, if he were so notified, agreed to or did waive said five days' notice of cancellation, then in either such event the law is for the defendant, and you will so find.

"2. Although you may believe from the evidence that defendant ordered said policy to be taken up for cancellation more than five days before said fire, yet if you further believe from the evidence that before it was taken up or canceled by defendant or its agent it was agreed between plaintiff's agent Gordon and the defendant's agent, Cox, that said policy of insurance should be and remain in full force until defendant's said agent should obtain for said plaintiff another policy of

insurance on said property so covered for the same amount as some other company or companies, and that the fire complained of occurred before such other insurance was so obtained for plaintiff, then in that event you will find for plaintiff as heretofore indicated; otherwise, you will find for the defendant."

<sup>483</sup> When the policy was brought in on the 31st an endorsement was made upon it as follows: "Canceled by order of the company, October 31, 1903." This notation was made by the bookkeeper of the local agent, and was read to the jury. The difficulty with the court's instructions to the jury is that the jury from the phraseology of the instructions were warranted in concluding that the policy was in force until it was taken up by the agent. On the contrary, the company had the right to cancel it on five days' notice. No question arises in the case about the return of the premium because both parties agree that what had been paid was to be applied to the next insurance when obtained. If Cox told Gordon that the company had ordered the policy canceled, and that he had come down to get it, and Gordon said he would write and get a new policy, it stood canceled within five days from that time, and the defendant is not liable. But if Cox undertook or agreed with Gordon that the policy should hold good until he sold him another policy of the same amount, and the fire occurred before such other insurance was obtained, the company was liable unless Gordon knew or was informed that Cox had been instructed to cancel the policy immediately. In lieu of the instructions given, the court should have instructed the jury as above indicated.

Cox was agent of the company with power to write insurance and issue policies. It was within the apparent scope of his authority to determine how long the policy should be in force in the absence of some restrictions upon his authority, and Gordon had a right to deal with him upon the faith of his apparent authority, unless he had notice of the restrictions which had been placed upon him. If Cox had said to Gordon that he would have to cancel the policy but that he would give him two weeks to get other insurance, Gordon would have had a right to suppose that, as he had authority to issue policies, he had authority to make <sup>484</sup> such an agreement. The agreement that the policy should remain in force until he had located the risk in another company was in effect only an agreement that it should remain in force a reasonable time for this purpose. The fact that Cox was to place the risk in some other company is not material. The contrary

would be essentially the same if it had been that the policy should continue until Gordon could place the risk in some other company. In placing the risk in another company Cox did not act for appellant. The arrangement would be in legal effect the same if some third person had been agreed upon to place the risk in another company, and Cox had agreed that the policy which he had issued should remain in force until the new insurance was obtained. Such an arrangement would be in effect an agreement not to cancel the policy then, but to wait and to give an opportunity for the procurement of other insurance before the cancellation would take effect. In the absence of some restrictions upon Cox's authority, of which Gordon had notice, such an agreement would be within the apparent authority of an agent authorized to make contracts of insurance. The company selects its own agents, and when third persons deal with them, without notice of restrictions upon their authority, the company should be held for the acts of the agent within the scope of his apparent authority. We have examined the case of *Miller v. Insurance Co.*, 54 W. Va. 344, 46 S. E. 181, but the facts of that case are so different from the facts here, that it seems to have little application.

Judgment reversed, and cause remanded for a new trial.

#### ON REHEARING.

HOBSON, C. J. In lieu of the instructions given, the court, under the evidence, should have instructed the jury, that (1) they should find for the plaintiff unless they believed from the evidence that defendant's <sup>485</sup> agent, Cox, five days before the fire which destroyed the property, notified the plaintiff's agent, Gordon, that the company had ordered the policy canceled; and, although such notice was given, still they should find for the plaintiff, if Cox then agreed with Gordon that the policy should remain in force until he got him another policy for the same amount, and the fire occurred before such other insurance was obtained, unless Gordon then knew that Cox had been ordered by the company to cancel the policy immediately; (2) if notice was given that the company had ordered the policy canceled, and there was no agreement by Cox that the policy should continue in force, as set out in No. 1, or if Gordon was informed by Cox that he had been ordered by the company to cancel the policy immediately, the jury should find for the defendant; (3) the letter from the company to Cox, read in evidence, was an order to cancel

the policy immediately. The opinion is extended to this extent, as counsel seem to have misapprehended it.

The petition for rehearing is overruled.

*The Waiver by Insurance Agents of conditions in policies of insurance is discussed in the note to Johnson v. Aetna Ins. Co., 107 Am. St. Rep. 99.*

### JUNG BREWING COMPANY v. COMMONWEALTH.

[123 Ky. 507, 96 S. W. 595.]

**NUISANCE in the Keeping of a Place for the Sale of Intoxicating Liquors.**—A house in which beer is kept for sale by the keg and in front of which crowds of men collect, after first contributing the moneys necessary to make a purchase of a keg, and where, after purchasing and drinking beer, they become boisterous, intoxicated and disorderly, and continue about the house, so that the public are disturbed and women avoid the street, is a public nuisance, and indictable as such. (p. 377.)

J. W. Alcorn, for the appellant.

N. B. Hays, attorney general, and Lorame Mix, for the commonwealth.

**508 BARKER, J.** The appellant corporation, Jung Brewing Company, was indicted by the grand jury of Laurel county, charged with maintaining a public nuisance on its premises in the town of Pittsburg, Laurel county, Kentucky. Upon trial it was found guilty by the jury, and a fine of five hundred dollars inflicted by the verdict.

The evidence on the trial showed that Pittsburg is a small mining town without police or town authorities, situated in a local option district; that some months before the indictment herein was found the Jung Brewing Company rented the house referred to, which is near the center of the town and not far from the church or schoolhouse on one of the main thoroughfares of the town; that it kept in the house beer for sale by the case or keg (one Hocker being the agent), and also kept a wagon to deliver the goods. A keg of beer was sold for two dollars, and a case for three dollars and thirty cents, the case consisting of thirty-six quart bottles, which were to be returned by the purchaser. Crowds of men, mostly miners, ranging from ten to twenty-five or over in number, would collect in the street in front of the house; some one would go in and get a case of beer and bring it out in the street, or o

the railroad property just across the street, where, in view of the house from which it was purchased, it would be divided among those who had made up the money, and the beer would then be drunk, the crowd getting intoxicated, boisterous and disorderly, and continuing in the street and about the porch of the house for hours. This was a frequent occurrence, so that women avoided the street, and the public passing there was disturbed. The town postoffice was nearby, and the schoolhouse was not far off. The crowd sometimes went in the house or on the porch. The agent, Hocker, to get rid of them, on some occasions closed up the house. Sometimes the beer was carried off in sacks and sometimes in the original case. The disorderly crowd could be seen <sup>509</sup> from the house, dividing the beer. One witness testified to a division made in the house, and other divisions were made in the street within ten feet of the house. The sales were not made to retail dealers, but to miners who could not afford to buy so much beer individually. At other times the beer was taken farther away. Sometimes it was sent by a wagon to a grove some distance off, and there divided. Such was in substance the evidence for the commonwealth.

The evidence for the defendant was to the effect that there was no disorder in the house, and that Hocker sold the beer by the wholesale, in quantities not less than five gallons; also that the crowd about the house and in the street was not drunk or disorderly or profane. But the evidence for the commonwealth tended to show that for some months the selling of beer in this way at the house had caused this disorderly crowd to collect, and that instead of a local option community, where intoxicants could not lawfully be sold, beer was sold freely, and in a more objectionable manner than if the local option law had not been in force, causing a serious public nuisance.

The question involved on the trial of this case was not whether the defendant violated the local option law. It is not charged with that offense, but whether or not, within the time mentioned in the indictment, it had maintained a common nuisance at the place named therein. The evidence of the commonwealth upon the trial, if true, established the offense with which the defendant was charged beyond doubt. Conceding that it had a right to sell liquor by wholesale, or even that it was an authorized retailer, it had no right to allow the assembling around its premises of noisy, drunken, boisterous crowds, whose "swilled insolence" and profanity made the use of the highway in that neighborhood, by women, al-

ways unpleasant and sometimes dangerous. The saturnal orgies described by the women who testified for the <sup>510</sup> c. monwealth upon the trial below accentuates the great importance to the public peace and safety that the laws regulating the sale of liquor in mining towns should be enforced with a firm hand and the strictest integrity. The sale of liquor in a community such as is involved here is almost as dangerous as the handling of fire in the neighborhood of powder, and, therefore, it is incumbent upon those who sell it in such localities to see that the business is conducted in a lawful manner, and to exercise the utmost watchfulness that the public peace be not endangered.

A careful reading of this record convinces us that the appellant had a fair and impartial trial, and that no injury was done it, either in the rulings of the court or by the verdict of the jury.

Judgment is affirmed.

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*A Place Where Liquor is Sold* may amount to a public nuisance: see the note to *Acme Fertilizer Co. v. State*, 107 Am. St. Rep. 229; so a poolroom or turf exchange maintained to facilitate betting on horse races: *State v. Vaughan*, 81 Ark. 117, 118 Am. St. Rep. 29.

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## ALEXANDER v. GARDNER.

[123 Ky. 552, 96 S. W. 818.]

**FORCIBLE DETAINER**—Necessity of the Relation of Landlord and Tenant.—To maintain a writ of forcible detainer, the relation of landlord and tenant must exist, and the reservation of rent in such form and allegiance to the title are distinguishing characteristics of the contract by which the relation of landlord and tenant is created. (p. 379.)

**LANDLORD AND TENANT**—Definition of Tenant.—A tenant is one who occupies the premises of another in subordination of another's title and with his assent, express or implied. (p. 379.)

**LANDLORD AND TENANT**—Relation of, When Exists Between a Land Owner and the Purchaser of Timber.—If a land owner sells and conveys the timber standing on his land, giving the purchaser the rights of way and privileges usually extended to lumbermen, including the right to erect tramways, cabins, buildings and appliances necessary to remove such timber, and the purchaser agrees that at the end of three years the timber shall be removed, and that the refuse timber, barns, houses and other structures remaining on the premises shall revert to the owner, the relationship of landlord and tenant is thereby created between the land owner and the purchaser. (p. 380.)



**FORCIBLE DETAINER.—Land Owner and Purchaser of Timber.**—Where a conveyance of a land owner to a purchaser of timber is such that the relationship of landlord and tenant is created between them, the former, on the expiration of the time for the removal of the timber and the reverting to him of the property remaining on the premises, may maintain a writ of forcible detainer against the purchaser who remains in possession. (p. 380.)

D. D. Sublett, for the appellant.

A. F. Byrd, for the appellees.

<sup>553</sup> CARROLL, C. In 1901 the appellees sold and conveyed to appellant, by deed duly acknowledged, all the timber and trees on a tract of land described in the conveyance—the deed providing that the grantee should have all the rights of way and privileges over and upon the land usually extended to lumbermen including the right to erect tramways, cabins, buildings and machinery necessary for the manufacture and removal of timber; and provided that the timber was to be removed within three years from May 1, 1901, and that all refuse, timber, bars, houses, cabins, sheds, erected on the premises by the second party (appellant) and remaining in the premises should revert and become the property of the present owners (appellees). On the sixteenth day of May, 1904, appellees procured a warrant of forcible detainer against the appellant, to recover the possession of the leased premises, and the only question to be determined on this appeal is whether or not a warrant of forcible detainer is the proper remedy in a case like this. Code, section 452, defines a forcible entry as “the refusal of a tenant to <sup>554</sup> give possession to his landlord after the expiration of his term”; and it has been held that, to maintain the writ of forcible detainer, the relationship of landlord and tenant must exist, and that the reservation of rent in some form and allegiance to the title are the distinguishing characteristics of a contract by which the relation of landlord and tenant exists: *Goldsberry v. Bishop*, 2 Duval, 143; *Cuyler v. Estis*, 23 Ky. Law Rep. 1063, 64 S. W. 673.

The first question to be determined is, Did the relation of landlord and tenant exist in any degree between these parties by virtue of the contract or conveyance referred to? A tenant has been defined to be one who occupies the lands or premises of another in subordination to that other's title, and with his assent, express or implied: *Wood on Landlord and Tenant*, sec. 1; *Taylor on Landlord and Tenant*, sec. 14. No particular form of words is necessary to create the relation, nor does the length of the term or the amount of the

compensation paid affect the question. Under the contract in this case, the appellant had the right to occupy the land for three years in consideration of a stipulated sum and the privilege of erecting buildings, putting machinery on the land, and making roads and tramways to enable him to enjoy the premises for the purpose for which they were granted. He was not given the right to use the land except in the manner pointed out in the contract, nor is the use of the land essential to create the relation of landlord and tenant. A tenant has the right to enter upon the premises granted for a specified purpose, and to this extent may enjoy the land and he does this in subordination to the title of the owner and with his assent, and, as a consideration, pays money or other thing of value, or even without the payment of any consideration, the relation of landlord and tenant is created. The reservation of rent is not essential to create the relation, although it is a usual incident of tenancy.

<sup>555</sup> It is insisted that this contract was a license, and not a lease, and it is often difficult to determine the difference between the two; but we think the difficulty in this case is removed by the terms of the contract itself. A license is defined to be: "An authority to do some act or a series of acts on the land of another without passing an estate in the land. It amounts to nothing more than an excuse for an act which would otherwise be a trespass. Being a personal privilege, it can be enjoyed only by the licensee. It is not assignable, so that an under-tenant can claim the benefit of the license to the licensee": Taylor on Landlord and Tenant, sec. 237; Wood on Landlord and Tenant, sec. 227; 18 Am. & Eng. Ency. of Law, 1127; Heywood v. Fulmer, 158 Ky. 658, 32 N. E. 574, 18 L. R. A. 491. Under the conveyance here involved, the grantee had the right to sell, convey or assign the rights and privileges granted by the contract, the right to the use for the purposes mentioned of all the land described therein, and at the expiration of the term to surrender the premises; therefore, the contract had all the elements of a lease, and the grantee was in effect a tenant of the grantor, and, consequently, upon the termination of the lease could be ejected by writ of forcible detainer.

The judgment of the lower court is affirmed.

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*On the Law of Forcible Entry and Detainer*, see the note to *Washington v. Campbell*, 121 Am. St. Rep. 369; and on the law of unlawful detainer, see the note to *Washington v. Moore*, 120 Am. St. Rep. 3.

**MUTTER v. MUTTER.**

[123 Ky. 754, 97 S. W. 393.]

**DIVORCE Because of the Physical Incompetency of the Woman.**—A husband is entitled to a divorce because of the incompetency of his wife for sexual intercourse known to her, but not to him, before the marriage, though it may be possible by resort to surgery to remove such incompetency. (p. 382.)

**ALIMONY, Denial of Because of the Fault of the Wife.**—Alimony must be denied to a wife where the divorce is granted for her physical incompetency known to her before the marriage and concealed from her husband, if the statute requires the denial of alimony to the spouse "in fault." The word "fault," as used in the statute, means more than wrong or error, and includes blemishes and defects. (p. 382.)

**ALIMONY, When not Allowable to a Wife.**—In Kentucky alimony is not allowed to a wife shown to be in fault, where a divorce is granted to the husband because of such fault. (p. 382.)

**DIVORCE—Liability of Husband for Costs and Attorney's Fees.**—In a suit by a wife for divorce in which her husband files a counterclaim and obtains a divorce for some fault or defect on her part, he is liable for the costs and also for the compensation of her attorneys in prosecuting the suit, though not for alimony. (p. 383.)

W. L. Porter, for the appellant.

Hatchett & James and Luther James, for the appellee.

<sup>755</sup> **LASSING, J.** The parties to this litigation were married in August, 1904. They separated three days thereafter, and in June, 1905, the wife instituted this suit for a divorce from bed and board, and for alimony, the grounds relied upon being abandonment and failure to support. The husband answered, denying the allegations of the petition, and setting up a counterclaim, seeking an absolute divorce on the ground of such malformation on the part of the wife as to prevent sexual intercourse. On these pleas issues were joined, proof taken, and upon final hearing, the trial court adjudged the husband entitled to the relief sought in his counterclaim, and granted him a divorce from his wife, Laura H. Mutter, and further adjudged that he should pay to her three hundred and thirty-five dollars alimony, and the cost of the proceeding, including seventy-five dollars attorney's fee allowed to her attorney. From this judgment both parties appeal.

The proof shows that the appellee was a woman of mature years, more than forty years of age; that appellant <sup>756</sup> was a widower, some years her senior; that they lived together but three days, when he took her home to her

nephew's, and left her there, alleging that she was not a natural woman, and that he had been deceived and defrauded into marrying her. It is further shown that appellee was not a naturally, or normally, formed woman, but that the opening in the hymen was abnormally small, so much so that it amounted to malformation; that in her condition it was impossible for her to have had sexual intercourse; in fact the condition of the hymen was such that it even prevented perfect menstruation. These facts were known to her before marriage, but she did not acquaint appellant with them. The physicians who testified in the case say that, through the aid of medical science, appellee might be enabled to fill the proper place of a wife, but on this point they are not entirely certain that a perfect result could be obtained, either by dilatation or by the use of the knife. Appellant declined to resort to the means suggested by the physicians, and declined to live with appellee.

We are of opinion that appellant was not required, or called upon, to resort to surgery in order to construct a wife. He has a right to expect to find his wife of natural build and proportion, and, when such malformation existed as would, as it did, prevent sexual intercourse, and this fact was concealed from him by appellee until after marriage, appellant was entitled to the decree granted. He was in no wise at fault, but the fault was wholly with the wife. She deceived appellant into marrying her by concealing from him her true physical condition. The word "fault" as used in the statute means more than a wrong—an error—a deviation from the rules of propriety; it means, also, a defect, or blemish, or impairment of excellence, and it is in this latter sense that the appellee was in fault, and, being in fault, she was not entitled <sup>757</sup> to alimony. The husband should not be made to suffer because of the wrong or fault of the wife, and the court has never held in any case where a divorce was granted to the husband because of some fault on the part of the wife that the wife should receive alimony at the hands of the wronged or injured husband. In the case of *Newsome v. Newsome*, 15 Ky. Law Rep. 801, 25 S. W. 878, the court said: "Either may sue for and obtain a divorce by simply alleging and proving the fact that they have lived apart without any cohabitation for five consecutive years, no judicial investigation respecting cause of separation nor inquiry as to who is in fault in meaning of the statute being required in order to determine the right to divorce." And continuing, the court said: "It seems to us, giving the statute a reasonable

construction, the husband is required, in a case like this, to pay costs of each party, without inquiring whether the wife is in fault." And again, in this same case, the court said: "It seems to us equally manifest that the provision of the statute denying alimony to the wife except 'on a divorce obtained by her' was intended to apply in that class of cases where a divorce obtained by the husband involves fault of the wife, not in cases like this, where, as either may maintain the action, it is not a material or legitimate inquiry in determining the right, who is in fault." Thus it will be seen that in the Newsome case the ground upon which the divorce was granted was the five year statute, and, there being no inquiry in that case as to who was in fault, the court properly held that, in the absence of any showing as to who was in fault, a reasonable alimony would be allowed the wife. But it is also clearly indicated in said case that, where it is necessary in order to grant the divorce to show that one or the other party is in fault, it is the invariable rule of this court that, where the wife is shown to be in fault, no alimony is allowed.

<sup>758</sup> Until the decree is granted the husband is liable for the debts of the wife, and this court has held, in any number of cases, that the costs contracted in the prosecution of her suit for divorce, including a reasonable fee to her attorney for his services, are properly adjudged against the husband, and, from an examination of the record in this case, we are of opinion that the fee allowed, to wit, seventy-five dollars, is not excessive.

It being shown in this case that the wife was in fault, and but for such fault on her part no decree of divorce could have been granted, the trial court erred in allowing any alimony whatever to appellee.

The judgment is reversed and cause remanded, with direction for further proceedings consistent with this opinion.

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*Impotency as a Ground for Divorce* is the subject of a note to S.—— v. S.——, 116 Am. St. Rep. 241.

# LOUISVILLE AND NASHVILLE RAILROAD COMPANY v. COYLE.

[123 Ky. 854, 97 S. W. 772, 99 S. W. 237.]

**CONTRACT, When not Mutual.**—If one party offers to furnish railroad ties for the rest of this year and the next, without specifying any class of ties or place of delivery, and the other party responds that he will take all the ties put on at a specified place within the next twelve months, provided they come up to regular specifications, the offer and the reply do not constitute a binding contract, because their terms are not the same. (p. 385.)

**CONTRACT, Want of Mutuality, When Relieved by Partial Performance.**—Where a contract is lacking in mutuality, a partial performance may relieve it of this defect and render either of the contracting parties liable for damage for failure to complete performance. (p. 386.)

**SPECIFIC PERFORMANCE of Contract, When Becomes Practical Though Original Contract was Lacking in Mutuality.**—Where the performance of a contract not required to be in writing is not compulsory on one party and he has an election to perform or not as he chooses, and elects to perform and the other party accepts the election, the want of mutuality is thereby eliminated, and each may have specific performance in a proper case against the other, although no causal action would originally lie for a breach of performance. (p. 386.)

**DAMAGES, Measure of for Failure to Pay for Property Value. It has no Market Value.**—Where property is sold and the purchaser refuses to receive or pay for it, and the market price cannot be ascertained with reasonable certainty, or when there is no purchaser for the property except the one who has broken the contract to purchase, the measure of damages is not restricted to the difference between the market price and what was agreed to be paid for the property, but may be the difference between the sum so agreed to be paid and that for which the seller was obliged to sell it to some other person. (pp. 386, 387.)

**MEASURE OF DAMAGES for Refusal to Carry Out a Contract to Purchase Ties to be Manufactured.**—Where one agrees to purchase railroad ties to be afterward manufactured, but refuses to comply with his contract, the measure of damages for the ties which have not in fact been manufactured is the difference between the contract price and the market price, which, when there is no person to whom sales may be made except the defendant in the action, may be regarded as the price for which the plaintiff might purchase like property from others. (p. 387.)

John T. Shelby, J. W. Brown and Benjamin D. Warfield, for the appellant.

C. C. Williams, for the appellee.

**856 CARROLL, C.** To recover damages for breach of contract, appellee brought this action. The contract relation is found in the following letters:

"Boone, Ky., August 16, 1902.

P. Jones, Paris, Ky.

Dear Sir: I have a chance to buy a lot of nice timber which might take me the rest of this year and the next in all ways to have made up in ties and get them on. Will you take all that I could furnish—it would not exceed six thousand ties—at the present prices or any price that might be established after be established. Let me hear from you soon."

On the following day, Jones, who was roadmaster for appellant, replied:

J. B. Coyle: I will take all the ties you put on at Gap in the next twelve months, provided they come up to regular specifications.

Respectfully,

"P. JONES, R. M."

Under this contract Coyle furnished one thousand and ninety-nine ties, which were accepted and paid for prior to October 10, 1902, upon which date he was notified by Jones that the company would not receive or pay for any ties after October 29th, unless the attachment suit by appellee had instituted against one of appellant's employees was dismissed, and, upon the failure of appellee to dismiss the action, appellant refused to receive from him any ties after October 29th. Appellee, at the time the contract was broken, had on hand a number of ties, and testified that he could and would have delivered to appellant, within twelve months from the date of the contract, and at the point therein designated, a sufficient number of suitable ties to make the thousand contracted for.

Appellant insists that there was no mutuality in the contract, and, therefore, it was not binding upon either party, and could be broken at any time by either. This argument is based upon the ground that the letter written by Jones is an acceptance in terms of the offer made by appellee, as the offer was to furnish the ties "the rest of this year and next," and no place was specified for their delivery, nor the class of ties described, whilst the letter of Jones said he would accept all the ties put "on at the Gap within the next twelve months, provided they came up to regular specifications." It may be said for the reason indicated that the letter and the reply did not constitute a binding contract on either party (*New York Life Ins. Co. v. Levy*, 122 Ky. 29 Ky. Law Rep. 6, 92 S. W. 325), but it was a con-

tract not required by the statute of frauds to be in writing and a part performance of it relieved it of the lack of mutuality contained in the writings. The letters, which were uncertain, were made definite by the conduct of the parties in construing them and performing the contract, and when the contract was thus accepted and performed in part by both of the parties, it became a binding obligation upon each of them, and neither could thereafter abandon or break it without responding in damages to the other. Where the performance of a contract not required to be in writing is compulsory on one party, and he has an election to perform or not, as he chooses, and he elects to perform his part of the contract, and the other party accepts his election, the want of mutuality is thereby eliminated, and he may then have specific performance in proper cases against the adverse party although no cause of action would originally lie for a breach of performance: Page on Contracts, sec. 1619; *Allen v. N. Domain Oil & Gas Co.*, 24 Ky. Law Rep. 2169, 73 S. W. 858 747; *Hoffman v. Colgan*, 25 Ky. Law Rep. 98, 74 S. W. 724; *Lowe v. Ayer-Lord Tie Co.*, 29 Ky. Law Rep. 1302, 97 S. W. 383; *Cooper v. Lansing Wheel Co.*, 94 Mich. 272, 34 A. St. Rep. 341, 54 N. W. 39.

It is also urged that the court misinstructed the jury in defining the measure of damages that appellee might recover. The instruction upon this subject is as follows: "If you find for the plaintiff, you will find for him such a sum in damages for the cross-ties he owned at the time the defendant refused if it did refuse, to take any more ties, as will equal the difference between the contract price and the price for which the plaintiff sold such ties, and the profits, if any, that the plaintiff would have realized on the remainder of the six thousand ties to be delivered, such profits to be ascertained by deducting the difference, if any, between the contract price between the plaintiff and defendant and the market price of ties on the defendant's line of railroad at Boone Gap, and such further deduction as you find from the evidence to be reasonable for the less time engaged by plaintiff and for his release from the care, trouble, risk and responsibility attending full execution of the contract." It is said that the measure of damages for the failure to take the two hundred and eighty-eight ties on hand was the difference between the contract price and the market price at the time of the alleged breach, and generally this is the correct rule in estimating damages for breach of contracts such as this, but it appears from the evidence that there was no purchaser for these ties at or near the place of



and have been delivered except appellant—in fact, no market for the ties at or near the place of delivery, and therefore the market value of the manufactured ties could not be ascertained—and where the facts of the case are such that the market value of the property cannot be determined with reasonable certainty, <sup>859</sup> or when there is no purchaser for the property except the person with whom the contract is made and who has broken it, it is necessary that some other criterion of value should be established in order to afford the person injured relief for the loss he has sustained. And, in this case, the loss he sustained on the manufactured ties was the difference between the contract price and the price at which he was obliged to sell the ties: Sedgwick on Damages, sec. 52. As to the ties not manufactured, the testimony showed that appellee could purchase ties delivered at the Gap for a certain price, which was less than he was being paid by appellant, and therefore as the ties were not manufactured, the court properly instructed the jury that the measure of damage was the difference between the contract price and the market price, which in this case was, in effect the price appellee could purchase for. Receiving no error in the judgment, it is affirmed.

#### RESPONSE TO PETITION FOR REHEARING.

The findings must be reasonably construed in view of the situation and intention of the parties. It was manifestly contemplated by Coyle when he wrote his letter that the company should indicate when the ties were to be delivered and what time it would take. When it indicated this and he assented to the action, the contract was closed. This assent might be expressed in words or it might be inferred from conduct of the company had notice. The proof shows conduct on the part of Coyle from which his assent should be clearly inferred. The contract bound Coyle to deliver as many of the ties as he could get by ordinary care and diligence in the time fixed, and was not lacking in mutuality. On the whole record, the ends of justice do not warrant a reversal. Petition overruled.

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*Specific Performance of Contracts* in the absence of mutuality of obligation and remedy is considered in *Iron Age Pub. Co. v. Western Tel. Co.*, 83 Ala. 498, 3 Am. St. Rep. 758; *South etc. R. R. Co. v. Highland etc. R. R. Co.*, 98 Ala. 400, 39 Am. St. Rep. 74; *Warren v. Castello*, 109 Mo. 338, 32 Am. St. Rep. 669; *Hickey v. Dole*, 66 N. H. 36, 49 Am. St. Rep. 614. The rule that there must exist, as a prerequisite to specific performance, both mutuality of obligation and

remedy, has been very much narrowed in modern equity practice. *Frank v. Stratford-Handcock*, 13 Wyo. 37, 110 Am. St. Rep. 963. A want of mutuality may be waived, see *South etc. R. R. Co. v. Highland Ave. etc. R. R. Co.*, 98 Ala. 400, 39 Am. St. Rep. 74; and a want of mutuality may be cured, where one side of the contract has been performed, see *Yerkes v. Richards*, 153 Pa. 646, 34 Am. St. Rep. 721.

### GENEVA COOPERAGE COMPANY v. BROWN.

[124 Ky. 16, 98 S. W. 279.]

**LIMITATION OF ACTIONS—Computation of Time Including Day of Injury.**—Under a statute providing that an action for personal injury shall be commenced within a certain time after the accrual of the cause of action, in computing the time within which the action must be commenced, the day of the injury is included. (p. 390.)

**LIMITATION OF ACTIONS—Computation of Time—Sunday.**—If a statute provides that an action for personal injury shall be commenced within a certain time, and the last day of that period is a Sunday, that day is included, and the time within which the action may be brought cannot be extended to the following day. (p. 390.)

**LIMITATIONS OF ACTIONS—Parties.**—An action against an alleged corporation, which is in fact a partnership, is not the commencement of an action against the individual owners of such partnership, and hence will not suspend the running of the statute of limitations against them. (pp. 392, 393.)

J. H. Miller and Sweeney, Ellis & Sweeney, for the appellants.

G. W. Hickman, J. W. Boston, and L. P. Tanner, for the appellee.

**19 CARROLL, C.** To recover damages for injuries sustained on September 19, 1903, in operating a hoop-cutter the appellee, on May 12, 1904, instituted an action against Geneva Cooperage Company, alleging that it was a corporation created under the laws of the state of Ohio. The summons that issued on the petition was executed on W. J. Hazard, the chief agent and manager of the company. On September 19, 1904, Hazard filed an affidavit, denying that Geneva Cooperage Company was a corporation, and averring that H. B. Gregory and J. M. Gregory were partners doing business under the partnership name of the Geneva Cooperage Company, and owned and operated the factory in which Brown was injured. On the same day, September 19, 1904, the plaintiff, now appellee, filed an amended petition against

B. Gregory and J. M. Gregory, partners under the firm of the Geneva Cooperage Company, and W. J. Hazard. A demurrer on this pleading was executed on the defendants on November 19, 1904. On November 7, 1904, Hazard filed a demurrer to the original and amended petitions, and H. B. Gregory and J. M. <sup>20</sup> Gregory filed their joint answer, in one paragraph of which they averred that the injuries for which damages were sought to recover damages accrued more than one year before the filing of the amended petition and the commencement of the cause of action against them, and they relied on the statute of limitations in such cases made and provided as a bar to any recovery against them. A number of demurrers and motions were made and pleadings filed.

It being conceded that the Geneva Cooperage Company is a partnership composed of J. M. Gregory and H. B. Gregory, the appellants insist that their plea of limitation presented a complete bar to any recovery by appellee, and, if this contention is sustained, it will not be necessary to notice the other alleged errors relied on for reversal. The statute applicable to this question is section 2516 of the Kentucky Statutes of 1903, which provides: "An action for an injury to the person of the plaintiff, or his wife, child, ward, apprentice, or servant, . . . shall be commenced within one year next after the cause of action accrued and not thereafter." This court, in *Wilson's Admr. v. Illinois C. R. Co.*, 29 Ky. Law Rep. 148, 100 W. 572, considered the identical question here involved, and held that as Wilson was injured and died on the 6th of February, 1901, and the action to recover damages was not instituted until February 6, 1902, it was barred by the statute provided on here, as more than a year had expired between the time Wilson died and the institution of the action. Under the statute, the cause of action accrued immediately upon the commission of the injury, and the statute of limitation commenced to run on September 19, 1903, and, in computing the time within which the action must be commenced, that day must be included.

In the construction of this state, the word "year" <sup>21</sup> means a calendar year: Ky. Stats. 1903, sec. 452. And a calendar year is ordinarily and in common acceptation considered to be three hundred and sixty-five days. But if the calendar year is computed from a given day in a month, say September 19, 1903, and the time within which the action must be commenced expires in one year, it would expire on the next day after the 19th of September of the following year, namely, the 18th of September. And it happens that in thus com-

puting the time in this particular case, and counting from September 19, 1903, to September 18, 1904, inclusive, the appellee had three hundred and sixty-six days in which to institute this action. Ordinarily, there would be included in this period of three hundred and sixty-five days, but as 1904 was a leap year, one day was added. So that, giving the statute the most favorable construction, and extending the meaning of "calendar year" to its extreme limit, the action is not barred.

It will be observed that the language of this statute differs in some respects from that used in other sections of the charter on limitation. It does not conclude that the action shall be commenced "within one year next after the cause of action accrued," but the further words, "and not thereafter," are added, so as to remove any possible doubt that might exist as to the meaning and intention of the legislature.

Nor can there be any question that, under the rule of construction adopted by this court, the day on which the injury occurred must be included. This question has been frequently before the court in the consideration of other statutory provisions, and the construction has been uniform. To illustrate, in construing section 745 of the Civil Code of Practice, which provides that "an appeal shall not be granted except within two years next after the right to appeal <sup>22</sup> has accrued," the court, in *Board of Councilmen of Frankfort v. Farmers Bank*, 105 Ky. 811, 20 Ky. Law Rep. 1635, 49 S. W. 811, viewed fully the authorities, and held that an appeal filed January 21, 1898, from a judgment rendered on January 1, 1896, was too late, quoting with approval the language of Judge Simpson in *Chiles v. Smith's Heirs*, 13 B. Mon. 4, in which it was announced that "the rule in regard to computation of time seems to be that, when the computation is to be from an act done, the day in which the act is done must be included, and hence, since there is no fraction of a day, the act relates to the first moment of the day in which it was done. But when the computation is to be from the day itself, and not from the act done, then the day in which the act was done must be excluded." Here the computation must be from an act done, namely, the injury to the person, and consequently the day on which the injury was done must be included.

It is said, however, that the eighteenth day of September, 1904, fell on Sunday, and as the action could not have been instituted upon that day, the person entitled to bring the suit should be allowed the whole of the next day in which

ute his action; and in support of this proposition our attention is called to *Owen v. Howard Ins. Co.*, 87 Ky. 571, 10 Law Rep. 608, 10 S. W. 119, which was a suit upon an insurance policy providing that no action upon it could be maintained unless commenced within twelve months next after the fire occurred, and, as the last day of the year was a Sunday, it was held that the action might be instituted on the following day, the court resting its conclusion upon the ground that as the statute of limitation relied on was the result of a contract, it should be fairly and equitably construed <sup>23</sup> to carry out the intention of the parties, and relieve the contract of a construction that would defeat its enforcement. And this seems to be the view generally taken in the construction of limitation clauses in contracts, although intervening Sundays will be counted. It is only when the day of performance falls on Sunday that it will be excluded and the next day allowed: *Salter v. Burt*, 20 Wend. 205, 32 Am. Dec. 530; *Myer v. Stewart*, 2 Conn. 69, 7 Am. Dec. 240; *State v. Michel*, 52 La. Ann. 936, 78 Am. St. Rep. 364, 27 South. 565, 49 L. R. A. 218. But this rule has never been extended to embrace statutory provisions limiting the time in which an action must be brought. Indeed, there seems to be no good reason why the court should take the liberty of extending the period of limitation fixed by the legislative department, when the time fixed is sufficient to give all persons interested ample opportunity to protect their rights by instituting an action; although it seems to be generally accepted that, when the period of time within which an act must be done is less than a week, an intervening Sunday will be excluded; if more than a week, the Sunday will be included: 26 Am. & Eng. Law, p. 10; *States v. Michel*, 52 La. Ann. 936, 78 Am. St. Rep. 364, 27 South. 565, 49 L. R. A. 218. And that rule has been adopted by our court in respect to the time in which an application for new trial must be made. Section 10 of the Civil Code of Practice provides that it shall be made within three days after the verdict or decision is rendered; and, although Sunday is not excluded by the letter of the code, the rule is that three days means three juridical days, and if Sunday falls within the time, it will be excluded: *Long v. Hughes*, 1 Duval, 387. And so with reference to the time in which judgment shall be pronounced in cases of felony, the provision of the <sup>24</sup> code being that "the court shall pronounce judgment until two days after the verdict is rendered," and this has been held to mean two juridical days;

O'Brien v. Commonwealth, 89 Ky. 354, 11 Ky. Law Rep. 512 S. W. 471.

In other instances, Sunday is expressly excluded by statute. To illustrate: Section 760 of the Civil Code of Practice provides: "No mandate shall issue nor decision become final until after thirty days excluding Sundays from the day on which the decision was rendered." And so the constitution (section 42) declares that "the session of the legislature shall be sixty days exclusive of Sundays"; and in section 88, the governor shall have ten days in which to return a bill presented to him, Sundays excepted. But where the statute does not in terms exclude Sundays, and the time fixed in which an act must be done is more than a week, Sunday will be included in computing the time: *Vailes v. Brown*, 16 Colo. 427 Pac. 945, 14 L. R. A. 120; *Shefer v. Magone* (C. C. 47 Fed. 872; *Cooley v. Cook*, 125 Mass. 406; *Dorsey v. Pratt*, 46 Hun (N. Y.), 112. For instance, the Civil Code of Practice, in section 44, provides that a summons shall be returnable to the first day of the next term of court, which does not begin within ten days from the date of the summons, and in determining whether or not process is within the time, Sunday is always included: *Ormsby v. City of Louisville*, Ky. 197, 2 Ky. Law Rep. 66.

Our attention has been directed to section 454 of the Statutes of 1903, providing that "if any proceeding is directed by law to take place, or any act is directed to be done, on a particular day of a month, if that day happen to be Sunday, the proceeding shall take place or act shall be done on the next day." This section is found in the chapter on the construction of statutes, but its meaning cannot be extended to embrace provisions in the statute of limitations. By its terms, it is confined to a proceeding directed by law to take place, or an act directed to be done, which must be construed to mean in the course of judicial proceedings.

After a full investigation of the authorities and a careful consideration of the question, we cannot escape the conclusion that an act under this statute must be brought within the year, and, if the last day of the year happens to fall on Sunday, the time in which it may be brought cannot be extended to the following day.

Nor was the institution of the action against the Geneva Cooperage Company as a corporation the commencement of an action against H. B. Gregory and J. M. Gregory as partners, although they owned and operated the concern generally known as the "Geneva Cooperage Company." This p

question was determined in *Leatherman v. Times Co.*, 88 Ky. 291, 10 Ky. Law Rep. 896, 21 Am. St. Rep. 342, 11 S. W. 12, 3 L. R. A. 324. There *Leatherman* sued the *Times Company* as a corporation for libel. After the expiration of the time he discovered that the *Times Company* was not a corporation, but a private concern owned and published by *Leatherman* and *Logan* as partners, and it was held that the expiration of the time of the action against the *Times Company* by that time did not have the effect of bringing the individual members of the company before the court, nor of suspending the time of limitation as to them. Nor is *Teets v. Snyder Mfg. Co.*, 120 Ky. 653, 27 Ky. Law Rep. 1061, 87 Ky. 803, in conflict with the view herein expressed, as the opinion in that case mentions and distinguishes the opinion in *Leatherman v. Times Company*, 88 Ky. 291, 21 Am. St. Rep. 342, 11 S. W. 12, 3 L. R. A. 324.

It is also urged that, as *Hazard* did not file an answer, judgment went against him by default, and he cannot complain of error that might authorize a reversal as to the merits. The amended answer, however, filed in May, 1905, states that "the defendants *H. M. Gregory, etc.*, by leave of the court, amended their answer," so that *Hazard*, in company with the other defendants, did interpose a defense. And all through the record appear motions made by "the defendants." We therefore conclude that, by virtue of the amended answer and the judgment made, *Hazard's* rights were as fully protected as if his name had been mentioned in each pleading and motion. In view of the conclusion reached upon the plea of the statute of limitation, we have not deemed it necessary to intimate the other interesting questions raised by counsel. Therefore the judgment is reversed, with directions to enter judgment dismissing the petition.

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*Computation of Time* is the subject of a note to *State v. Michel*, 100 Ky. 372. On the exclusion of the first or last day in computing time, see the recent cases of *Tilton v. Sterling Coal etc. Co.*, 100 Ky. 173, 107 Am. St. Rep. 689; *Maynes v. Gray*, 69 Kan. 49, 100 Am. St. Rep. 146; *Elder v. Horseshoe Min. etc. Co.*, 15 S. D. 124, 100 Am. St. Rep. 685; *Aultman & Taylor Co. v. Syme*, 163 N. Y. 54, 100 Am. St. Rep. 565.

## FORRESTER v. HOWARD.

[124 Ky. 215, 98 S. W. 984.]

**JUDICIAL SALES—Amendments Without Notice.**—If land sold to purchasers at judicial sale and a deed made to them, and orders to have the record corrected, though made without notice to the former owner of the land, are not prejudicial to him. (p. 396.)

**JUDICIAL SALES—Confirmation, What Amounts to.**—Though the record does not show that the report of a sale of land made by a commissioner was confirmed, an order of court directing that a deed be made is, in effect, a confirmation of the sale. (p. 396, 397.)

**APPEALABLE ORDERS.**—An order confirming the sale of land and directing that a deed be made, is a final and appealable order. (p. 397.)

**APPEALABLE ORDERS—Vacating in Lower Court.**—If an order is appealable, it can be modified or vacated only on appeal or in the lower court for some of the causes specified in the statute. Otherwise, the court loses control of the case and power to modify its rulings. (p. 397.)

**JUDICIAL SALES—Conveyance—Presumption—Correction of Mistake.**—It is presumed that the description in a deed made by a court commissioner in pursuance of an order for a judicial sale of land follows the description contained in the pleadings and judgment, but if, through neglect or mistake, such description is wrong in the deed only, the court may at any time permit its commissioner to correct such conveyance and make a new deed, conforming to the description contained in the judgment. (p. 397.)

**ATTORNEY AND CLIENT—Lien on Property in Litigation—Appeal.**—An attorney who defends an action in which it is sought to recover property is not entitled to a lien thereon if he succeeds in saving it, but that question cannot be considered upon appeal, unless presented in proper time. (p. 397.)

H. C. Clay and J. G. & J. S. Forrester, for the appellants.

W. F. Hall and Green & Vanwinkle, for the appellees.

**218 CARROLL, C.** The appellants, who are attorneys, were employed by appellees to defend a suit brought against them to recover a tract of land containing five hundred acres known as the "Bingham Patent." They were successful in the defense of the action, and were allowed a lien on the land for a reasonable fee. Afterward, in 1894, they brought a new suit, averring that their services were reasonably worth ten hundred dollars, and asked that so much of the land as might be necessary to satisfy the same be sold for that purpose. Pending this action it was agreed that one B. F. Creech own a certain part of the five hundred acres, and by an amended petition appellants sought to subject the remainder of the tract, which consisted of one hundred and thirty-three acres, to the payment of their debt, and in 1896 a judgment



ed in their favor for three hundred dollars, and it was  
r adjudged that they had a lien on the one hundred  
irty-three acres, or rather the entire five hundred acres,  
was described by metes and bounds, excepting that part  
f owned by Creech, which was also described in the  
ent—the description of the land and the part excepted  
the same in the judgment as in the pleadings. Under  
dgment, the <sup>219</sup> one hundred and thirty-three acres  
old and purchased by appellants for the amount of  
debt, and in November, 1896, a deed was made convey-  
them the land, and a writ of possession awarded. After  
it of possession was awarded, the case was left off the  
, and the next order was made in August, 1899. This  
recites that the deed of 1896 was prematurely made and  
ective, and, on motion of appellants, is quashed. The  
of sale made by the commissioner in 1896 was con-  
by this order, and the commissioner directed to pre-  
another deed conveying to appellants the land described  
former judgment, and thereupon the deed produced by  
mmissioner was acknowledged and approved by the court.  
appellees had no notice of this order—the only purpose of  
was to supply an omission in the record in failing to  
he report made by the commissioner in 1896 confirmed.  
at the February term, 1905, of the court, the action on  
of appellants was redocketed, and an order entered  
g that the deed made by the commissioner in 1899 was  
ve in failing to correctly describe the land, there being  
d from the deed the two last calls in the description  
ned in the pleadings and judgment, and the commis-  
was directed by this order to correct the deed in the  
t mentioned, and prepare and report to the court a deed  
ning a correct description of the property. Thereupon  
mmissioner produced a deed which was examined and  
ved by the court, and another writ of possession was  
d. This order was also made without notice to ap-  
. At the July term, 1905, the appellees, after notice to  
ants, moved the court to set aside and vacate the orders  
n the case on behalf of appellants in 1899 and in 1905,  
ndered to appellants the <sup>220</sup> amount of their debt, in-  
and costs. To this motion the appellants responded, in  
nce, that the only purpose of the motion made in 1899  
1905 was to correct the omission and errors heretofore  
ned, and that the appellee, E. S. Howard, was then the  
rner of that part of the Bingham patent containing one  
ed and thirty-three acres, and which was subjected to

their lien and conveyed to them, and that in March, 1903, S. Howard had leased in writing from appellants until January, 1906, the one hundred and thirty-three acres, surrendering to them all rights and interest he might have therein, agreeing to surrender possession at the expiration of the term to appellants. To this response a reply was filed by appellee E. S. Howard, denying that appellants were at any time granted a lien on, or that there was conveyed to them, the one hundred and thirty-three acres, asserting ownership thereto in himself, and averring that the rent contract was obtained by fraud.

On the issues made by the response and reply evidence was heard by the court, and it appears from this evidence that the one hundred and thirty-three acres in controversy included in, and is a part of, the Bingham five hundred acre patent, and is all that remains of this five hundred acres after setting apart to Creech the quantity it was agreed by the parties he was entitled to. It also discloses that, when the judgment was obtained by the appellants in 1895, this one hundred and thirty-three acres was not worth more than three hundred dollars or four hundred dollars, but that in 1905, and at the time of the trial, it was worth fifteen hundred dollars. The Bingham patent was not surveyed until March, 1905, and then Howard, as he testifies, learned for the first time that its lines included the one hundred and thirty-three acres upon which he had resided for some time, although he made a deposition given by him in 1890, in the case of Bingham v. Howard, involving the ownership and title to this land. Howard testified that he had lived on this one hundred acre tract for thirty years, and <sup>221</sup> that his father bought the tract from Elisha Bingham. It thus appears that appellee Howard knew something of the boundary of this Bingham land. The court entered a judgment setting aside and vacating all orders made in the case in 1899 and 1905, to which judgment appellants excepted, and prayed this appeal. Afterward, in February, 1906, appellees filed exceptions to the commissioner's report of sale made in 1895. These exceptions the court sustained, and it was ordered that the report of sale be quashed and held for naught, and from this order appellants also appeal.

The substantial rights of appellee were in no wise prejudiced or affected by the orders made at the instance of appellants in 1899 or 1905. Indeed, it was not necessary that appellants should have had any of these orders made, although the record did not show that the report of sale made by the commissioner in 1895 was confirmed, the order of

ing that a deed be made was, in effect, a confirmation of the sale, and the order confirming the sale and directing a deed be made was a final and appealable order, and the only way that appellees could vacate or modify that order was in the manner pointed out in the code, by appealing to the court, or having it vacated for some of the causes specified in section 518 of the Civil Code of Practice. Having failed to resort to either of these methods, their motion made in 1905 was entirely unavailing. The lower court had completely lost control of the case, and could not, by any order made in 1905, disturb a judgment or final order entered in 1895.

For the same reason, the order of the lower court sustaining the exceptions to the report of sale made in 1895 was void. If the deed made by the commissioner in 1895 can be found, it may be recorded in the proper office; if not, a deed made in 1905 should be recorded. The title to the land was vested in appellants when the deed was made conveying them the land in 1895. It is to be presumed that this deed contained the description of the land contained in the pleadings and judgment, but if, by oversight or neglect, the description of the land in the deed did not conform to the description of the land contained in the judgment and report of sale, the court might at any time have permitted its commissioner to correct the deed, or make a new deed conforming to the judgment and report. To authorize this court to reverse the judgment of the lower court in vacating the orders made on motion of the appellants and in sustaining the exceptions to the report of sale, no motion for a new trial was necessary. The record discloses all the facts necessary to enable this court to decide the questions of law presented.

Our attention is also called to the fact that it was error to grant appellants a lien upon the land for their fee. This would have been well taken if the question had been presented in proper time, and so much of the judgment as granted a lien would have been set aside. An attorney who brings an action in which it is sought to recover property not entitled to a lien upon the property that he succeeds in winning: *Lytle v. Bach & Miller*, 29 Ky. Law Rep. 424, 93 Ky. 608. But it is now too late for the appellees to complain of this error.

The judgment of the lower court vacating the orders made in the case on behalf of appellants in 1899 and 1905 and in sustaining exceptions to the commissioner's report of sale is reversed, with directions to proceed in conformity to this opinion.

*If a Commissioner's Deed Executed in Pursuance of a Sale at closure is defective in stating the parties whose title is conveyed thereby, the grantee is entitled to have it corrected by a court of chancery: Gates v. Gray, 85 Ark. 25, 122 Am. St. Rep. 19. Equity will relieve a mistake in the quantity of land sold at a judicial sale, where the mistake is such that relief could be granted were it a private one: Miller v. Craig, 83 Ky. 623, 4 Am. St. Rep. 227. On the reformation of writings in general on the ground of mistake, see the note to Steinmeyer v. Schroepfel, 117 Am. St. Rep. 227.*

### MIVELAZ v. JOHNSON.

[124 Ky. 251, 98 S. W. 1020.]

**MECHANICS' LIENS—Statement of Claim—Name of Owner.**—A statement of a mechanic's lien, is not fatally defective by reason that it misstates the name of the owner, where the name of the owner must be given only when known, and there is no such person as the one named in the statement in the vicinity, nor owning property in the vicinity. (p. 400.)

**MECHANICS' LIENS—Statement of Claim—Description of Property.**—A mechanic's lien is not invalidated merely because the claim therefor describes more or less land than the loan can lawfully cover. (p. 400.)

**MECHANICS' LIENS—Statement of Claim—Description of Property.**—Failure to properly describe, in a mechanic's lien statement, a portion of the premises, upon which the lien is claimed, does not invalidate the lien as to the portion correctly described. (p. 401.)

**MECHANICS' LIENS—Acceptance by Note.**—The fact that a subcontractor accepts a note from the main contractor for the amount of the claim does not affect his right to enforce his mechanic's lien against the property. (p. 401.)

E. L. McDonald, for the appellant.

D. M. Ley, for the appellee.

<sup>254</sup> HOBSON, J. Mary E. Mivelaz made a contract with R. A. Barnes to build for her a house and granitoid side porch in <sup>255</sup> front of her lot on the east side of Third street, in the city of Louisville. Barnes made a subcontract with A. Johnson for the granitoid work. Johnson did the work. Mivelaz paid Barnes the whole amount she owed him under the contract, but Barnes did not pay Johnson. The amount due Johnson was seventy dollars. He thereupon filed a statement in the county clerk's office and brought this action asserting a lien upon the property. The circuit court judgment in favor of Johnson, and Mrs. Mivelaz appeals.

It is insisted for appellant that the statement filed by Johnson in the county clerk's office is not sufficient to give her

on the property. Section 2468 of Kentucky Statutes of is as follows: "The liens mentioned in the preceding section shall be dissolved unless the claimant, within six months after he ceases to labor or furnish materials as aforesaid, files with the office of the clerk of the county court of the county in which such building or improvement is situated, a statement of the amount due him, with all just credits and setoffs known to him, together with a description of the property intended to be covered by the lien, sufficiently accurate to identify it, the name of the owner, if known, and whether the materials were furnished or the labor performed, by contract with the owner, or with a contractor or subcontractor, which statement shall be subscribed and sworn to by the person claiming the lien or by some one in his behalf."

The material part of the statement filed by Johnson, in so far as it is claimed to be defective, is as follows: "Affiant, A. Johnson, says that he is a mechanic in the business of making sidewalks, and that during March, 1903, he furnished the material and the labor to lay a granitoid sidewalk on the following described lots in the city of Louisville under contract with R. A. Barnes, and as a contractor <sup>256</sup> of said R. Barnes, who was a contractor for said work for Mary Mulvin. He says that the said property belongs to Mary Mulvin and is situated on the east side of Third street. Beginning at point six hundred and forty-seven and one-half ( $647\frac{1}{2}$ ) feet south of P street, extending thence southwardly along the east line of Third street twenty-six feet and four inches, extending back easterly in parallel lines of the same distance as front and at right angles with Third street, one hundred and eighty-eight (188) feet, to an alley."

The property of Mrs. Mivelaz was in fact situated six hundred and thirty-seven and one-half feet south of P street, extending thence southwardly along the east line of Third street twenty-six feet and four inches, and running back at right angles to the street. It will be observed that in the statement the property is described as beginning at a point six hundred and forty-seven and one-half feet south of P street, and extending from this point twenty-six feet and four inches; so that the statement in fact included sixteen feet and four inches of the lot, and did not include ten feet of it, but included ten feet of other property. It will also be observed that the name of the owner of the property is given in the statement as "Mary Mulvin," and not as "Mary Mivelaz." In all other respects the statement complies with the statute. The mistake occurred in the name of the owner is not

explained by the proof; nor does it seem clear how "Mivelaz" could have been corrupted into "Mulvin." Mrs. Mivelaz had been in no way prejudiced by the mistake. She had been in Barnes before the statement was filed. No third person was interested in any way. The mistake in the description of the lot, in writing "647½" for "637½," does not seem sufficient to defeat the lien. The statement shows it was for building a sidewalk in front of a lot on the east side of Third street, having <sup>257</sup> a front of twenty-six feet and six inches, and that the sidewalk was built under a contract with R. A. Barnes, who was a contractor for the work for Mrs. Mulvin. If there had been no mistake in the owner's name, it is reasonably clear that no one could have been misled as to what property was intended. It does not appear that there is any such person as Mary Mulvin, or that any property in this vicinity is owned by any one who could have been mistaken for Mary Mulvin. The name of the contractor is given as Mrs. Mivelaz is the person who contracted with him.

It is a matter of common knowledge that foreign names are often pronounced very differently from the way they are spelled, and it is often difficult to spell the name from the way it is pronounced. The mechanics who do work as contractors are not, as a rule, expert spellers, and should be held to a high standard in the spelling of proper names. The statute only requires the name of the owner to be given, if known. The purpose of the statute is to require only the claimant a statement of the name, if he knows it; and he should not lose his claim where it turns out that he was mistaken in the name. He is no more affected by a mistake in the name than he would be if he gave as the owner the person who is reputed to own the property, and it should turn out that some other person owned it. In 20 American and English Encyclopedia of Law, page 424, the rule is thus stated: "The statute only requires the name to be given, if known; if the name is not known, the statement is sufficient, although it is silent upon the subject." The courts have shown a reluctance to set aside mechanics' liens merely for local misdescriptions, for the reason that the statutes are designed for the aid of the mechanics and that they usually prepare <sup>258</sup> their own papers. There are numerous cases where mistakes in statements as important as those before us have been held not to affect the lien: See *Willamette S. M. Co. v. Krenshaw*, Cal. 205, 29 Pac. 633; *Kennedy v. House*, 41 Pa. 39, 8 Dec. 594; *Pollock v. Morrison*, 176 Mass. 83, 57 N. E.

see v. Litchfield, 145 Mass. 565, 1 Am. St. Rep. 482, 14  
923; Corbett v. Chambers, 109 Cal. 178, 41 Pac. 873.

This is not a case where the description indicates a different  
property from that intended to be subjected. It is simply a  
case where part of the property sought to be subjected is not  
described in the description, and where the value of the part in-  
cluded is largely greater than the claim. In 20 Amer-  
ican and English Encyclopedia of Law, page 522, the rule is  
stated: "The lien is not invalidated merely because it  
embraces more land than the lien can lawfully cover. Nor is  
it defeated by a failure of the description to cover as much  
property as it might have covered. Failure to describe prop-  
erty or a portion of the premises or improvements upon which  
the lien is claimed will not invalidate the lien as to the portion  
correctly described." We therefore conclude that the chan-  
cellor properly sustained the lien.

The fact that Johnson had accepted a note from Barnes  
does not affect his rights; Mivelaz v. Genovely, 121 Ky. 235,  
10 Ky. Law Rep. 203, 89 S. W. 109. The circuit court prop-  
erly sustained the demurrer to the paragraph of the answer  
alleging an estoppel, for the reason that it was not averred  
that any representation was made to Mrs. Mivelaz, or that she  
was induced by any representation to follow the course that  
she did. On the whole evidence we do not see that the chan-  
cellor made any error in refusing to allow the credits claimed.  
Judgment affirmed.

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*Taking of a Note by a mechanic or materialman does not ordi-  
narily amount to a waiver of his right to a mechanic's lien: Hoagland  
v. Ak, 33 Neb. 376, 29 Am. St. Rep. 485; Hill v. Alliance Building  
Co., S. D. 160, 55 Am. St. Rep. 819; Meek v. Parker, 63 Ark. 367,  
10 Am. St. Rep. 119; Baumhoff v. St. Louis etc. R. R. Co., 171 Mo.  
4 Am. St. Rep. 770. See the note on this subject to Kilpatrick  
v. Kansas City etc. R. R. Co., 41 Am. St. Rep. 761.*

*Insufficiency of the Description of the property in a statement  
of claim for a mechanic's lien, as invalidating the lien, is dis-  
tinguished in Whittier v. Stetson & Post Mill Co., 6 Wash. 190, 36 Am.  
St. Rep. 149; Coburn v. Stephens, 137 Ind. 683, 45 Am. St. Rep. 218;  
Waukisha Springs etc. Co., 120 Wis. 311, 110 Am. St. Rep.  
The fact that the description includes more land than can be  
subjected to the lien is not necessarily fatal: Lyon v. Logan, 68  
Iowa 521, 2 Am. St. Rep. 511; White Lake Lumber Co. v. Russell,  
10 Mich. 126, 3 Am. St. Rep. 262.*

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## GREGORY v. SLAUGHTER.

[124 Ky. 345, 99 S. W. 247.]

**AUTOMOBILES—Negligence.**—A person who is driving an automobile at a high rate of speed on one of the principal streets of a city, and is unable to see a street-crossing or a pedestrian thereon on account of a street-car being between him and the crossing, who fails to stop his machine until the car has passed, is guilty of gross negligence. (p. 403.)

**DAMAGES for Personal Injuries, When not Excessive—Excessive Verdict.**—If a person negligently struck by an automobile has his hand badly cut and permanently injured, one of his fingers bruised and is so severely bruised on various parts of his body as to confine him to his home for several weeks, a verdict for two thousand five hundred dollars' damages is not excessive. (pp. 403, 404.)

**DAMAGES in Cases of Tort.—Loss of Profits from Business.**—Loss of profits may be recovered as part of the damages in cases of tort, and evidence of what the business of the plaintiff produced on a general average is competent for the consideration of the jury in estimating his damages. (p. 407.)

Helm, Bruce & Helm, for the appellant.

C. H. Sheild, for the appellee.

**248 BARKER, J.** The automobile which W. H. Gregory was driving through the streets of Louisville collided with T. Grant Slaughter, at the corner of Broadway and Brook streets, inflicting upon him painful and permanent physical injuries. To recover damages for which this action was instituted, the result that the jury returned a verdict in favor of plaintiff for the sum of two thousand five hundred dollars. The defendant's motion for a new trial being overruled, he is allowed to appeal.

The substantial facts are these: Broadway street, at the place of the accident, runs east and west. Brook street, at the same point, runs north and south. T. Grant Slaughter, just before the accident, was at the northeast corner of Broadway and Brook streets, and desired to board a street-car which was running on Brook street, going south. A regulation of the street-car company forbids the stopping of its cars at the intersection of streets. The car in question, therefore, could only stop to receive and discharge passengers after it had crossed to the south side of Broadway. Slaughter, in order to catch the car when it stopped, ran across Broadway, probably keeping up with the car, which was moving slowly. At the time the appellant, Gregory, was driving his automobile on the south side of Broadway, going east. He did not



hter, nor could Slaughter see the automobile coming, be-  
the street-car was between them. The rate of speed at  
the automobile was being driven is disputed. The wit-  
for the plaintiff (appellee) describe it as going at a  
e rate of speed; the appellant, who claims to be an ex-  
nced automobilist, states he was traveling <sup>349</sup> at the rate  
om eight to ten miles an hour. It is not seriously dis-  
that the automobile came up so close to the street-car  
create the impression that there was danger of a collision  
en the two; but, before this could take place, by the use  
steering lever, appellant veered his automobile around  
ar, where he found Slaughter directly in his path, and  
a six feet of him. He claims (and it may be conceded to  
ne) that after he saw appellee he could not, by any sort  
igence, stop his automobile in time to prevent the colli-  
and the infliction upon appellee of the injury complained

careful reading of the evidence in this case convinces us  
he appellant was driving his car at a high rate of speed,  
ugh, as we see it, appellant's own estimate of the rate  
e accepted as true. His automobile weighed two thou-  
three hundred pounds. He states it was going at the  
f eight to ten miles an hour. He was on one of the prin-  
thoroughfares of a great city, and approaching a cross-  
here it was at least reasonable to expect pedestrians to  
He could not see this crossing for the reason that the  
-car was between him and it, and thus obscured his vis-  
Instead of stopping his automobile until the car passed  
e could see whether there were pedestrians on the cross-  
eyond, he simply changed his direction so as to go around  
assing car, and by his own act was brought face to face  
the appellee at a distance too short to prevent the col-  
at the rate he was moving. This was, in itself, gross  
gence to the verge of recklessness. In practical result  
was no difference between what he did and if he had  
his eyes and driven his automobile over the street cross-  
ithout observing whether anyone was in his way or not.  
e conclude that, accepting appellant's own evidence as a  
orrect statement of the facts, he was guilty of gross neg-  
e in inflicting the injury which occurred to appellee.

is urgently insisted, as a cause for reversal, that the ver-  
s excessive. The evidence as to the injury received by  
lee shows that he was knocked down and dragged, partly  
ng to the car and partly under it, for a distance of ten  
teen feet. His hand was badly cut, one of his fingers

broken, and he was severely bruised on various parts of his body, especially upon one of his legs. He was confined to his home several weeks. His hand is permanently injured, being so stiff that he cannot close it entirely, although he can still write with it. Appellee's injury is far greater than the mere breaking or the loss of a finger. The whole hand is permanently injured, although the loss of its use is only partial. The cases relied on by appellant as showing that the verdict in this case is excessive did not involve the permanent injury to the whole hand, but were confined to the loss of one finger, or the mere breaking of a finger; nor was there any other injury inflicted. Taking all the facts of this case into consideration, the pain, both mental and physical, which appellee must have suffered, together with the partial loss of the use of his whole hand, and the loss in his business, to be hereafter discussed, we do not think the verdict was excessive.

Appellant also complains that the court erred in allowing incompetent evidence as a basis for a computation of the value of appellee's loss of time. Appellee is an insurance solicitor whose remuneration depends upon the writing of insurance risks, and is based upon the amount of new business he secures. He was allowed by the court to state that his business loss during the time he was confined to his home <sup>351</sup> amounted to one thousand dollars. Upon cross-examination it was developed that his earning money was entirely contingent upon his writing insurance risks, and thereupon appellant moved the court to exclude from the jury all the evidence relating to the loss of business, upon the ground that the profits of his business were entirely speculative, and therefore could not be considered as a legitimate element of damages. It is contended by appellant that the plaintiff was entitled to recover for the value of his lost time occasioned by the accident, provided the accident resulted from his (appellant's) negligence. But he urges that there is a difference between the loss of business profits and the loss of time, and it must be conceded that he produces no authority for this position, although the cases upon which he relies with most confidence involved the loss of profits by reason of breaches of contract.

Shearman and Redfield, in their work on Negligence, section 739, say: "The liability of a defendant in an action for negligence is broader than in an action for mere breach of contract." In the case of *Louisville & Nashville R. R. Co. v. Reynolds*, 24 Ky. Law Rep. 1402, 71 S. W. 516, the right to recover damages arising from loss of business in personal injury cases caused by tortious negligence was clearly re-

nized. In that case the plaintiff was a specialist physician, and was allowed to testify of his loss of business and possible profits by not being at his office during the time he was hurt. It was held that this was error, not because incompetent generally, but because the petition did not allege special damages. In this case the petition sufficiently alleges the special damages, being evidently prepared in the light of the Reynolds case.

In the case of *City of Logansport v. Justice*, 74 <sup>352</sup> Ind. 378, 39 Am. Rep. 79, which was an action for damages for personal injuries caused by negligence, it was said on the subject in hand: "It is also claimed that the court erred in permitting the plaintiff to make proof concerning his professional earnings before his injury. In substance, the plaintiff is permitted to prove what his professional earnings had been per year for five years, and how much his business had fallen off during six months succeeding his injury. This was permitted to go to the jury under an allegation in the complaint that the plaintiff was damaged in his business, and asking a recovery for the same. The damages are for a personal injury. This evidence was inadmissible in estimating the value of time lost, but not as a basis of damages. Taken in connection with the demand of the complaint and the instruction of the court, the evidence was clearly admitted as a basis of damages. It has been held that similar evidence is competent, not as a basis of damages, but as a guide to the jury, to aid them in the exercise of their discretion."

In the case of *New Jersey Express Co. v. Nichols*, 33 N. J. L. 434, 97 Am. Dec. 722, the court said: "The plaintiff, on his examination in chief, after proving that his business was that of an architect, was asked the following question: 'What was your average annual profits in your business?' To which he answered: 'The average was about two thousand five hundred dollars—that is, the average income.' When the deposition was offered to be read in evidence, the defendant's counsel objected to the reading of this question and answer, for the reason that, if read in evidence and allowed by the court to be considered by the jury, it would tend to lead the jury to an indefinite inquiry, which would be contrary to law. The court overruled the objection, and permitted the question and answer to be read to <sup>353</sup> the jury. In actions founded on contract, evidence of the loss of profits resulting from non-performance has, in some instances, been rejected as too speculative and uncertain to be made the means of arriving at compensation as the measure of damages. But in actions of tort,

where the quantum of damages is very much within the discretion of the jury, evidence of the nature and extent of plaintiff's business, and the general rate of profit he has realized therefrom, which has been interrupted by the defendant's wrongful act, is properly received, not on the ground of furnishing a measure of damages to be adopted by the jury, but to be taken into consideration by the jury, to guide them in the exercise of that discretion which, to a certain extent, is always vested in the jury."

In the case of *Allison v. Chandler*, 11 Mich. 542, it was said: "But whatever may be the rule in actions upon contract, we think a more liberal rule in regard to damages for profits lost should prevail in actions purely of tort, excepting perhaps in the case of an action of trover. Not that they should be allowed in all cases without distinction; for there are some cases where they may be, in their nature, be too entirely remote, speculative or conjectural to form any reliable basis for a probable opinion. In such cases perhaps the decisions which have excluded the anticipation of profits of a voyage broken up by illegal capture, or collision, may be properly justified upon this ground. Upon this, however, we express no opinion. But generally, in an action purely of tort, where the amount of profits lost by the plaintiff can be shown with reasonable certainty, we think they should be not only admissible in evidence, but that they constitute a proper and far a safe measure of damages."

We are of opinion that not only is the proposition that in cases of tort, loss of profits from business may<sup>354</sup> be recovered as a part of the damages (proper allegation being made in the pleading), sustained by the great weight of authority, but the principle is based upon reason and justice. Should one who has tortiously inflicted upon another a serious personal injury, which confines him to his home or bed, and necessarily takes him from his business, be heard to say he ought not to pay anything because his victim cannot demonstrate to a mathematical certainty what his loss in profits has been? If there is any uncertainty, ought not the doubt to be solved in favor of the innocent, rather than the guilty? The rule contended for by appellant would place it out of the power of any but one receiving a fixed salary to recover for loss of business in a personal injury case. The plaintiff was an insurance solicitor; he could not tell when he would incur a risk, and his profits depended entirely upon his securing risks for his company. That he would be able to secure a policy today or tomorrow, he could not tell, but during a long period of time he could say that he averaged a given sum. It s

to us that the evidence of what business produced on a general average is competent for the consideration of the jury in estimating his loss. No lawyer or doctor can say that during any determinate period he would have been employed by a client or patient, yet each knows that year in and year out he makes an income approximately, during a long period of time, the same, although differing in individual years. This profit may be called uncertain, but the most prudent men habitually act upon it in the most important affairs of life. They marry and rear families, buy property, and borrow money upon the confident expectation of being able to meet the obligations growing out of these most important contracts with the incomes arising from their business. To say <sup>355</sup> that one may wrongfully inflict injury upon the person of a man whose income is dependent upon his own personality, the confidence of the public in his skill, energy and integrity, and that the wrongdoer will not be required to make compensation for the loss of expected profits arising from the injury, would be to refuse compensation for the most serious item of damage. Indeed, this item of damage is more certain than several others whose legitimacy is conceded. Mental and physical pain—who can measure in terms of money these with any certainty of being even approximately accurate? And yet they are submitted to the jury in every case for their consideration in estimating compensatory damages. The general level of a man's income for a considerable period before the injury, while perhaps not an accurate, or even altogether satisfactory, measure of the damages, is worthy of the consideration of the jury in a case like this.

Appellant complains in his brief that he is the victim of public prejudice against automobiles. This may be true, and, if so, that prejudice is based upon the carelessness of a large number of automobilists of a character similar to that of which this record shows appellant was guilty. The owners of automobiles have the same right on the public highways as the owners of other vehicles; but when one drives so dangerous a machine through the public thoroughfares, it is incumbent upon him to exercise corresponding care that the safety of the traveling public is not endangered thereby. When the owners of automobiles learn this, it is confidently believed that whatever prejudice may now exist against them in the public mind will entirely disappear, for the public is not usually prejudiced without cause.

<sup>356</sup> Perceiving no error in the record, the judgment is affirmed.

*The Law of the Automobile* is the subject of a note to *Christie v. Elliott*, 108 Am. St. Rep. 212. As to the degree of care to be used by travelers which one must use in operating an automobile in a certain way, see *McIntyre v. Orner*, 166 Ind. 57, 117 Am. St. Rep. 359. As to the liability of a city for persons injured by automobiles, see *City of New York v. City of New York*, 186 N. Y. 139, 116 Am. St. Rep. 545. As to the liability of the owner of an automobile for injuries caused by his employé, see *Lotz v. Hanlon*, 217 Pa. 339, 118 Am. St. Rep. 922. Automobiles operated and propelled in a manner incompatible with the safety of the traveling public have the same rights with other vehicles upon the public highway, subject to the rules and regulations as are prescribed by law: *State v. Swann*, 203 Mo. 517, 120 Am. St. Rep. 671.

*The Law of the Road* is discussed generally in the note to *Brady v. Etling*, 42 Am. St. Rep. 366.

### MITCHELL v. BRADY.

[124 Ky. 411, 99 S. W. 266.]

**MUNICIPAL CORPORATIONS—Want of Notice—Falling Objects.**—If an iron pipe attached to the side of a building adjacent to the street and abutting upon the sidewalk, in falling, kills a person on the sidewalk, but there is no evidence of notice on the part of the city of the defective and dangerous condition of the pipe, the city is not liable. (p. 409.)

**LANDLORD AND TENANT—Defective Condition of Premises—Injury from Falling Objects.**—The owner of a building erected upon the sidewalk of a street is not absolved from liability for the falling of a part of the building or of something attached thereto, by reason of the fact that he has leased the property, and his tenant has covenanted himself to keep the property in repair. In such case both the owner and tenant are responsible. (p. 411.)

**WITNESSES—Competency—Testimony of Wife for Husband—Joint Interest.**—If a husband, as administrator of his son, brings an action to recover for his wrongful death, the damages belong to the husband and wife, and in such case she is a competent witness for her husband. (p. 411.)

W. Furlong, B. H. Young and M. W. Ripey, for the appellants.

**413 HOBSON, J.** Hugh Brady is the owner of a building located on the northeast corner of Sixth and Broadway streets in Louisville. He rented the building to the United Laundry Company, which used part of the lower part of the building as an office and sublet the remainder of the building to Mary Donnelley, who in turn sublet two rooms to William Mitchell, in which he lived with his family. Attached to the building there was a tin down-pipe to take the water from the roof. The down-pipe extended down the wall of the house on the Sixth street side and about five feet above

sidewalk it entered an iron down-spout, the lower end of which rested on a metal gutter, which extended across the sidewalk, through which the water was conveyed to the sewer. The iron pipe was about five feet long and something like six inches in diameter, half round in shape, the flat side being placed against the side of the house which abuts immediately upon the sidewalk. The iron pipe weighed about eighty pounds. On June 3, 1903, Mitchell's little son, three years old, was on the sidewalk in charge of his mother, who was nearby, when the iron pipe, without warning fell down, striking the child upon the head and killing him almost instantly. W. E. Mitchell qualified as the administrator of the child and brought this action to recover for his death against Hugh Brady, the owner of the property, the United Laundry Company, who leased it from him, and the city of Louisville, charging that the iron spout was permitted to become and remain in a dangerous condition, and that this was known, or could have been known, to the defendants by ordinary care on their part; that the sidewalk was in a dangerous condition <sup>414</sup> from the iron spout overhanging it without being properly secured, and that this dangerous condition had negligently been allowed to continue for a long time. The defendants filed answers controverting the allegations of the petition, and the case was heard by a jury. At the conclusion of the plaintiff's evidence the court peremptorily instructed the jury to find for the defendants, and, the plaintiff's petition having been dismissed, he appeals.

The proof heard on the trial established without doubt the facts above stated. It also showed that the only fastening securing the iron pipe in position was a wire at the top, which was wrapped around a nail on either side; that the wire had become rusted and the mortar had been washed out, so that the nail on one side had nothing to hold it and had come out, allowing the pipe to fall and strike the child, who happened to be just then nearby on the pavement. In the contract between Brady and the laundry company, the property was leased by him to it for five years, and it was obligated to keep the premises in repair and not to permit any part of it to become unsafe or dangerous. There was no evidence tending to show notice on the part of the city of the dangerous condition of the spout, and, as the danger came from the defective condition of the house and not from any defect in the sidewalk, the peremptory instruction as to the city seems to have been proper, but as to the other defendants, a different rule applies. In *Shearman and Redfield on*

Negligence, section 347, the rule is thus stated: "It is, therefore, the settled doctrine on this subject that, if an abutter or owner makes an excavation upon his land adjacent to, or on, a highway, and leaves it unprotected, he is liable to a passer or traveler on the highway, who while using ordinary care, falls into it and is injured. So if he erects a <sup>415</sup> building upon or over a street, he is under a legal obligation to take ordinary, reasonable care that it shall not fall into the street and injure persons lawfully there, and a ruinous wall or other structure likely to fall is a nuisance, and if the structure falls into the street and injures a passer-by after a reasonable time to repair or remove it has elapsed, the owner is liable to the injured person." The same rule is laid down in 1 Thompson on Negligence, section 1213, in these words: "If the owner of a house has constructed it in so faulty a manner, or suffered it to get out of repair, so as to endanger persons passing along the street, it becomes a nuisance, and, on familiar grounds, he is liable to any person sustaining special damage thereby." The rule has been applied in many cases, as in *Thompson v. Ashton*, 1 Q. B. D. 314. The rule was also applied in *Salisbury v. Herschenroder*, 106 Mass. 458, 8 Am. Rep. 367, to a ladder on a narrow sidewalk set up against a building while the wind was blowing strong (*Clarke v. Rhode Island Electric Co.*, 16 R. I. 463, 17 Atl. 59); to a brick falling from a bad wall (*Mauerman v. Siemerts*, 71 Mo. 189, 12 L. R. A. 798). In *Murray v. McShane*, 52 Md. 217, 36 Am. Rep. 367. In the case last cited the plaintiff, while passing by, sat on the threshold of the door to tie his shoe, and while sitting there momentarily was struck by the fall of the brick. It was held that he was not a trespasser, and might recover. In *Wells v. McCormick*, 52 N. J. L. 470, 19 Atl. 1101, 8 L. R. A. 798, the same principle was applied to a tree planted on the owner's ground, and it was held that both the owner and the tenant <sup>416</sup> of the property were responsible. In *St. Louis R. R. Co. v. Hopkins*, 54 Ark. 209, 15 S. W. 610, 12 L. R. A. 189, a large wooden sign fastened to the wall fifteen feet above the sidewalk fell from the blowing of the wind such might be expected in the regular course of the season, and injured the plaintiff while he was on the sidewalk. The railroad company was held liable. In the note to this case other cases are collected.



From these authorities, both the owner of the property, Brady, and the laundry company who rented from him and had control of it, are *prima facie* responsible for the injury to the intestate under the proof; that is, the plaintiff made out a *prima facie* case against them. The owner of a building erected over the sidewalk is not absolved from liability to a person injured by the fall of a part of the building on the sidewalk, by reason of the fact that he has leased the property to another and the tenant has obligated himself to keep the property in repair. Both the tenant and the owner in such a state of case are responsible. It is incumbent upon the owner to keep his premises safe, and he cannot relieve himself of this liability by contract with his tenant. It is entirely immaterial that W. E. Mitchell lived in the building, or that Mrs. Donnelley rented to him a part of the building, with or without the consent of the laundry company. The injury was not received in the building. The fact that Mitchell lived in the building had nothing to do with the injury. The child was lawfully on the sidewalk where it had a right to be without regard to where its father lived.

Mitchell himself was not at home at the time his child was killed. He offered on the trial to introduce as a witness on his behalf his wife, who was with the child at the time. The circuit court declined <sup>417</sup> to allow her to testify, under section 606, Civil Code. While the administrator is the only plaintiff in the action, the recovery in a case like this belongs to father and mother equally. It has been held that in such actions the distributees of the estate testify for themselves within the meaning of section 606. The wife has an interest in the action and should be allowed to testify for herself; *Manion's Admrs. v. Lambert's Admx.*, 10 Bush, 295; *Hopkins' Admr. v. Faeber*, 86 Ky. 223, 9 Ky. Law Rep. 550, 5 S. W. 749. The precise question before us was presented in *Board of Internal Improvements v. Moore's Admr.*, 23 Ky. Law Rep. 1885, 66 S. W. 417. It was there held that the wife was a competent witness. In that case the court, among other things, said: "The husband is acting in a fiducial capacity, and prosecuting the action for the benefit of himself and wife. The wife is a competent witness in this case the same as if she would have been had the action been brought by herself and husband. Her relation to the subject of the controversy is exactly the same as it would have been had some other than her husband qualified as personal representative. From the nature of the case, the interest of the husband and wife cannot be severed in the prosecution

and recovery in the action. It cannot be that the legisl meant to exclude the wife as a competent witness in own behalf simply because the husband has a joint and interest in the recovery. To so hold would do violence to the language and spirit of the section which authorizes a married woman to testify for herself."

We rest our judgment on this ground. There is no limitation in section 606 upon the right of the wife to testify for herself, except that she may not testify against her husband or concerning any communication <sup>418</sup> between them during marriage. There are limitations upon her right to testify for her husband, but where they are jointly interested there is nothing in the section to indicate that each may testify for himself as any other litigant.

As to the city of Louisville the judgment is affirmed. As to the other appellees the judgment is reversed, and the case is remanded for further proceedings consistent herewith.

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*The Relative Liability of Lessor and Lessee in the event of a person sustaining injuries from the defective condition of the premises is discussed in the notes to Leahan v. Cochran, 86 Am. St. Rep. 515; Griffin v. Jackson Light etc. Co., 92 Am. St. Rep. 499.*

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## FORD'S ADMINISTRATOR v. PADUCAH CITY BOARD OF PUBLIC WORKS. WAY.

[124 Ky. 488, 99 S. W. 355.]

**STREET RAILWAYS—Speed of Cars—Expert Evidence.**—In an action against a street railway for damages for the negligent killing of a person on its track, expert evidence by car operator as to what would be a safe and reasonable rate of speed for the cars while being operated at the point where the injury occurred is admissible. (p. 414.)

**STREET RAILWAYS—Speed of Cars.**—If the jury is informed how fast the particular car causing an accident was moving at the time, the condition of the track over which it was moving and the use to which the street was put, it is for the jury to judge whether or not the rate of speed, under the conditions and circumstances shown to exist, was excessive. (p. 415.)

**STREET RAILWAYS—Ordinance Regulating Speed of Cars—Evidence.**—The violation of a city ordinance regulating the speed of street-cars is of itself no evidence of negligence on the part of the street-car company. (p. 415.)

**STREET RAILWAYS—Right of Way.**—Street-cars have the right of way over the streets of a city, and it is the duty of a citizen, whether on foot or in a vehicle, to give unobstructed passage to cars. (p. 416.)

**STREET RAILWAYS—Duty of Person on Track.**—The motorman in charge of a street-car, on seeing a trespasser on the track, has a right to assume that he will get out of the way, and need take no steps to stop his car to avoid injury to him, unless he has reason to believe that such person is not aware of the danger or is unable to protect himself. (p. 416.)

**STREET RAILWAYS—Care Required of Person on Track.**—If a person is walking along the edge of a street-car track, the motorman on a car has a right to suppose that upon hearing the bell, such other person will leave the track in time to avoid being struck by the car, and is not required to stop it, nor to take steps to avoid injuring him, until it becomes reasonably apparent that he is not going to get out of the way. (p. 417.)

J. M. Worten, for the appellant.

Wheeler, Hughes & Berry, for the appellee.

<sup>490</sup> LASSING, J. This suit was instituted in the McCracken circuit court by the administrator of N. M. Ford against the Paducah City Railway, seeking to recover damages for the killing of N. M. Ford. The petition alleges that the defendant company, in operating one of its cars, carelessly, negligently and recklessly ran upon and against deceased, knocked him down, and so injured him that he immediately thereafter died. The company's answer was a traverse and also a plea of contributory negligence. A reply made up the issue. After the issue had been made, the plaintiff offered to file an amended petition, for the purpose of filing the franchise which the defendant company had from the city of Paducah. The defendant objected to the filing of this amendment, and the court sustained the objection, and refused to permit it to be filed. The trial resulted in a verdict for the defendant company, and the plaintiff appeals.

The proof shows that the deceased, an aged man, <sup>491</sup> was walking north, near one of appellee's car tracks on Sixth street, in the city of Paducah, between Jackson and Tennessee streets, and that, while so walking, he was struck by a south-bound car on said track; that is, a car running in the opposite direction. Sixth street, where the accident occurred, had no improved sidewalks; the sidewalks were laid out, but had not been paved. It was the custom of pedestrians to walk in the streets. The street at this point where the accident occurred had been recently graveled or macadamized, and was rough; the smoothest part was near the tracks, or between the rails of the track, of the defendant company. The deceased was very deaf. The accident was seen by but one eye-witness, a man named Dickey, who was

sitting on his porch nearly opposite the place where the accident occurred. He states that when he first observed deceased he was walking slowly along the street near outer edge of—perhaps five feet from—the rail of the track that he was gradually approaching the track. He was situated on his porch that he could not see the car at that time. His attention was next directed by the ringing of the bell and the halloing of the motorman, and he looked up and saw the deceased almost opposite him, and too near the car track to permit the car to pass without striking deceased. The car at the time being some sixty or eighty feet from deceased. The car did not run over deceased, but struck and knocked him down, and he died in about fifteen minutes thereafter. The car came to a standstill before it had entirely passed deceased. The witness Sencer testifies that deceased was lying with his feet near the hind trucks of the car. The motorman in charge of the car did not test the proof showing that he was not, at the date of the trial, in the employ of the company, and had not been for 492 month or more and his whereabouts were unknown. The witness (Rice), flagman for the Nashville, Chattanooga and St. Louis Railway Company, testifies that he heard the car strike deceased when he was a square and a half away; he heard the lick above the sounding of the bell and the halloing of the motorman; in fact, he says he is not positive he heard either the ringing of the bell or the halloing of the motorman, but it was the lick that attracted his attention. Appellant offered to prove by several witnesses who had experience in the operation of street-cars what would be a safe and reasonable speed in running cars, but the court refused to permit this testimony to go to the jury. These facts are taken from the statement thereof in appellant's brief.

Appellant claims that the trial court erred to his prejudice in several particulars, but principally in refusing to permit him to show by expert street-car operators what would be a safe and reasonable rate of speed for a car when being operated over a street such as the one that this was being operated on at the point where the injury occurred; second, that the court erred in instructing the jury; and third, that the court erred in refusing to permit amendment offering to file the franchise of the defendant company to be filed. We do not think that the court erred in refusing to permit the witness to testify as to what would be a reasonable rate of speed, for the reason that what may be negligence in the speed of a car in one portion of a

might not be negligence in another portion thereof; in fact, what would be negligence in the speed of a car in one square of a street, might not be negligence in the next square. So it is impossible to fix an arbitrary rate of speed at which it would be safe to operate a car within the city limits. Appellant was permitted to prove, <sup>493</sup> as best he could, the speed at which the car which ran against deceased was moving; he was permitted to show the condition of the street, the extent to which it was used by the public, and the purposes for which it was used in general by the public, and we are of the opinion that, with these facts before them, it was for the jury to say whether the car in question was traveling at a dangerous rate of speed. It has been held that to move a car at all is per se dangerous: *Louisville & N. R. R. Co. v. McCombs*, 21 Ky. Law Rep. 1232, 54 S. W. 179. The danger is not confined alone to the speed with which the car is moved, but to the manner in which it is operated as well and, when the jury is told how fast the particular car in question was moving, the condition of the track over which it was moving, and the use to which the street was put over which it was moving, they must judge for themselves as to whether or not the rate of speed, under the circumstances and conditions shown to exist, was excessive.

Counsel for appellant contends with much earnestness that the court erred to his prejudice in refusing to allow proof that the ordinance of the city of Paducah requires street-cars to move in the business sections of the city at a rate of speed not exceeding eight miles an hour, and elsewhere at a rate not exceeding ten miles per hour, and he cites authorities from several other states tending to support his contention. He does not cite any Kentucky authorities, however, and we have been unable to find any that tend to support his contention. On the contrary, it has been repeatedly held that the violation of a city ordinance in this respect is, of itself, no evidence of negligence: *Louisville & N. R. R. Co. v. Redmon's Admx.*, 122 Ky. 385, 28 Ky. Law Rep. 1293, 91 S. W. 722; *Louisville & N. R. R. Co. v. Dalton*, 19 Ky. Law Rep. 1318, 43 S. <sup>494</sup> W. 431; *Dolfinger v. Fishback*, 12 Bush, 474. The violation of a city ordinance is no more evidence of negligence than obedience to its provisions would be evidence of due care. We do not think the trial court erred in refusing to permit the ordinance to be introduced.

Appellant complains of the instructions as given by the court, but a careful analysis of his objections thereto shows that his real objection is because the court said to the jury

in instruction No. 1 that appellee had a right to use track, and he argues from this fact that the jury were do less led to believe that appellee had the exclusive right the use of its tracks. We do not think, however, that jury was misled by this instruction. The supreme court of Pennsylvania, in the case of *Ehrisman v. East Harrisburg City Ry.*, 150 Pa. 180, 24 Atl. 596, 17 L. R. A. 448, says: "There is this distinction to be observed between steam roads and street railways. In the case of the former they have the exclusive right to the use of their tracks at all times and for all purposes, except at road crossings. Street railways have not this exclusive right. Their tracks are used in common by their cars and the traveling public. Where this common use is conceded and is unavoidable in towns and cities, the railway companies and the public have equal rights. Those of the railway companies are superior. Their cars have the right of way, and it is the duty of the citizen, whether on foot or in vehicles, to give unobstructed passage to the cars. This results from two reasons: First, from the fact that the car cannot turn out or leave its track, and, secondly, for the convenience and accommodation of the public. These companies have been chartered for the purpose, in part at least, that they are a public accommodation. The convenience of an individual who seeks to cross the tracks must give way to the convenience of the public. It would be unreasonable that a carload of passengers should be delayed by the unnecessary obstruction of the track by a passing vehicle." And this court in the case of *Central Passenger Ry. Co. v. Chatterson*, 14 Ky. Law Rep. 100, adopted the rule laid down in the Pennsylvania case, without qualification, as the law defining the relative rights of the street-car companies and citizens in the use of the public streets. Under this rule, the street-car had the right of way, and the appellant was not prejudiced because of the fact that the court in its instruction so told the jury, when the instruction complained of is read in conjunction with the other instructions given, we are of opinion that the appellant was not prejudiced thereby.

Appellant also complains of instruction No. 3, because that instruction the court told the jury that appellee had the right to assume that deceased would leave its track in time to avoid injury, etc. This objection is not well taken, for this court has repeatedly held to the contrary, and in the case of *Ward's Admr. v. Illinois C. R. R. Co.*, 22 Ky. Law Rep. 191, 56 S. W. 807, the rule is thus stated: "The rule is

settled in this state that those in charge of a railroad train on seeing a trespasser on the track have a right to assume that he will get out of the way, and need take no steps to stop the train to avoid injury to him, unless they have reason to believe that he is not aware of the danger, or unable to protect himself." In the case at bar, the proof shows that the deceased was walking north, along the edge of the car track, while the street-car was approaching him, going south. There is no evidence that the motorman in charge of the car knew that the deceased <sup>498</sup> was deaf. In the absence of such knowledge he had a right to believe that the deceased would leave the track in time to avoid being struck by the car, upon hearing the ringing of the bell, and the motorman was not required to stop the car or to take steps to avoid injuring deceased until he discovered, or it became reasonably apparent to him, that deceased was not going to get out of the way. After having made this discovery, it was his duty to use all means in his power to avoid injuring him. The witness Dickey testifies that the motorman not only sounded the bell, but that he halloed a warning to the deceased, and evidently made every effort that he could to avoid injuring him. The speed of the car at the time it struck deceased can best be determined from the fact that the car did not pass beyond deceased's body on the ground before it came to a complete stop. The proof is not at all satisfactory as to the rate of speed at which it was traveling, but it was certainly not traveling at a high rate of speed, or else it could not have been stopped within the short space within which it was stopped.

We are of opinion that the court gave to the jury the law of the case as warranted by the facts proven, and the judgment is affirmed.

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*The Right of a Railway Company in a Street* is only an easement to use the highway in common with the public. It has exclusive right to travel upon its track, although perhaps it has a superior right there from the fact that its cars cannot deviate therefrom, while ordinary vehicles can. The rights of street railway cars and other vehicles are, as a rule, equal; neither has a paramount right over the other: *Marden v. Portsmouth etc. Ry.*, 100 Me. 41, 109 Am. St. Rep. 476; *Barto v. Beaver Valley Traction Co.*, 216 Pa. 328, 116 Am. St. Rep. 770; *Drown v. Northern Ohio Traction Co.*, 76 Ohio St. 234, 118 Am. St. Rep. 844; *Kinyon v. Chicago etc. Ry. Co.*, 118 Iowa, 349, 96 Am. St. Rep. 382.

*Street Railways in Using the Public Streets* are required to make reasonable use thereof consistent with the rights of other persons and vehicles occupying the streets in conjunction with them; and the Am. St. Rep., Vol. 124—27.

motormen and conductors have in general the same rights and duties with reference to other vehicles crossing their course that the drivers of any other vehicles have: *Marden v. Portsmouth etc. Ry.*, 100 Me. 41, 109 Am. St. Rep. 476.

*The Speed at Which a Railway Car may Properly be Run*, and the degree of watchfulness imposed upon those in charge, must depend to some extent upon surrounding conditions: *Butler v. Rockland Ry. Co.*, 99 Me. 149, 105 Am. St. Rep. 267; *Haley v. Missouri Ry. Co.*, 197 Me. 15, 114 Am. St. Rep. 743; *Keiser v. Lehigh Valley R. R. Co.*, 212 Pa. 409, 108 Am. St. Rep. 872; *Eichorn v. New Orleans R. R. etc. Co.*, 112 La. 236, 104 Am. St. Rep. 437. The violation of a railroad of its contract with the town not to run its trains at a certain speed is evidence of negligence in an action for personal injuries: *Duval v. Atlantic Coast Line R. R. Co.*, 134 N. C. 331, 10 Am. St. Rep. 830; and ordinarily the operation of a train at a speed prohibited by ordinance is evidence of negligence: *Hutchinson v. Missouri Pac. Ry. Co.*, 161 Mo. 246, 84 Am. St. Rep. 710; *James v. Kansas City etc. R. R. Co.*, 157 Mo. 621, 80 Am. St. Rep. 328; *Beidel v. Philadelphia etc. R. R. Co.*, 87 Md. 153, 67 Am. St. Rep. 630.

## ELLIOTT v. LESLIE.

[124 Ky. 553, 99 S. W. 619.]

**PARENT AND CHILD—Assignment of Expectancies.**—A contract, whereby a son, in consideration of the payment of a sum of money to him by his father, releases his claim to any part of his father's estate, is void. (p. 423.)

**PARENT AND CHILD—Sale of Expectancy—Advancement.**—If a son makes a written contract with his father, whereby, in consideration of the payment of a sum of money to him by his father, releases his claim to any part of his father's estate, though the contract is void, the money will be charged to the son as an advancement. (p. 424.)

York & Johnson, for the appellants.

M. W. Maynard, James Monroe Roberson, and E. D. Sherrill, for the appellees.

554 **CARROLL, C.** In 1899, James H. Leslie died intestate. He left surviving him several children and grandchildren. The only property he owned at his death was real estate worth probably three thousand dollars. An action was brought to have this real estate sold, and the proceeds divided among his heirs, and also for the purpose of settling his estate. This controversy is between the children of T. J. Leslie—a son of James H. Leslie—and the other heirs. In 1889 T. J. Leslie executed to his father the following contract, which was put to record in the clerk's



of the Pike county court: "Whereas, there is an unfortunate suit pending in the Pike circuit court of my father, James H. Leslie, against me; now, in order to settle said suit and avoid litigation, and in consideration that my father has this day given and paid to me in cash one thousand dollars, which I accept in full of all my present <sup>555</sup> and future interest in my father's estate, whether real, personal or mixed, and I hereby forever acquit, release and relinquish all right or claim to or in his estate, and will not claim any part of his estate as against him or any of his heirs or devisees. The payment as above stated is to be in full of any future interest in his said estate. The said J. H. Leslie is to pay the legal cost of suit between us, but not my lawyer's fee. This does not include my interest in my mother's estate."

The children of T. J. Leslie insist: First, that his writing does not estop them from asserting their right to their father's interest in the estate of James H. Leslie; second, that the one thousand dollars mentioned in the writing should not be charged to them as an advancement, because it was paid as a compromise in settlement of a lawsuit at the time pending between their father and James H. Leslie. The other heirs contend that this writing was a valid agreement between T. J. Leslie and his father, and that, under its provisions, neither T. J. Leslie nor his children are entitled to any interest in the estate left by James H. Leslie. The chancellor held that the one thousand dollars mentioned in this agreement should be charged to T. J. Leslie as an advancement, and from this judgment both parties appeal.

It appears from the record that James H. Leslie had made advancements to all of his children, aggregating approximately about twelve hundred dollars each, so that T. J. Leslie received from his father practically the same amount as the other children. We do not consider it necessary to look into the question whether or not this writing was executed as a compromise, or to examine the purpose of its execution. It may be conceded that it was fairly entered into, and that by its terms T. J. Leslie attempted to accept the one thousand dollars in full satisfaction of all his prospective interest in the estate of his <sup>556</sup> father. Viewing the paper from this standpoint, we will proceed to inquire into its validity for the purpose intended.

On more than one occasion this court has been called upon to pass upon the sufficiency of writings executed by a child conveying his prospective or anticipated interest in his par-

ent's estate to another person, and, with two exceptions will be noticed, has held that the attempted conveyance has no binding force or effect. Thus, in *McCall's Adm.* *Hampton*, 98 Ky. 166, 56 Am. St. Rep. 335, 17 Ky. Rep. 713, 32 S. W. 406, 33 L. R. A. 266, Wade Hampton sold and conveyed with covenant of general warranty the right and interest that he might thereafter become entitled to in his father's estate to his brother, Charles Hampton. After the death of the father, a creditor of Wade Hampton sought to subject his interest in his father's estate to the payment of his debt. Charles H. Hampton asserted title to it under the deed made by his brother. It was held that the interest of Wade Hampton did not pass by the deed, and that the creditor was entitled to subject the estate to the payment of his debt. To the same effect is *Adm.* *Schlesinger*, 81 Ky. 290, 5 Ky. Law Rep. 280; *Whitely v. Exrs. v. Wheeler*, 2 Met. 474, 74 Am. Dec. 421. It may be remarked that in neither of these cases did the parent execute any writing consenting to the conveyance, although in each of them it appeared that he had verbally assented to it. And some importance appears to have been attached by the court to the fact that no writing was executed by the parent consenting to the conveyance. In *Lee's Exr. v. Lee*, 2 Met. 134, one child purchased from another his interest in the estate of his father; the father agreed to the arrangement, and executed a writing obligating himself to give to the son who had <sup>557</sup> purchased that part of his estate that he had intended to bequeath to the child who sold—this writing being executed by the parent, as well as the child who sold his interest. It was held that by the writing the son parted with all his interest in his father's estate. In *McBee v. Myers*, 4 Bush. 100, Mrs. Craig, a daughter of McBee, with the consent of her father, sold to her brother, Walter McBee, all her right and interest in his father's estate. The father also executed a paper in which he affirmed his consent to the sale, and agreed to give Walter McBee the land intended for his daughter. The father having died intestate, Walter McBee was held entitled to the interest of Mrs. Craig in his father's estate. It will thus be seen that this court has held contracts of this kind binding when they were entered into with the written consent of the parent, but that without such consent they do not operate to divest the heir of his interest.

As an original proposition, it is difficult to understand what ground sales of expectancies of this character can be sustained, especially when it is kept in mind as a f

mental principle necessary to the validity of every bargain and sale that there must be a grantor, a grantee, and a thing in being to be granted. It may be said, however, that the courts generally are disposed to uphold the validity of these contracts, when they are evidenced by writing, signed by the parent, and fairly executed, free from any semblance of fraud or overreaching. In elaborate notes to Garcelon's Estate, 104 Cal. 570, 43 Am. St. Rep. 134, 38 Pac. 414, 32 L. R. A. 595, and McCall's Admr. v. Hampton, 98 Ky. 166, 56 Am. St. Rep. 358, 17 Ky. Law Rep. 713, 32 S. W. 406, 33 L. R. A. 266, the authorities upon this subject are fully collected. The fact, however, that courts are reluctant to sustain these contracts, and have hedged them about with as <sup>558</sup> many conditions as possible in order to prevent their enforcement, is strikingly illustrated in all the cases that we have examined. In fact, the impression is left that the doctrine is adhered to on account of the fact that it is generally recognized, rather than because it is based on any sound reason. In Pomeroy's Equity Jurisprudence, section 953, the learned author, whilst stating that contracts of this character are valid and enforceable, remarks: "Heirs, reversioners, and other expectants, during the lifetime of their ancestor, are considered as peculiarly liable to imposition and exposed to the temptation and danger of sacrificing their future interest in order to meet their present wants. Being sometimes in actual, but more often in imaginary, distress, they do not stand upon an equal footing with those who deal with them concerning their expectancies of estate. . . . In the second place, the dealings of heirs and reversioners with their expectant interests are often a gross violation of the moral, if not legal, duties which they owe to their ancestors who are the present owners of the property, and from and through whom their future estate will come, and may be a virtual fraud upon the rights of those parties. Equity, therefore, treats such dealings in expectancies as a possible fraud upon the heirs and reversioners, who are important parties to the transaction, and as a virtual fraud upon their ancestors, life tenants, and other present owners. All dealings by such expectants are not necessarily and absolutely voidable, but in every such conveyance or contract with an heir, reversioner or expectant a presumption of invalidity arises from the transaction itself. It is not necessary to show, as a condition of relief, that the heir or reversioner was an infant, or that he was in a condition of actual distress when the bargain was made. A court of equity presumes distress.

<sup>559</sup> And the very fact of the sale or charge shows *prima facie* that he was not in a position to make his own terms and that he submitted to have them dictated to him by another party." This is not only a just but a vigorous nunciation of the sale of expectancies, and is supported by Story and other writers of recognized ability, and illustrated as do the individual cases, the suspicion and distrust with which such transactions are viewed. The ground upon which these sales have been upheld is variously stated. Thus, *Ruple v. Bindley*, 91 Pa. 296, the court said: "An assignment for a valuable consideration of demands, having at the time no actual existence, but which rests in expectancy or possibility, is valid in equity as an agreement, and takes effect as an assignment when the demands intended to be assigned subsequently brought into existence." Whilst Mr. Pomeroy in section 1271, says: "The assignee of an expectancy, possibility or contingency acquires at once a present equitable right over the future proceeds of an expectancy, possibility or contingency. . . . There was an equitable ownership of property in abeyance, so to speak, which finally changed into an absolute property upon the happening of the future event. Equity permits the creation and transfer of such an ownership, while the original common law rejected even such notion." And he says, in section 1287: "Mere possibilities or expectancies are, according to the general course of decision, assignable in equity for a valuable consideration, and equity will enforce the assignment when the possibility or expectancy has changed into a vested interest or possession." The explanation is sometimes given that the assignment operates as a contract by the assignor to convey the legal estate or interest when it vests in <sup>560</sup> him, and equity will specifically enforce such contract by decreeing a conveyance."

When it is considered that the heir under the condition being investigated had no interest or estate whatever in the property of the parent, either remote or contingent, it strikes one at first blush as being out of the question that the bare possibility of having an interest at some future time can be made the subject matter of a bargain and sale. As said in *2 Fearne on Remainders*, 23: "An expectancy or chance is a mere hope, unfounded in any limitation, provision, trust or legal act whatever, such as the hope which an heir apparent has of succeeding to the ancestor's estate. This is sometimes said to be a bare or mere possibility, and at other times less than a possibility. It is a possibility in the popular sense of the term, but it is less than a possibility in the spec-

sense of the term 'possibility.' For it is no right at all in contemplation of law even by possibility, because, in the case of a mere expectancy, nothing has been done to create an obligation in any event, and where there is no obligation there can be no right, for right and obligation are correlative terms." We are not disposed to give our assent to a doctrine, however ancient or general it may be, that is rested upon so unsubstantial a foundation as the one that upholds the right of an heir to traffic in something that has no existence, and may never have. Take the case before us as an illustration: Here the child in consideration of one thousand dollars sells to his parent his interest in the parent's estate, and obligates himself not to assert in the future any claim to it. What did the heir sell? What did he have to sell? Absolutely nothing. What could the father have bought? What was the consideration for a conveyance of this character? The parent, if he saw proper to do so, was not estopped by this paper <sup>561</sup> from giving to the child other estate or property. He had the absolute right to dispose of his property as he pleased, and, if he had chosen to donate to his son, after his contract was made, one thousand dollars or five thousand dollars, who could question his right to do so? If the parent had made a will and devised to this son a certain portion of his estate, would it be held that the devise was void, and that the father by entering into this agreement had barred himself from distributing his estate according to his wishes? Under our laws, that have been in force with few changes since the establishment of the state, the ancestor has been authorized to dispose of his estate during his lifetime by way of advancement, or after his death through the medium of a will. And these methods have become a part of the settled laws of the state, familiar and acceptable to its people. And if either of these means of disposition is not resorted to, and the owner of an estate dies intestate, the law of descent and distribution at once becomes operative, and, under its wise and salutary provisions, the undevised and undisposed estate is settled on those persons whom the law has selected as the objects of the decedent's bounty. As well said in *McCall's Admr. v. Hampton*, 98 Ky. 166, 56 Am. St. Rep. 358, 17 Ky. Law Rep. 713, 32 S. W. 406, 33 L. R. A. 266: "Some courts hold that the expectancy of an heir to inherit his father's estate is not an interest capable of assignment in equity any more than at law, and we agree with courts upon the question. It seems at this late day needless to discuss the wisdom and policy of the law which has been sanc-

tioned for so many generations, and we do not feel called upon to defend it. A strict adherence to it will save multiplying contentions, protect the improvident child and heir at law from fraud and deceit, save free and untrammelled actions of the possessors of estates in their <sup>562</sup> distribution. If there were no other reasons for adhering to the rule, those suggested would be all-sufficient, in our opinion, for our doing so."

The conclusions here announced may appear to be in conflict with the cases of *Lee's Exr. v. Lee*, 2 Duval, 134, and *M. Bee v. Myers*, 4 Bush, 356, but, if so, they are in harmony with the later and sounder utterances of this court as declared in *Alves v. Schlesinger*, 81 Ky. 290, 5 Ky. Law Rep. 280, and *McCall v. Hampton*, 98 Ky. 166, 56 Am. St. Rep. 335, 17 Ky. Law Rep. 713, 32 S. W. 406, 33 L. R. A. 233, as well as its judgment in *Wheeler's Exrs. v. Wheeler*, Met. 474, 74 Am. Dec. 421. It seems to us that these latter cases materially modify, if they do not, in fact, overrule, the opinions upholding sales of expectancies when made without the consent of the parent. Indeed, these latter opinions cannot be reconciled with the earlier ones of this court. It is difficult to perceive any substantial difference between a sale of an expectancy without the written consent of the parent and a sale with his consent. In neither case does the transaction rest upon any consideration, nor is it supported by any enforceable obligation. It is a mere technical distinction without a sound difference, in keeping with the rule announced by some other courts of last resort that a conveyance of this character will be enforced if made with a covenant of warranty, but otherwise not. We therefore conclude that when the parent, under a contract like the one in question, advances to his child money or property, that it should be charged to the child as an advancement, and this is the sensible, reasonable and legal effect of it. Under the statute, the intention of the donor is never consulted. It is immaterial whether he intended to charge the heir with the property donated or not, or what his purpose was in making the advancements. This rule will give reasonable effect to contracts of this character when they are entered into, and will carry out the purpose and intention of our laws.

<sup>563</sup> The chancellor having charged the amount received under this contract as an advancement, his judgment is affirmed.

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*The Assignment or Release of Expectant Estates is discussed in note to McCall v. Hampton, 56 Am. St. Rep. 339. An heir may release*

ancestor, for a sufficient consideration, all the share which he otherwise acquire in the latter's estate on his death: *Brands v. Pitt*, 44 N. J. Eq. 545, 6 Am. St. Rep. 909; *In re Estate of Garce*, 14 Cal. 570, 43 Am. St. Rep. 134. See, also, *Hudnall v. Ham*, 183 6, 75 Am. St. Rep. 124; *Hale v. Hollon*, 90 Tex. 427, 59 Am. St. 319. Where a release of a right of inheritance is made to the or, the rule requiring the person relying on it to prove its fair- no longer in force: *Estate of Edelman*, 148 Cal. 233, 113 Am. St. 31.

*Parol Promise of an Heir to Accept a Certain Amount of prop-* in lieu of his expected interest in his parent's estate, when ed by the execution and delivery of a deed and the possession of property conveyed, is valid: *Crossman v. Keister*, 223 Ill. 69, m. St. Rep. 306.

## CRAWFORD v. TRAVELERS' INSURANCE COMPANY.

[124 Ky. 733, 99 S. W. 963.]

**INSURANCE, ACCIDENT—Knowledge of Agent—Estoppel.**— knowledge of an insurance agent, acting within the scope of his au- ty, respecting any material fact which affects the risk, is im- to the company, and it is estopped from setting such fact up in e, unless the person dealing with the agent knows of his limited s and that he is exceeding them. (p. 426.)

S. Kelly, for the appellant.

A. Fulton, for the appellee.

NUNN, J. The judgment appealed from was ren- by the Nelson circuit court in an action instituted by ppellant against the appellee to recover five thousand s on an accident insurance policy issued to Dr. Alex- Crawford, appellant's intestate. On the trial, after introduction of testimony by both parties, the court gave ary a peremptory instruction to find for defendant, and s ruling the appellant now complains.

e policy was sold to Dr. Crawford by the agent of ap- on September 23, 1904, which insured him against ac- tal death for a term of twenty-four hours. Within that he was killed by reason of a collision of two trains, e of which he was riding. In its answer appellee relied upon the following clause in the policy, to wit: "This , and the <sup>735</sup> insurance thereunder, shall be wholly as to persons under eighteen and over sixty-five years e." It is alleged that Dr. Crawford was over the age ty-five years at the time he purchased the ticket or , that he failed to disclose that fact, and for this reason

appellee was not bound to pay the policy. The appellant's reply, admitted that Dr. Crawford was over the age of five years at the time; but alleged that the agent of appellee who sold him the ticket knew that fact, and that his insurance agent did not know that the ticket or policy contained such a clause. The appellee, by rejoinder, controverted the affirmative matter in the reply, and for the first time questioned the authority of the agent of appellee on selling the ticket to waive any provision of it. It is not necessary to consider the effect of this plea in rejoinder; for, as we understand the briefs of counsel, the question of the limited power of the agent who sold the ticket is abandoned. But if not, the principle is so well settled that such an agent, while acting in the apparent scope of his authority, will bind his principal as firmly as could its general officer while acting in that capacity. His knowledge, therefore, respecting any material fact which affects the risk is imputed to the company, and it is estopped from setting it up in defense unless the party dealing with the agent knew of his limited power, and that he was exceeding the power conferred upon him by his principal: See May on Insurance, sec. 143; *Phoenix Ins. Co. v. Brooklyn v. Phillips*, 16 Ky. Law Rep. 123; *German Ins. Co. v. Hart*, 16 Ky. Law Rep. 346; *Phoenix Ins. Co. v. Spence*, 87 Ky. 285, 10 Ky. Law Rep. 254, 8 S. W. 453; *London & Lancashire Fire Ins. Co. v. Gerteisen*, 21 Ky. Law Rep. 51 S. W. 617; *Teutonic Ins. Co. v. Howell*, 21 <sup>736</sup> Ky. Law Rep. 1245, 54 S. W. 852. J. Tyler Davis was the agent of appellee in the district which included Nelson county. He left these tickets or policies in the hands of B. J. Hubbard, prepared to be delivered to purchasers; Hubbard only had authority to insert the date and the name of the purchaser on the ticket. The facts of this case are similar to the facts of *London & Lancashire Fire Ins. Co. v. Gerteisen*, 21 Ky. Law Rep. 471, 51 S. W. 617. In that case the court said: "It is also well settled that knowledge of the agent who represents the company in the transaction is the knowledge of the company. It is insisted, however, that Rudd alone was appellant's agent, that Haws had no authority from it, and that it is not chargeable with facts known to Haws, unless communicated to Rudd. This is the decisive question in the case. According to the testimony, Haws was in effect the partner of Rudd in effecting this insurance. The rule that a delegated authority cannot be delegated has some limitations. It is usual for insurance agents who issue policies to employ out solicitors to take applications on which the policies



ued; and authority to do so may be inferred, nothing  
ring to the contrary, for this is the common way the  
ess is done. When Haws came to appellee professing  
an insurance agent, and took his application and ob-  
d for him the policy of insurance, he had a right, with-  
notice of a defect in his power, to regard him as the  
of the company for this purpose, and appellant, by ac-  
ing the application, issuing the policy and keeping the  
ium, is estopped to say his act was unwarranted, and  
take the benefit with the burden."

the case at bar Hubbard, the agent who sold Crawford  
ticket, stated in effect that he knew at the time he sold  
ticket that Crawford was over <sup>737</sup> the age of sixty-five

J. Tyler Davis testified that about a week before the  
of this ticket Dr. Crawford came to him in a certain  
store in the town of Bardstown, and applied to him for  
urchase of a ticket of insurance, and he informed him  
e time that his company would not insure persons over  
five years of age; but there was no proof introduced  
ing that Dr. Crawford knew at the time he purchased  
ticket sued on that it was a policy or ticket in the com-  
that J. Tyler Davis represented. Hubbard testified  
when he sold Crawford the ticket, the train on which he  
wford) took passage was about due, and that Crawford  
ved the ticket, put it in his pocket, and started to the

Under these facts, in our opinion, there was sufficient  
nce to authorize the court to submit the case to the jury.  
as error to give a peremptory instruction. In the case  
ravelers' Ins. Co. of Hartford v. Ebert, 20 Ky. Law Rep.

47 S. W. 865, the court said: "It is evident that the  
was authorized to issue accident policies of some kind,  
it nowhere appears that appellee had any notice or in-  
ation to the effect that his power in that respect was  
ed; hence we are of opinion that appellant is bound by  
representations and contracts in respect to insurance  
by an agent authorized to make any contract of insur-

It would be unreasonable to expect the community at  
to be cognizant of the authority and restrictions which  
insurance company might impose upon an agent, and we  
it no more than reasonable and just that appellant  
d be bound by the contract and representations of its  
in respect of the kind of insurance sold to the appellee,  
or which the agent received pay." In the case of Stand-  
Life & Accident Ins. Co. v. Holloway (Ky.), 72 S. W.  
24 <sup>738</sup> Ky. Law Rep. 1856, the insured was crippled,

and the policy contained the provision avoiding it as to ples, just as in the case at bar the provision makes it as to persons over sixty-five years of age. The court that it was proper to submit to the jury for its determination, under the evidence, whether the agent who issued policy had knowledge of the insured's crippled condition. The court in that opinion said: "So, in view of the authorities referred to, we are constrained to hold that if Ro appellant's agent, at the time he delivered to appellee policy sued on, knew that he was maimed or crippled, provision in the policy intended to exclude cripples waived in this case; and we think appellant is estopped to deny the waiver. It was for the jury to determine from evidence presented whether the agent had such knowledge or not, and, though he denied having any knowledge the appellee testified that he walked in before him with his limp, and that upon reaching the ticket-office window he put his cane upon the base or shelf thereof in plain view of the agent. From these facts the jury doubtless found that the agent saw, and had opportunity to know of, appellee's crippled condition; and, upon the other hand, that the latter did not know, and had no means of learning, of the provision in the policy intending to exclude persons of his class from the benefits, as he took the passenger train immediately after receiving it for the purpose of going to Louisville."

We are of opinion under these authorities that it is proper for the court to submit to the jury the question of the agent's knowledge as to the age of the insured; and, at the time the policy was issued he knew that the insured was over the age of sixty-five years, that then the company was bound, unless the jury <sup>739</sup> believe from the evidence that Dr. Crawford at the time knew that the agent was exceeding his authority.

For these reasons, the judgment of the lower court is reversed, and the cause remanded for further proceedings consistent with this opinion.

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*The Waiver of Conditions in Insurance Policies* by agents of a company is discussed in the note to *Johnson v. Aetna Ins. Co.* 100 Am. St. Rep. 99. A provision in an accident insurance policy in relation to the payment of premium is waived by the delivery of the policy by an authorized agent with full knowledge of the fact that the insured had been injured subsequently to the date of the application for insurance, and the receipt and retention of the premium at the time of the delivery of the policy: *Rayburn v. Pennsylvania Cas. Co.*, 138 N. C. 379, 107 Am. St. Rep. 548. And a warranty in a policy of insurance that the title to the property insured is in the insured is waived when the authorized agent of the insurer, before delivery

policy and payment of the premium, is informed that the title to property is in the wife of the insured, and stated that that made reference: State Mutual Ins. Co. v. Latourette, 71 Ark. 242, 100 St. Rep. 63. See, also, Hartford Fire Ins. Co. v. Redding, 47 Fla. 10 Am. St. Rep. 118; Queen Ins. Co. v. Straughan, 70 Kan. 186, 10 Am. St. Rep. 421. But it has been held that the knowledge by an agent of the insurer, before issuing a policy, that the insured occasionally rode steeplechase races does not prevent the insurer from avoiding the policy, on the ground that the insured was injured while riding in steeplechase, and that such riding was a voluntary exposure to unusual danger: Smith v Aetna Life Ins. Co., 185 Mass. 74, 102 Am. St. Rep. 326.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**LOUISIANA.**

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**STATE v. POLICE JURY.**

[120 La. 163, 45 South. 47.]

**DE FACTO OFFICER.**—A Writ Signed by a Female Deputy Clerk is not subject to collateral attack. She is at least an officer de facto. (p. 431.)

**SUMMONS**—An Objection to a Writ Because Signed by a male is Waived if not raised before the case is decided on its merits. (p. 431.)

**TENDER.**—A Tender Need not be Made when no purpose can thereby be served; parties are not required to do vain things. (p. 432.)

**LIQUORS**—Imposition of Prohibiting License.—The power to impose a liquor license does not include the power to impose a license so large in amount as to be in effect prohibitory. (p. 433.)

Stewart & Stewart, for the appellant.

Robert P. Hunter & Sons, for the appellee.

<sup>164</sup> **BREAUX, C. J.** Relator asked for a writ of mandamus against the police jury of the parish of Webster. Relator seeks to have the liquor license in the ward in which he proposes to open a liquor saloon fixed at two thousand five hundred dollars. The license at this time, fixed in accordance with an ordinance of November 8, 1906, is five thousand dollars, for the year 1907. Relator urges that a license of five thousand dollars is prohibitory, and for that reason is illegal.

The judgment appealed from makes the mandamus peremptory, and orders the police jury to meet within two days and fix the license for the year 1907 at the amount of two thousand five hundred dollars. From that judgment, the defendant parish has taken a suspensive appeal.

the exceptions: There are preliminary questions to the one of which we will, in the first place, apply ourselves.

The first is that no legal writ has been issued; that the writ served was signed by Mrs. Dora Dupuy, who is incapable of holding office or of exercising any of the duties of a deputy clerk.

The second of defendant's propositions is that the suit is defective, because relator did not make a tender of the two hundred and five hundred dollars, amount of license which he admits is not excessive and prohibitory; and, lastly, relator's petition discloses no cause of action.

We now return to the first proposition for decision, to wit, that the writ was signed by a person of the opposite sex. At any rate, had de facto authority sufficient to bind the complaining respondent. She unquestionably qualified by taking the proper oath. Her appointment had the sanction of the judge. She exercised the duties of the office and the writ with some <sup>185</sup> claim of title to her position. She acted as a deputy clerk.

One who brings suit cannot be collaterally prejudiced by such objection. It was not shown that the relator, who resides in another parish at some distance from the court of the parish of Webster, knew that a young lady had signed the writ of mandamus.

The validity or the invalidity of the appointment of the relator as deputy clerk is not a question which should prejudice the complaining person, and not one in which respondent had any great reason to be concerned.

The following decisions relate to the binding effect of acts of de facto officers: *State v. Sadler*, 51 La. Ann. 1397, 26 La. 390; *Guilbeau v. Cormier*, 32 La. Ann. 930; *Succession of Keller*, 39 La. Ann. 579, 2 South. 553; *Cash v. Whitcomb*, 13 La. Ann. 401, 71 Am. Dec. 515; *Mayor etc. of Natchitoches v. Redmond*, 28 La. Ann. 274.

Moreover, the question, if there is anything in it, is one which should have been urged in limine. It was decided on the merits. The record does not disclose that the respondent made the least attempt to have it considered and decided before the case was decided on the merits by the final judgment of the district court.

The respondent must be considered as having waived the objection urged, if it ever had any merit.

The defendant, under the circumstances above stated, disavowing the testimony, is presumed to waive an exception: see *of Kempe v. Hunt*, 4 La. 477; *Powell v. Graves*, 15 La.

Ann. 188; *Curé v. Porte*, 18 La. Ann. 206; *Lewis v. E*  
23 La. Ann. 254; *Tupery v. Edmondson*, 32 La. Ann.  
*Hickman v. Dawson*, 33 La. Ann. 438; *Ashbey v. Ashb*  
La. Ann. 138, 5 South. 546. But the defendant has  
notified. A copy of the petition was served upon it.

<sup>166</sup> "On an application for mandamus all that is re-  
is that the parties in interest should have notice of the  
cation in order that their rights may be protected": *S*  
*v. Holmes*, 15 La. Ann. 334; Code Prac., art. 841.

The mandamus proceedings, because no tender of  
license was made to the sheriff, is the point urged  
order by the respondent, on which we will pass at this

In January of this year, relator, through counsel,  
upon the police jury to fix the license at the amount of  
thousand five hundred dollars.

They refused and insisted upon five thousand dollars.  
is very evident that a tender of one-half of the amount  
not have served any purpose. The sheriff testified that  
certainly would not have accepted it. We must say that  
ground of exception has no merit. Parties cannot be  
quired to do vain things.

The remaining ground urged by respondent for de-  
is that the petition discloses no cause of action and no  
on the part of relator to prosecute the suit.

There is a ground of action alleged, although it has  
very much diminished by the lapse of time. The year  
which the license was asked has nearly elapsed, and re-  
can now recover only a barren right. That is the right to  
open the saloon for about one month, which he could  
only by paying at the very least a half license—thir-  
twelve hundred and fifty dollars—a rather large amount  
pay to open a saloon at a place in the swamp, as stated  
the testimony.

But there is a cause of action. As to the right of action,  
it appears of record that relator owns forty acres of land  
the ward in which he wishes to become a saloon-keeper.  
ground here urged why he has no right of action is that  
does not allege that he is a taxpayer. Having shown that  
is a land owner, it follows that he is a taxpayer. The  
able inference is that property owes taxes.

<sup>167</sup> On the merits: In the locality in which the relator  
posed to open a liquor saloon (in a brushy swamp, as  
in the evidence), a saloon-keeper could not at the time  
the case was tried and the witnesses were heard, and mu-

pay a liquor license of five thousand dollars and realize least profit from the sales of the saloon.

The testimony leads to one conclusion, to wit, that the attempt to keep such a saloon would meet with certain failure. At two thousand five hundred dollars, five or six in number, save one in the ward were closed because the owners had no profit in the occupation. It is only because these saloons were closed that the relator here might with prospect of success at all offer to pay the two thousand hundred dollars.

In view of the number of witnesses that have testified regarding the prohibitory character of the license of five thousand dollars, it must be held that the judgment appealed from should not be set aside.

In the case of the State v. Police Jury of Red River, 116 767, 41 South. 85, this court held that the power to impose the license did not include the power to prohibit.

The license to carry on the saloon business in the fifth ward is prohibitory. Under the cited decision, it must be held that it is illegal.

At an election held in the ward it had been decided by the vote of the ward at the election that a liquor license would be issued to those who chose to follow the business of selling liquor.

The right acquired by that election may be put an end to by laws prohibiting the sale of intoxicants. It cannot be prohibited by police jury ordinance imposing a prohibitory license as to amount.

For reasons assigned, the judgment is affirmed.

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*Women as Officers.*—A Clerk of a County Court is a ministerial officer, and as the constitution and statutes of Missouri only require such office shall be filled by a citizen of the United States and the state, without requiring that it shall be filled by a male citizen, a woman is not disqualified by reason of her sex alone from holding such office, as she may possess the citizenship required: *State v. Hoskins*, 137 Mo. 636, 59 Am. St. Rep. 515. See, also, *Brown v. McMinn*, 76 Iowa, 479, 14 Am. St. Rep. 228; *Schuchardt v. People*, 90 Ill. 39, 39 Am. Rep. 34. When a ministerial officer is authorized to appoint a deputy clerk, he may, unless restricted by statute, appoint whom he pleases, without regard to age, sex, color or race: *Wilson v. Board of Commissioners*, 87 Mich. 493, 24 Am. St. Rep. 173.

Am. St. Rep., Vol. 124—28

# GORDON v. MECHANICS' AND TRADERS' INSURANCE COMPANY.

[120 La. 441, 45 South. 384.]

**BANKRUPTCY—Change of Title to Property.**—Under bankruptcy law there is no change of title until the trustee is appointed and qualified, whatever may be the retroactive effect of the passing of the title when the appointment is actually accomplished. (p. 437.)

**BANKRUPTCY.**—The Trustee is not Bound to Accept Property tendered by the bankrupt to the creditors, even if it is in existence unless such acceptance would be beneficial to them, a fortiori where it would be prejudicial to do so. (p. 438.)

**FIRE INSURANCE—Forfeiture by Bankruptcy Proceedings.**—Voluntary bankruptcy proceedings do not avoid a policy of insurance on the property, where a loss occurs after the filing of the petition but before the appointment of a receiver and a trustee, for until the appointment the title to the property, together with the right of possession, remains in the bankrupt. (p. 438.)

Price, Roberts & Warren and Parkerson, Bruenn & Ballew, for the applicant.

Clayton & Hawthorn, for the respondent.

<sup>442</sup> NICHOLLS, J. This case was tried and decided in the lower court upon the following statement of facts:

1. That the defendant issued to plaintiff its policy of insurance on plaintiff's stock of goods while contained in a one-story frame building with shingle roof at No. 409, P. Sanborn's map, in the town of Rustin, Louisiana, for an amount of one thousand dollars as alleged in plaintiff's petition, which policy is herewith filed and marked "Exhibit A."

2. That plaintiff began to place his goods in the said building on or about the second day of September, 1904, and began business as soon thereafter as his goods could be placed and straightened; that it is agreed that the affidavit of plaintiff hereto attached, and marked "A, 1," shall be received in evidence without objection as to form or manner of taking. The book referred to in <sup>443</sup> said affidavit is filed herewith and marked "Exhibit B."

3. That plaintiff from time to time entered into a book kept for that purpose the invoices for all the merchandise bought after opening up business at Rustin, Louisiana, as a merchant; said book being filed herewith, and marked "Exhibit C."

4. That said plaintiff kept a record or account of his cash sales made each day in a cash-book; said cash-book being filed herewith and marked "Exhibit D."



That on February 1, 1905, plaintiff filed a voluntary petition in bankruptcy in the United States district court for the western district of Kentucky, in the city of Louisville, Kentucky, and on said petition on said date said plaintiff was adjudicated a bankrupt. Certified copies of said petition and said decree adjudicating said plaintiff a bankrupt are herein, and marked "Exhibits E and F."

That on February 2, 1905, the stock of merchandise belonging to plaintiff while situated in said building was destroyed by fire, which originated in the building occupied by R. & Goldberg adjoining that occupied by plaintiff.

That on February 3, 1905, George L. Martin was appointed and qualified as receiver of the plaintiff, bankrupt, and on February 15, 1905, the said Martin was appointed receiver, and on February 17, 1905, qualified by having his appointment approved; certified copies of said orders and decrees are filed herewith and marked "Exhibits G, H, I, and J."

That on May 13, 1905, a decree was entered by the United States district court for the western district of Kentucky, confirming a composition offered by plaintiff to his creditors; said decree being filed herewith, and marked "Exhibit K."

That the policy sued on herein is and was a part of the estate of the plaintiff in <sup>444</sup> the hands of the trustee, and was conveyed to plaintiff by the trustee by virtue of the decree confirming the composition above referred to.

That the stock of merchandise named in said policy insured thereunder was worth at least seven thousand dollars at the time of the fire, and that the total concurrent liability, including the policy sued on herein, did not exceed five thousand dollars.

The clause of the policy upon which the defendant relies is, with some inapplicable omissions, as follows: "The policy unless otherwise provided by agreement included hereon or added hereto, shall be void . . . if the interest of the insured be other than unconditional and sole ownership . . . or if any change other than by death of an insured person takes place in the interest, title or possession of the property insured by legal process or judgment or voluntary act of the insured or otherwise, or if this policy is assigned before a loss."

The defendant contends that at the moment of the adjudication of bankruptcy the title to the property involved passes out of the bankrupt, and vests in the trustee to be applied to the creditors, in due course under the provisions

of the federal statute; that a transfer to an assignee by decree of court under the bankrupt laws of the United States upon the bankrupt's petition, divests the bankrupt of title to his property, which title becomes immediately vested in the assignee. Defendant's counsel say section 3 of the bankruptcy act of 1898 concerning the question of title reads as follows (with certain unimportant omissions): "The trustee of the estate of a bankrupt upon his appointment and qualification . . . shall be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt . . . to all . . . property which he owned at the filing of the petition he could by any means have transferred."

Construing the clause of the statute under construction, the court said in *Re Burka* (D. C.), 104 Fed. 445: "Properly interpreted, the trustee is by operation of law vested with the title as of the date the bankrupt was adjudged to be a bankrupt." See, also, *In re Elmira Stevedoring Co.* (D. C.), 109 Fed. 456, and authorities there cited.

The court in *Re Abrahamson*, 1 Am. Bank. Rep. 44, said: "From the time of filing the petition in a case of voluntary bankruptcy the bankrupt's estate is 'in custodia legis' and upon the general power and general jurisdiction conferred upon a court of bankruptcy, which powers are exercised by the referee to whom the matter in bankruptcy is referred, it is the duty of the court upon its own motion to take actual possession and custody of the bankrupt's estate through a receiver or by direction to a marshal." To the same effect, *Carter v. Hobbs* (D. C.), 92 Fed. 594.

Counsel quote *Young v. Eagle F. Ins. Co.*, 14 Mass., 150, 74 Am. Dec. 673, *Adams v. Rockingham F. Ins. Co.*, 29 Me. 292, and *Perry v. Lorillard F. Ins. Co.*, 201 N. Y., as declaring: "That the proceedings be stayed, and thus the property become re-vested in him, the contingency too remote to be considered the foundation for a remaining insurable interest in the bankrupt. He has no power to reclaim the property, and has no right in the property by any contract executed or executory." And *Poughkeepsie M. Ins. Co.*, 23 Barb. (N. Y.) 623, and *Bank v. Insurance Co.*, 7 R. I. 429, as holding that "a voluntary assignment for the benefit of creditors is a transfer."

Plaintiff's counsel contend that a voluntary petition in bankruptcy and an adjudication thereon is nothing more than an expression of willingness on the debtor's part to consummate and deliver to the creditors his property and

y pledged to them; that the adjudication merely means court's willingness to accept it whenever a trustee shall been appointed to take charge of it; that the mere ex- on the part of the insured debtor to deliver to the ee in bankruptcy and the assent of the court to accept it gh the trustee <sup>446</sup> when appointed does not and cannot te either a change of ownership or possession until the ee is actually appointed and takes charge; that during interval between the adjudication and the appointment qualification of the trustee the title must remain in some-

The trustee is not in existence, and it cannot, there- be in the trustee. If the title be neither in the trustee n the bankrupt, there would be a hiatus in the title, a d during which the property would belong to nobody. e title cannot pass to the trustee, though, when it does it may be retroactive in its effect, and date back to the lication. But if no trustee is ever appointed, the bank- does not part with the ownership of his property. e might be and are cases where it might never be neces- to appoint a trustee. If not there never was a change e title, and if there was no change in the title, the policy ot void. Under the bankruptcy law there is no change le until the trustee is actually appointed and qualified, ever may be its retroactive effect when it is actually ac- lished.

to the possession of the property it must of necessity in with the bankrupt until some one receiver or trustee thorized to take charge; and even then it is universally that the mere taking possession of property by a receiver r a decree of court is not a change of possession to void policy. Plaintiff urges that the principle that a mere al seizure of part of the goods insured which did not ally dispossess the insured does not carry with it as its t the avoiding of a policy under the clause which defend- relies on in this case finds application in this case, and principle has been recognized in *McClelland v. Green-* Ins. Co., 107 La. 124, 31 South. 691; *Herman v. Katz*, Tenn. 118, 47 S. W. 86, 41 L. R. A. 700; *Walradt v. nix Ins. Co.*, 136 N. Y. 375, 32 Am. St. Rep. 752, 32 N. 063.

Plaintiff also urges that a transfer of the policy under rupt proceedings is within the prohibition which makes ssignment vitiate the policy, citing 13 American and ish Encyclopedia of Law, 187, 242.

Plaintiff particularly relies in this case upon *Fuller v. Jameson*, 98 App. Div. 53, 90 N. Y. Supp. 456, and *Fuller v. Farmers' F. Ins. Co.*, 184 Mass. 12, 67 N. E. 879.

Counsel of plaintiff quote the court in the New York case as saying: "In the interim, however, the title to the property together with the incidents of interest and possession, vested in the bankrupt, and the insurable rights which the bankrupt had in the policy of insurance were not in any way affected or impaired. We think this is made clear by recalling—what we assume to be conceded—that during such interim between the adjudication and the appointment of the trustee the bankrupt, and no one else, could as owner insure the property. We think that the construction to be placed upon the provision in the policy as to the character of the change of the interest, or possession which would render the policy void, is such a change as would enable some one else having the right and title to take out a new policy."

It appears from the agreed statement of fact that plaintiff filed a petition in voluntary bankruptcy on February 1, 1905, and that on the same day he was adjudicated as a bankrupt, but that on the very next day, February 2, 1905, the property which was covered by the insurance policy on which the present suit was instituted was destroyed by fire.

This was before either a receiver or a trustee had been appointed or qualified. As a consequence, the possession of that property never passed from Gordon to either the one or the other. Had the property remained in existence upon the date of the appointment of the Martin trustee, title to the same could have been transferred from the bankrupt (Gordon) to him, but there was at that time no property in which title could attach, nothing which the trustee could receive for the benefit of the creditors. The trustee is bound to accept property tendered by the bankrupt to his creditors, even if it be in existence, <sup>448</sup> unless such acceptance would be beneficial to them, a fortiori when it would be prejudicial to do so.

In this case, before the trustee could exercise any power on the subject, the property was destroyed. What had been the property in Gordon in a stock of goods no longer existed. All that remained from it of value to either himself or his creditors was the money which he could derive himself from the policy of insurance upon it. By collection of the amount to be drawn from it the proceeds could be made to inure to the benefit of his creditors. The only hope which the creditors had of getting anything from the property would

ough Gordon enforcing his rights upon the policy. ere the trustee does not deem it of benefit to accept title particular property when in fact it could not be applied the payment of creditors, the title to it remains in the bankrupt as if it had not been tendered. It was to be exted under the circumstances that the creditors would cont to a composition with Gordon, and depend upon his peral obligation to pay them, and this it appears was the fact. he creditors made a composition with the debtor which confirmed by the court. The effect of this was to place ters quoad the property covered by the policy as if it never been tendered to the creditors. In the interval be- en the adjudication in bankruptcy and the appointment the trustee the title of the property tendered remains in bankrupt. The decree itself does not pass the title. Its e simply marks the point of time to which the title, if esequently acquired by the trustee, relates back. The title the bankrupt in the interval exists. It may vest in the stee, or it may not, as circumstances should develop. No e could vest when there would be no property in existence en he was appointed to which a title could be made to ap-

We have not been able to refer to the cases from New rk and Massachusetts from which plaintiff's <sup>449</sup> counsel te, but the remarks, as quoted, are in themselves forcible, d we think correct. Defendant does not set up any injury harm to itself, in fact, from what has taken place in this tter. It is standing upon what it must admit to be the y strictest construction of the contract and the law in its or. We do not concur with it as to what the rights and igation of the parties springing from the situation are. e only question argued in the brief in behalf of defendant that which we have discussed. The other position taken it in the lower court, we presume, is not relied on.

We think the judgment brought up for review is correct, d it is hereby affirmed.

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*Fire Insurance Policy is not Avoided by a sale of the property* ch is not fully consummated: *Magoun v. Fireman's Fund Ins. Co.*, Minn. 486, 91 Am. St. Rep. 370; *Garner v. Milwaukee Mechanics' Co.*, 73 Kan. 127, 117 Am. St. Rep. 460; *Mackintosh v. Agricultural Fire Ins. Co.*, 150 Cal. 440, 119 Am. St. Rep. 234. Thus no forfeiture results by a judicial sale of the insured property and its consumation, if payment of the purchase price is not made and no bill sale executed: *International Wood Co. v. National Assur. Co.*, 99 415, 105 Am. St. Rep. 288. As to whether an assignment for creditors or the institution of bankruptcy proceedings avoids insurance on property, see *Orr v. Hanover Fire Ins. Co.*, 158 Ill. 149, 49 Am. Rep. 146; *Perry v. Lorillard Fire Ins. Co.*, 61 N. Y. 214, 19 Am.

Rep. 272; *Phoenix Ins. Co. v. Lawrence*, 4 Met. 9, 81 Am. Dec. The general rule is that conditions against alienation of the property insured, contained in fire insurance policies, are ordinarily intended to provide only against changes in ownership which might supply a motive to destroy the property, or which might weaken the interest of the insured in protecting it. Hence dealings with the property calculated to produce any such effect do not, by reason of such conditions, avoid the policy: *Schloss v. Westchester Fire Ins. Co.*, 141 566, 109 Am. St. Rep. 58.

### TOUCHY v. GULF LAND COMPANY.

[120 La. 545, 45 South. 434.]

**MINOR AND TUTOR.**—A Private Sale by a Tutor of a minor's land to pay debts is a nullity. (p. 440.)

**MINOR AND TUTOR.**—Avoidance of Sale by Tutor.—In making a private sale of land which has been made by his tutor, a minor is bound to account to the purchaser for the proceeds used in paying debts for which the estate was liable, but he is not required to testify as to such proceeds prior to instituting suit to recover the property. (p. 441.)

**MINOR AND TUTOR.**—Estoppel to Repudiate Sale.—When a tutor has made a private sale of his minor's land, the minor is estopped to repudiate the sale by the fact that shortly after the sale he approves the tutor's account, nor by the circumstance that the proceeds of sale are used to pay debts of the succession, if he is not informed that the sale was private and for less than two-thirds of the appraised value of the property. (p. 442.)

Leon Sugar and Thomas Camile Planche, for the appellant.  
Winston Overton, for the appellee.

**546 LAND, J.** This is a petitory action to recover a tract of land which belonged to Mrs. Davis C. Touchy, deceased. Plaintiff is the son and sole heir of the decedent, and at the time of her death was a minor. The surviving husband, father, Victor Touchy, qualified as natural tutor and succeeded to administer the succession, which owed debts. In the year 1901 the said tutor sold the land in dispute at a private sale to the defendant company for the price of four hundred dollars, paid in cash.

The succession was administered, the debts paid, and an account was rendered and homologated. The residuum was delivered to the plaintiff, an emancipated minor, a little more than the age of eighteen years.

Plaintiff claims title to the property by inheritance from his mother, and alleges that the private sale of the land

purposes of paying debts was an absolute nullity. This position of law is not disputed. In <sup>547</sup> Blair v. Dwyer, La. 332, 34 South. 464, this court held that a private sale of minor's property to pay debts was void, although authorized by a family meeting and judgment of the court. This doctrine was reaffirmed in Parker v. Ricks, 114 La. 942, 10 South. 687, citing Blair v. Dwyer, 110 La. 332, 34 South. 464. Fletcher v. Cavalier, 4 La. 267, and Aronstein v. Irvine, La. Ann. 1478, 22 South. 405. See, also, Rist v. Hartner, La. Ann. 378, 10 South. 760.

The exception that the plaintiff had not tendered back the proceeds of the sale previous to the institution of the suit is without merit: Self's Heirs v. Taylor, 33 La. Ann. 769; Heirs of Wood v. Nicholls, 33 La. Ann. 744; Rist v. Hartner, 44 La. Ann. 378, 10 South. 760.

The real defense is that the plaintiff ratified the sale, and attempted to deny it. It appears from the evidence that the minor was emancipated on the first day of July, 1901. Four days later the tutor filed his final account, which showed no balance on hand to the credit of the succession. The residuum consisted of real estate appraised at two thousand one hundred and twenty-five dollars. Among the items sold to the tutor, under the head of "Sales of Property," appears the following item:

April 22, 1901, To Gulf Land Co. Ltd., S.  $\frac{1}{2}$ , S. E.  $\frac{1}{4}$  of Sec. 27 and N.  $\frac{1}{2}$  N. E.  $\frac{1}{4}$  Sec. 27 \$1400.00."

The tutor prayed that the under-tutor and the emancipated minor be cited. Appended to the account is the following ratification and acknowledgment, signed by both of them, to wit: "I, the within and foregoing account accepted and approved and all legal delays waived. I have carefully examined the same, and I am familiar with all the items thereof, as to debits and credits, and I find it correct in all of its items and clauses, and hereby approve the same and consent to its homologation, and that the tutor be discharged as provided for."

In admitting that emancipated minor examined the items of the account and that the same were explained to him by the under-tutor <sup>548</sup> of the tutor, still the account itself did not show to the plaintiff that the property in question had been sold at private sale for less than two-thirds of its appraised value. Plaintiff testified that he was ignorant of this act at the time and for several years thereafter.

The former under-tutor testified that he did not think anything was mentioned about the manner in which the

property had been sold—whether at public or private sale. The former attorney of the tutor testified that they did not discuss on the day of the settlement any sales at all, but simply went over the whole account, and checked up the sales that had been made. The evidence, therefore, shows that the plaintiff at the time of the alleged ratification was ignorant of the crucial fact that the property had been sold at private sale. It may be assumed as a fact in the case, in the absence of evidence to the contrary, that the proceeds of the sale were used in payment of the debts of the succession as shown by the account, and in that way inured to the benefit of the plaintiff. In a similar case it was held that there can be no ratification of such a void sale, unless it is shown that the minor knew of the infecting radical vice which contaminated the act, and yet voluntarily cured the nullities: *Rist v. Hartner*, 44 La. Ann. 378, 10 South. 760. The minor, being ignorant of the facts, was not estopped by his approval of the tutor's account or by the circumstance that the price of the sale was used to pay debts of the succession: *Heirs of Self v. Nicholls*, 33 La. Ann. 744; *Heirs of Self v. Taylor*, 33 La. Ann. 769; *Rist v. Hartner*, 44 La. Ann. 378, 10 South. 760.

Plaintiff is bound in equity to return the price of the sale and the taxes paid on the property, and is not entitled to the rents because the land is vacant.

It is therefore ordered that the judgment appealed from be reversed; and it is now <sup>549</sup> ordered that the plaintiff be recognized as the lawful owner of the south half of the southeast quarter of section 22, and the north half of the northeast quarter, of section 27, township 10 south, range 8 west, Louisiana meridian, containing one hundred and sixty-one and five-tenths acres, but that no writ of possession issue under this judgment until the plaintiff shall pay unto the defendant the sum of fourteen hundred dollars and the further sum of one hundred and eighteen dollars and seventy-three cents, with legal interest thereon from the date; and it is further ordered that the defendant pay the costs in both courts.

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*A Sale by a Guardian of His Ward's Real Estate cannot be made without an order of court: See the note to Schmidt v. Shaver, 119 Am. St. Rep. 311. As to the necessity of a guardian complying with the statutory requirements in making a sale under order of court, see Moore v. Trust Co. v. Redd, 38 Colo. 458, 120 Am. St. Rep. 132; Hargrave v. State, 147 Ala. 97, 119 Am. St. Rep. 60.*



CAMMACK v. LEVY.

[120 La. 873, 45 South. 925.]

**CORPORATIONS—Release of Subscribers to Stock.**—A corporation has no legal capacity to release an original subscriber to its stock from the obligation of paying for his shares, in whole or in part, by reducing the capital stock or by any other arrangement.

**CORPORATIONS—Effect of Reduction of Value of Stock.**—When a corporation reduces the par value of the shares of stock, and after one of the stockholders sells his shares as thus reduced, the purchaser's liability to creditors is measured by such reduced value, but if the reduction is void as to creditors, the original subscriber remains bound to them as before. (p. 445.)

Andrew J. Cammack, in pro. per., and Louis T. Dulaney, for respondent Compton.

Andrew Thorpe, for the respondent Leopold Levy.

ANDREW THORPE, Plaintiff and the defendant Levy were stockholders in the New Iberia Cotton Mill Company, Limited. Plaintiff owned five shares and Levy owned twenty shares of par value of one hundred dollars each. On or about June 16, 1901, Levy offered to sell his shares at fifty cents on the dollar of the amount he had paid thereon. Plaintiff proposed to Levy to purchase fifteen of said shares, provided the par value of the stock was reduced from one hundred dollars to forty dollars per share. This was done at a stockholders' meeting by a practically unanimous vote amending the charter. Thereupon plaintiff paid Levy the price agreed upon and the fifteen shares thus reduced were transferred to the books. The secretary issued certificates to plaintiff on the basis of the reduction above stated. In other words, plaintiff by this purchase acquired fifteen shares of the value of forty dollars each. This stock so reduced was subsequently paid up in full.

After considerable time after this transaction a receiver was appointed to wind up the affairs of the corporation, which was found to be insolvent. The court, holding the reduction of capital stock voted by the stockholders to be null and void as to creditors, ordered a contribution on the basis of sixty dollars per share of one hundred dollars par value. The receiver demanded from plaintiff a contribution of twenty dollars on each share of stock standing in his name on the books. Thereupon the plaintiff instituted the present suit against the receiver and the receiver to set aside the sale of said fifteen

shares, as having been made through fraudulent representations <sup>875</sup> and statements, and in error of fact on a material point, and to recover against said Levy the sum of five hundred and two dollars and fifty cents paid by plaintiff on shares. Plaintiff further prayed for the cancellation of the transfer of said stock and for its reinstatement on the books in the name of Levy, and to be discharged from further responsibility as a stockholder.

Levy, for answer, pleaded a general denial, admitting, however, the sale of the stock as alleged, but specially averring that as plaintiff participated in the meeting at which the stock was reduced to forty dollars per share par value purchased thereafter; and that being previously a stockholder, he had the right and the opportunity to fully inform himself of the status of the company before purchasing, and estopped to plead ignorance or error as to such matters.

The receiver answered, denying any fraudulent representations as to the financial condition of the corporation at the time plaintiff purchased said stock, denying the right of the stockholders to reduce the stock from one hundred dollars to forty dollars a share, and prayer for judgment against plaintiff for four hundred and forty dollars balance due on two shares of stock standing in his name.

The district court rendered judgment rejecting plaintiff's demand, and condemning him to pay the receiver the amount claimed in reconvention. This judgment was affirmed by the court of appeal.

We granted the writ of certiorari prayed for in this case mainly for the purpose of reviewing the judgment in favor of the receiver. But the whole case is now before us for final termination.

We concur in the opinion of both courts that there is no evidence tending to prove fraudulent representations or material error of fact. The error, if any, was one of law which is not pleaded. The legal consequences of the reduction of the capital stock quoad the then creditors of the corporation was a question of law, pure and simple. The reduction was good in law as to <sup>876</sup> the corporation and stockholders, and perhaps subsequent creditors.

The right of the receiver to a judgment against the plaintiff based on the transfer of the fifteen shares of stock is another and different question. Plaintiff was treated in both courts as having assumed all the obligations of Levy as the original subscriber to the capital stock of said corporation. As a matter of fact, plaintiff did not purchase from Levy five

of the par value of one hundred dollars, but bought him fifteen shares of the par value of forty dollars. Plaintiff bound himself to the corporation to pay the balance on fifteen shares of the par value of forty dollars, and not the balance due on fifteen shares of the par value of one hundred dollars. In short, plaintiff never subscribed to or acquired shares of the par value of one hundred dollars. Then, for what theory can he be held as a debtor to the corporation for more than the face value of the shares purchased by

The receiver alleges that plaintiff is bound because the reduction of the capital stock was null and void as to creditors.

If so, the status quo was not affected by the reduction. The general doctrine is that a corporation has no legal capacity to release an original subscriber to its capital stock from the obligation of paying for his shares, in whole or in part, by reducing the capital stock or by any other arrangement: *McCoy v. McCoy*, 450, 451.

As to the reduction was void as to creditors, Levy remained bound to them as before. Plaintiff is bound to creditors and to the corporation only to the extent he bound himself. The receiver cannot repudiate the reduction as an act ultra vires, but at the same time affirm the validity of the transfer from the corporation to the plaintiff. The continued liability of Levy as an original subscriber necessarily excludes the liability of the corporation. Both cannot be bound on the same subscription. Plaintiff is bound as holder of the reduced shares or not at all. It is therefore ordered that the judgment of the district court and of the court of appeal <sup>877</sup> be amended by reducing the amount allowed on the reconventional demand of the receiver to one hundred and twenty-five dollars, and by condemning the receiver to pay costs, and that as thus amended the judgment be affirmed, the receiver to pay costs of this appeal.

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*Power of a Corporation*, as against its creditors, to release a subscriber of the stock from his obligations is discussed in *Melvin v. Fire Ins. Co.*, 80 Ill. 446, 22 Am. Rep. 199. And the right of a corporation, as against its creditors, to diminish its capital stock is discussed in *Shields v. Hobart*, 172 Mo. 491, 95 Am. St. Rep. 529; *Heller v. National Marine Bank*, 89 Md. 602, 73 Am. St. Rep. 212; *Theis v. Theis*, 125 Wis. 651, 110 Am. St. Rep. 880.

## CALDWELL v. NELSON MORRIS &amp; CO.

[120 La. 879, 45 South. 927.]

**ESTOPPEL to Deny Jurisdiction of Court.**—If Persons Sued in a United States Court as residents of Illinois enter a plea to the jurisdiction of the court, asserting that they are domiciled in Louisiana, and the plaintiff, acting upon this assertion, brings his action in the state court in Louisiana, the defendants are then estopped to deny to the jurisdiction of the latter court on the ground that they are domiciled in Illinois. (p. 447.)

**PROCESS.**—A Commercial Firm Should be Cited by serving any of the partners in person, or at their store or counting-house, or by delivery to their clerk or agent. (p. 447.)

Lyle Saxon, for the appellant.

Merrick & Lewis, Philip Gensler, Jr., and Ralph J. Schuchman, for the appellees.

**879 MONROE, J.** Plaintiff, having brought an action against defendants in the circuit court of the United States for the recovery of certain damages said to have been sustained by reason of their conduct, alleged that they **880** were incorporated under the laws of Illinois, and domiciled in Chicago, and he was met with a plea to the jurisdiction. The reading, in part, as follows, to wit: "That it is not a company or corporation, existing under the laws of the state of Illinois, nor a citizen or inhabitant of the state of Illinois, nor do they reside therein, but that defendant is a commercial copartnership domiciled in Louisiana, as well as in other states, composed of three members, viz., Nelson Morris, Edw. Morris, and Ira Morris. Wherefore, insisting upon its exemption from suit in this court, it prays that this suit be dismissed," etc.

Plaintiff, thereupon acquiescing in the representation made, brought his suit against defendants in the civil district court, alleging that they are commercial partners, and that their firm is domiciled in New Orleans, in Louisiana, "as well as in other states," and caused citation to be served at their place of business in this city upon their agent or representative there in charge, and he was met with the exception "that there is no one in the jurisdiction of this court authorized to receive service of citation in this cause."

Upon the trial of this exception, it was shown that the place at which the citation was served is the only established place of business which defendants have in this state, and the person upon whom the service was made is their manager.

sole representative in this city. As a witness on behalf of the defendants the person mentioned testified that he had no authority to receive service of citation, and that Nelson Morris & Co. is not domiciled in this parish, though it has a large office here, but that the partners live in Chicago, and that their main place of business is in that city.

From a judgment maintaining the exception and dismissing the action as in case of nonsuit, plaintiff has appealed.

The defendants having judicially asserted in the United States that they are commercial partners, and that their firm is domiciled <sup>881</sup> in Louisiana, and plaintiff, acting upon the force of their assertion, having brought his action in the state court, accordingly they cannot now be heard to assert the contrary: Civ. Code, art. 2291; Abbott v. Wilbur, 22 La. Ann. 107; Bender & Belknap, 23 La. Ann. 764; Factors' & Traders' Co. v. De Blanc, 31 La. Ann. 100; State v. Judge, 34 La. Ann. 1220; Folger v. Palmer, 35 La. Ann. 743; Walker v. Walker, 37 La. Ann. 107; 11 Am. & Eng. Ency. of Law, 2d ed. 446; Lumley v. Wabash R. Co. (C. C.), 71 Fed. 21.

The law requires that a commercial firm shall be cited by name "on any of the partners in person, or at their store or counting-house by delivery to their clerk or agent" (Code of La., art. 198; Hunstock v. His Creditors, 10 La. 488, and the law has been complied with in this case.

On the death of Nelson Morris having been suggested, the appeal was sustained, through his counsel, has obtained the order, and taken effect as provided by rule 13 of this court (21 South. v) to make the parties parties, and to entitle him to proceed.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and that this case be remanded to the district court to be there proceeded with according to law and to the views expressed in the foregoing opinion, the costs of the appeal to be paid by the appellants, and those of the lower court to await the final judgment.

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*Where the Plaintiff in an Action for Divorce Alleges the Requisite Residence, but the finding is against her on that point, and after alleging the statutory residence she amends her complaint, alleging the requisite residence and asking a divorce on different grounds, she cannot, in such a case, be allowed to vacate the decree granted, set up want of residence at the time of the commencement of the action: Wood v. Wood, 59 Ark. 333, 33 Am. St. Rep. 42.*

**BOURG v. BROWNELL-DREWS LUMBER COMPANY**

[120 La. 1009, 45 South. 972.]

**MASTER AND SERVANT—Safe Place for Minor to Work.**—Where an employer, in violation of his understanding with the father of a minor employé, assigns the minor to a duty for which he is not employed, and thereby places him in a position necessarily dangerous even for an experienced mechanic, the employé has the right to sue upon the protection and superior knowledge of his employer. (p. 450.)

**DAMAGES.—Injury to Feelings** is an element of actual damages, and is recoverable as an element of exemplary damages. (p. 450.)

**DAMAGES.—A Claim for Damages for Mental Suffering** is personal to the individual affected, and is not heritable. (p. 450.)

**PARENT'S ACTION FOR DEATH OF CHILD.—The Negligence of a Parent** in causing the death of his child is an element of damages in an action against the negligent party; and as such damages are not susceptible of measurement, it is sufficient for their recovery that the jury is satisfied from the evidence that the actual relationship between the plaintiff in the action and the deceased were the same as would exist between parent and child. (p. 455.)

**PARENT'S ACTION FOR DEATH OF CHILD.—The Negligence of a Minor** is not to be considered in an action by his father for damages for the death of the minor through the negligence of his employer. (p. 455.)

**PARENT'S ACTION FOR DEATH OF CHILD.—The Negligence of a Parent to Look to his Child for Support** in case of need should not be considered in an action by the parent for damages caused by the death of the minor through the negligence of his employer, where there is no evidence that the parent is in need or ever expects to be. (p. 455.)

Action by plaintiff for damages sustained in consequence of the death of his minor son, which he alleges was brought about through the breach of contract and negligence of the defendant, by whom the boy was employed. It appears that the minor was employed to do work about the mill of the defendant under an agreement with the father that the boy should not be employed about the engine. But the defendant, in running much trouble with the heating of a journal and pin, the boy was given the duty of cooling it from time to time with water. In the performance of this duty, the boy took him into a dangerous part of the engine-room, where the boy was caught in adjacent machinery and so injured that he lived but a few moments after the accident. He was earning eighty-five cents a day. His father was a carpenter earning two and a half or three dollars a day. The verdict and judgment for the plaintiff in the sum of five thousand dollars, from which the defendant appealed.

Charles L. Wise and Charles F. Borah, for the appellant.  
Gordy & Gordy and O'Neill & Alpha, for the appellee.

\* MONROE, J. The jury and the judge in the trial apparently found no reason, nor do we, for accepting denials of the defendant's foreman in preference to the native testimony of plaintiff's witnesses (who, with the exception of plaintiff himself, are without interest) to the effect that it had been agreed that the boy should not be employed about the engine, but that he was nevertheless charged by the foreman with the cooling of the journal and the wrist-pin and had performed that duty prior to the accident in the presence of the foreman, occupying, in order to do so, what appears to have been the most dangerous position in the engine-house. Apart from the testimony tending to show that it had been made his duty, it is improbable that, without instructions, the boy would have selected, as a favorable opportunity for leaving work to which he had been assigned (at the big saw) and meddling with the engine, the moment when the foreman was passing, but it is highly probable that the foreman, in passing, told the boy to see to the journal, which he admits was "running warm," and was likely at any minute to run hot," and perhaps went with him on or to the platform; and it is quite clear that the boy at once became involved with the belt and the fly-wheel, and was dashed against the platform on the opposite side (with a force which broke the stake by which the platform was supported and disturbed the planks), and was then brought back and hurled violently lifeless against the partition which separates the engine-room from the engine-room.

Whether the foreman directed the boy or went with him on the occasion in question or not is immaterial, in view of the fact, which we find established, that it had been made the duty of the boy to apply the water to the journal and the wrist-pin and that in order to do so it was necessary to go on the platform, which was built "with the idea . . . that no one would be allowed there except those who were competent to work on machinery." The platform, unguarded by a railing, which was put up immediately after the accident, was not a reasonably safe place for anyone, but was unnecessarily unsafe, and no warning that defendant could have given to Sidney Bourg, a boy fourteen years old, would have been of use for sending him there, even if there had been no understanding with his father upon the subject.

It is contended by the learned counsel for the defendant that the testimony as to the statements or admissions of the foreman made say, within an hour after the accident, and later in the day, should have been excluded, for the reason that he had no authority to bind the defendant in that way. The court, however, conceded that the foreman was vested with full authority with respect to all matters concerning the safety of the defendant's employés; and it was he, by whom, in the instance the employé was engaged, and under whose orders he performed his work. Quoad the matter at issue, therefore, the testimony of the foreman was the vice-principal. Beyond that, the testimony was admissible as contradicting that of the defendant, to the effect that he did not know how the boy met his death, and that he had never ordered him to cool the journal or wrist, and that the boy had never gone on the platform without the knowledge or approval.

We conclude, upon the whole, that in violation of the duty standing with his father and of the dictates of common prudence, the boy was assigned to a duty for which he was not employed; in a position where he ought not to have been placed, though there <sup>1021</sup> had been no understanding upon the subject, which position was unnecessarily dangerous even for an experienced mechanic, and of and from the dangers of which the defendant was bound to take cognizance, and to protect the boy, who, by reason of his youth and inexperience, was unable to protect himself, had the right to rely for such protection upon the superior knowledge of his employer: *See* *Boyd v. Ruddock-Orleans Cypress Co.*, 114 La. 247, 38 South. 275; *Gracia v. C. N. Maestri Furniture Co.*, 114 La. 371, 38 South. 275; *Lindsey v. Tioga Lumber Company*, 108 La. 468, 95 La. St. Rep. 384, 32 South. 464; *Carter v. F. W. Dubach Lumber Co.*, 113 La. 239, 36 South. 952; *Perrin v. Crescent Cigar Co. Y. & S. H. Co.*, 119 La. 83, 43 South. 938.

The question of the quantum of damages to be allowed in cases of this character is always a difficult and delicate one to determine. The plaintiff here seeks to recover solely on his own right, and in fact would have no ground for an action if the heir of his minor son, since the latter died almost immediately, and so far as we can judge from the evidence was suffering.

This is not, therefore, a suit for damages, the recovery of which is authorized by those provisions of the Civil Code which may be found under the subtitle, "Of the Damages Resulting from the Inexecution of Obligations" (save as will be mentioned hereafter), but is an action based on so much of article



for the subtitle "Of Offenses and Quasi Offenses") as well as that, "Every act whatsoever of man that causes damage to another obliges him by whose fault it happened to reparation"; and on so much of paragraph 3, article 1934 (under the subtitle first above mentioned), as provides that, "In the assessment of damages under this rule" (referring to the rule in the first clause of the paragraph, that, in certain cases, the damages resulting from the inexecution of "contracts" may be assessed without calculating altogether on the pecuniary loss or the privation of pecuniary gain to the party), "as well as in the case of offenses, quasi offenses and quasi contracts, much discretion must be left to the judge of the jury," etc. In the application of the provisions of the law thus quoted, to claims for damages for mental suffering, injury to feeling, reputation, etc., the established doctrine is that such damages are to be regarded as actual, rather than as nominal. *Byrne v. Gardner*, 33 La. Ann. 6; *Deslonde v. Johnson*, 39 La. Ann. 14, 1 South. 286; *Johnson v. Levy*, 118 La. Ann. 7, 118 Am. St. Rep. 378, 43 South. 46, 9 L. R. A., N. S., 177.

Generally speaking, however, claims for damages for mental suffering are personal to the individual affected, and not heritable. That is to say, A has usually no right of action for the recovery of damages for his mental suffering or for injury to his feelings resulting from wrongs inflicted upon B, no matter what may be the relation of B to him, nor have the heirs of A any such right. Thus it would hardly be contended that A could recover for any mental disturbance that he might suffer by reason of the maiming, the libeling, the assaulting, or the death of his cousin, his uncle, or his brother, and the same rule has been in the past in this state, and elsewhere is applied to the case of a father, claiming damages for injury to his son. In the case of *Black v. Carrollton R. Co.*, 10 La. Ann. 38, 63 Am. Dec. 586, Mr. Justice Buchanan, as the chief justice of this court, said: "We carefully notice the distinction between the immediate sufferer in a railroad accident and a relative of the sufferer, however near may be that relative."

It may well be supposed that the mutilation of a young and promising boy, the pride of his parents, and the favorite of his schoolmates, such as the petition describes the plaintiff's son, has excited feelings of the keenest anguish in the hearts of his relatives, and of the most painful sympathy in the hearts of many who were not endeared to him by ties of kindred. We do not understand the object of the law to be the punishment of an offending party for having been the cause of an unpleasant emotion in the family and acquaintances of the

party offended; and this in the form of a pecuniary compensation to the relative or friend <sup>1023</sup> thus affected. Were the law, the consequence of an offense to the offender be greater or less, in proportion to the larger or smaller of friends of him who had been offended."

And Chief Justice Slidell, though dissenting upon grounds from the views of the majority of the court, "I do not think that the father's mental suffering shows an element in the assessment of damages in his favor. It would be extending, without a sufficient legal ground, the exception to the general rule, that actions for injury to the person are personal": See, also, 8 Am. & Eng. Ency. of Law, 2d ed., p. 664; 13 Cyc. p. 146.

Since the decision thus quoted was rendered, however, it has been held by this court (in the cases cited supra and others), as also in other jurisdictions (8 Am. & Eng. Ency. of Law, 2d ed., p. 661), that injury to feelings is an element of actual, and not of punitive or vindictive, damages, and it has also been held by this court that the provisions (which have been quoted) of articles 1934 and 2315 of the Civil Code are broad enough to authorize the recovery of damages in cases for mental suffering inflicted upon one person by the negligent killing of another. Thus, in *Sundmaker v. The M. V. R. Co.*, 106 La. 111, 30 South. 285, the mother brought an action, in her own right and in right of her child, two years and a half old, to recover for the negligent killing of the latter, and was awarded four thousand dollars, though it is evident that there could have been no recovery on the second count. In *Blanc v. Sweet*, 107 La. 355, 90 Am. St. Rep. 303, 31 S. 766, the parents sued for damages resulting from the death of their daughter, a girl of sixteen, who lost her life through the negligence of the owners of a steamboat upon which she was a passenger, and the court said: "The daughter whom the plaintiffs have lost was an active girl, full of life and spirit, of great physical vigor, who assisted in the work which was required about their country home, and they might reasonably have expected a continuation of that assistance and of the filial and kindly offices which the deceased, as an affectionate <sup>1024</sup> daughter, owed to her parents. The plaintiffs are entitled to recover the amount which the daughter was entitled to recover at the moment of her death." And the judgment of the trial court which rejected the claim was reversed, and plaintiffs were awarded two thousand five hundred dollars.

In *Ortolano v. Morgan's L. & T. R. & S. Co.*, 109 La. 902, 33 South. 914, the parents of a child five years old sued in their own right and in right of their child for damages resulting from injuries inflicted upon, and the death of, the child (who was run over by a railroad car), setting up as an element of the damages claimed their own sorrow and the deprivation of the child's society and support, and they recovered four thousand dollars; the court awarding a lump sum, without distinguishing between the grounds of action.

In *Buechner v. City of New Orleans*, 112 La. 599, 104 Am. St. Rep. 455, 36 South. 603, 66 L. R. A. 334, the parents of a boy nine years old, apparently suing only in their own right, recovered six thousand dollars for the loss of their child, by drowning, as the consequence of the defective condition of a public bridge.

In *Bonnin v. Town of Crowley*, 112 La. 1025, 36 South. 842, the father recovered one thousand dollars (and might, perhaps, have recovered more, had not the answer to the appeal been filed too late), for the loss of a son, almost grown, who was killed by accident in defendant's electric plant.

In *Parker v. Crowell & Spencer L. Co.*, 115 La. 463, 39 South. 445, the father, suing solely in his own right, recovered five thousand dollars on account of the almost instantaneous killing in a railroad accident of a son, who, though a minor, was old enough to be engaged as a switchman. The court (*inter alia*) said: "Defendant contends that, inasmuch as punitive damages cannot be awarded in a case of this kind, where no malice or recklessness equivalent to malice is charged, and inasmuch as plaintiff avers that his anguish and mental suffering at the loss of his son cannot be compensated for in money, and inasmuch as these are the sole grounds upon which plaintiff claims <sup>1025</sup> damages, the petition discloses no cause of action. We do not concur in that view. The petition, taken as a whole, alleges that, while no amount of money can compensate plaintiff for the loss of his son, yet, that he has suffered greatly, and for that suffering, and also by way of punishment, the defendant should be made to pay him ten thousand dollars. . . . Plaintiff asks us to increase the amount of five thousand dollars allowed by the jury, but we see no reason for disturbing the verdict. The allowance is strictly for the suffering of the plaintiff. This is not a case for punitive damages. . . . And no right of action is set up, as having been inherited from the deceased. . . . The question of the allowance of damages to a parent for his mental suffering from the death of his child was very fully con-

sidered by this court in the case of *Sundmaker v. Yazoo & M. V. R. R. Co.*, 106 La. 111, 30 South. 285, on application for rehearing, though the report of the case does not show it, an amount of four thousand dollars was allowed. The case there, was an infant, and had been instantly killed. The closely analogous question of allowing damages for the mental suffering of a mother, who had been deprived of the consolation of attending the dying bedside of her son, was very much considered in the case of *Graham v. Western Union Tel. Co.*, 109 La. 1069, 34 South. 91. In both of these cases the conclusion was deliberately reached that such an element of damages must be considered under the Code."

In *Dobyns v. Yazoo & M. V. R. R. Co.*, 119 La. 72, 43 South. 934, the widow of a freight conductor, suing in her own name alone, recovered ten thousand dollars as damages sustained by her from the negligent killing of her husband, the court saying: "In assessing the damages, the distress and mental suffering inflicted upon the plaintiff by the deprivation of her husband's companionship are, under our law, elements to be considered."

In the case of *Graham v. Western Union Tel. Co.*, 109 La. 1069, 34 South. 91, the court of appeal had reversed a judgment in favor of plaintiff and dismissed the suit and the matter was brought before this court by writ of review. Chief Justice Nicholls, as the organ of the court, said: "The damages were claimed because of the mental pain and anguish occasioned by the mother not being able to reach the son, prior to his death."

The cause of action having been the failure of the defendant to deliver a telegram addressed to plaintiff may, perhaps, be said to <sup>1026</sup> have arisen *ex contractu*, and hence to have fallen within the meaning of Civil Code, article 1934, which, as we have seen, expressly provides that, in certain cases so arising, the right to recover damages is not restricted to the pecuniary loss. The court, however, in disposing of the matter, refers to the fact that article 2315 of our Civil Code corresponds to article 1382 of the Code Napoleon, and cites *Dalloz v. Vergé* the following, as an interpretation of the article last mentioned, to wit:

"Nos. 104, 273. Le chiffre des dommages intérêts dus à la veuve et aux enfants de la victime d'un accident du chemin de fer, doit être basé, non seulement sur le dommage matériel par eux éprouvé, mais, encore, sur le préjudice moral, résultant de la perte du père de famille, des affections brisées et

la douleur sans que néanmoins la somme soit hors de proportion avec la perte réelle et appréciable a prix d'argent."

Appreciating the fact that the doctrine thus sanctioned should be applied with great circumspection, and should not, perhaps, extend beyond cases of the character to which it has thus been already applied, we nevertheless find no sufficient reason for receding from the position so taken—that, under our law, the mental suffering and deprivation caused to a parent by the death, through negligence, of his child, is an element which may properly be considered in an action for damages against the party charged with the negligence. And we may add, in this connection, that as such damages are not in their nature susceptible of exact measurement, it ought to be sufficient for their recovery that the jury and the court are satisfied from the evidence that the actual relations between the plaintiff in such suit and the deceased on account of whose death the suit is brought were the normal ones which should exist between parents and child or husband and wife: *Graham v. Western Union Tel. Co.*, 109 La. Ann. 1069, 34 South. 91. See, also, *Warner v. Clark*, 45 La. Ann. 863, 13 South. 203, 21 L. R. A. 502; *Billet v. Times-Democrat Publishing Co.*, 107 La. 761, 32 South. 17, 58 L. R. A. 62.

<sup>1027</sup> Counsel for the plaintiff, now before the court, say: "The plaintiff was entitled to the usufruct—the imperfect usufruct, which confers absolute ownership, of his [the minor's] earnings during seven years to come."

But they have fallen into an error. It is true that the parents have the usufruct of the estates of their children during the minority of the latter, subject to the obligations imposed by law upon usufructuaries, and to the further obligation of maintaining and educating the children according to their station in life (Civ. Code, arts. 223, 224); but Civ. Code, art. 226, provides that: "This usufruct shall not extend to any estate which the children may acquire by their own labor and industry," etc.

So that, as to the earnings of the minor, save as an indication of his capacity to furnish the support which, in case of necessity, the plaintiff would have the right to expect, it cannot be said that plaintiff discloses any interest in them.

The remaining cause of action, as presented by the petition, is based on the provision of Civil Code, article 229, to the effect that, "children are bound to maintain their father and mother and other ascendants who are in need," etc. But there has been no attempts to prove that plaintiff is in need, or ever expects to be.

Plaintiff's right of recovery, therefore, rests upon the position that he is sorrowing, and will sorrow, for the untimely death of his son, and for the deprivation of his son's society and filial affection, and, exercising the discretion vested in the courts in such cases, we fix the amount to which he is entitled at five thousand dollars.

It is therefore ordered, adjudged and decreed that the judgment appealed from be amended by reducing the amount thereby awarded to five thousand dollars, and, as amended, affirmed, the plaintiff to pay the costs of the appeal.

*The Doctrine of Assumption of Risks and Contributory Negligence* on the part of employes as affecting their right to recover for injuries sustained while engaged in the service is discussed in the notes to Houston etc. Ry. Co. v. De Walt, 97 Am. St. Rep. 884; Brazil Coal Co. v. Gibson, 98 Am. St. Rep. 289; Wellston Coal Co. v. ... 87 Am. St. Rep. 586. The law on this question is modified in the case of youthful and inexperienced employes: Siegel-Cooper & Co. v. ... 218 Ill. 559, 109 Am. St. Rep. 302; Shirley v. Abbeville Furniture Co., 76 S. C. 452, 121 Am. St. Rep. 952.

*Actions for the Wrongful Death of a Human Being* are discussed generally in the note to Brown v. Electric Ry. Co., 70 Am. St. Rep. 669. As to the elements and measure of damages in actions for the death of minor children, see Smith v. Middleton, 100 Ky. 588, 99 Am. St. Rep. 308; and notes to Louisville etc. Ry. Co. v. Goodykoontz, 12 Am. St. Rep. 381; Youngblood v. South Carolina Ry. Co., 85 Am. St. Rep. 840.

## AUDUBON HOTEL COMPANY v. BRAUNNIG.

[120 La. 1089, 46 South. 33.]

**LANDLORD AND TENANT—Sublease.**—The Original lessor does not Pass to a subtenant; there is no contractual tie between the subtenant and the original lessor. (p. 458.)

**LANDLORD AND TENANT.**—A Subtenant in Asserting his Contract Rights must address himself to his immediate lessor and not to the original landlord. (p. 458.)

**LANDLORD AND TENANT—Renewal of Lease.**—The right of a Subtenant to enjoy the property does not include the right to a renewal given by the first lessor to his lessee. (p. 458.)

**LANDLORD AND TENANT—Renewal of Lease.**—A Subtenant has no Action against the owner or original lessor for a renewal of the lease, for there is no contract between him and the original lessor and no legal tie which he can invoke. (p. 458.)

**LANDLORD AND TENANT.**—A Subtenant has no Direct Action against the original lessor for his torts. (p. 460.)

Charles I. Denechaud, Miller, Dufour & Dufour and E. A. O'Sullivan, for the appellants.

Merrick & Lewis, Philip Gensler, Jr., and Ralph J. Schwarz, for the appellee.

<sup>1090</sup> BREAUX, C. J. This is an action by the plaintiff to oust the defendants, subtenants. Plaintiff proceeded by rule on the defendants to show cause why a judgment should not be rendered in its favor against defendants to compel them to vacate the premises known as "Oak Hotel," No. 941 Canal street, in New Orleans.

The property was bought by plaintiff some time after it had been leased. The certificate forming part of the act of sale under which plaintiff holds as owner shows that the lease in question expired on September 30, 1907.

The vendor to plaintiff had leased the property for three years, and gave to lessee the right to sublease the premises, and also the privilege of extending the lease one or two years from its expiration. The monthly rental was five hundred and seventy-five dollars for the first extended year and six hundred and seventy-five dollars for the second year. Under the original lease the monthly rental was four hundred and seventy-five dollars, payable monthly. The lessee under this first lease bound himself to make no transfer of the lease in whole or in part.

The defendants as lessees bound themselves <sup>1091</sup> for a term of five years to sell beer manufactured or supplied by the American Brewing Company, of which their lessor is president.

The contracts of lease were duly recorded.

After the property had been sold to plaintiff, the board of directors of the company found it to their interest to go into possession of the property. They were met by the opposition of the defendants, who were the subtenants.

The parties met and sought to compromise without success. Nothing came of the attempt. Thereafter defendants notified their landlord, Mr. E. G. Schlieder, in time of their wish to renew the lease for two years. To this Schlieder answered, refusing to renew, and informed them that the board of directors of the plaintiff company had canceled the right to renew.

The plaintiff (the Audubon Company) also notified the defendants, in answer to their notice of wish to renew, that it declined to renew; it was none of its concern; that it, the

plaintiff company, was a third person, and had nothing with the lease or with the defendants or their wish to renew.

The defendants persisted in claiming their rights to renew. There was no lease renewed.

About the time that the Audubon Hotel, through its board of directors, canceled the lease, it entered into an agreement with the lessor, Schlieder, and furnished bond to indemnify him in case his renunciation of all rights to renew the lease (which right he, Schlieder, held from Mr. Henry Denis, the lessor) caused him any damage. In addition to this bond the plaintiff company bound itself to Schlieder to sell on the premises before referred to only the beer of the American Brew Company, for a term of ten years.

The defendants were condemned by the judge of the district court to vacate the <sup>1092</sup> premises within twenty-four hours, or, in default of their thus vacating, a writ of possession was ordered to issue to place plaintiff in possession.

Defendants moved for a suspensive and devolutive appeal, which was granted.

The suspensive appeal was not timely taken: *In re Babin*, 119 La. 1070, 44 South. 891.

The devolutive appeal is now before us, and brings up the questions involved.

As relates to the subtenant: The sublease is a new contract. The old lease does not pass from Denis or the Audubon Hotel (Denis transferrer of plaintiff to Schlieder) to the subtenant (the defendants). The lessor is not a party to the sublease, and the subtenant is not a party to the original lease. There is no contractual tie between the subtenant and the original lessor. The lease of the subtenant terminates with the death of the one from whom he holds as tenant. The lessee or owner stands between the subtenant and the lessor, the original owner. It is to the former, his lessor, that the subtenant must address himself in asserting his rights. The subtenant cannot demand of the original lessor suing to be reinstated in the possession of the property after his lease had expired. It is true that the subtenant has all the lessee's rights to enjoy the property. This right does not go further. It does not include in particular the right of renewal given by the first lessor to his lessee. This is a separate, distinct right. A subtenant has no action against the owner or original lessor for a renewal of the lease by reason of the fact that there is no contract between the subtenant and the original lessor, and no legal tie which he can invoke.

The original lessee might avail himself of the right to renew under the terms of his lease with his lessor, and the



avoid further litigation by exercising his right and complying with his obligation, but, if he does not choose to do this, the subtenant is without right to demand renewal by the lessor.

<sup>1093</sup> The latter can interpose the answer to him that there is no privity of contract between them, for he had stipulated the right of renewal with the lessee, and not with his subtenant.

By way of illustration we state as showing limitation of subtenant's right:

Leases are renewable by tacit reconduction. The lessor may thus renew the lease, but the subtenant cannot hold his lessor by reconduction.

In the same way a subtenant cannot insist that the owner or first lessor shall renew the lease with him, and release the lessee entirely.

In choosing a tenant owners exercise some degree of judgment. There are questions of ability to pay, matters regarding the taking care of the property. There are some tenants more careful than others. For this and other similar reasons tenants are sometimes selected and some restriction placed upon them as to sublease or transfer of the lease.

A subtenant cannot impose himself and call upon the lessor and insist upon his renewing the lease, despite the opposition of his own lessor or the one from which this subtenant holds.

A tenant can continue as tenant, but a subtenant cannot continue without his tenant.

The lessor has a right to the enforcement of the contract as written. The mode of renewal of the parties to the contract was binding: *Cordeviollé v. Redon*, 4 La. Ann. 40; *Henderson v. Meyers*, 45 La. Ann. 791, 13 South. 191; *Meyer v. Rothschild*, 46 La. Ann. 1174, 15 South. 383.

"When the landlord refuses to renew the lease, the lessee has the right to elect whether he will proceed at law for damages or in equity for specific performance."

The lessees only: *Taylor on Landlord and Tenant*, sec. 339.

We quote the foregoing only to add that the lessee has the right mentioned above. We <sup>1094</sup> have nowhere found that it lies in the subtenant, however.

The effect of the renewal would be to surrender the old lease. The subtenant has no right to surrender the old lease. That is something for the lessee to do.

A French text-writer on the subject, interpreting similar laws in France, has said: "The prorogation is nothing else in effect than a new contract": *Baudry Lacantinerie*, vol. 1, p. 129, "Contract of Lease."

"The subtenant," again translating from the same writer, "becomes the tenant of the lessee, and not the tenant of the lessor": Baudry Lacantinerie, vol. 1, p. 594, sec. 1, same title.

In this case, under the rule the subtenant must look to his own lessor.

Further, the same text-writer says: "This difference is not tested. There are certain authors who think that a subtenant might, like the transferee of a lease, act directly against the lessor. They do not give themselves the trouble to justify this proposition which rests on nothing at all."

There is an exception according to this text-writer.

The subtenant has none the less, a direct action against his lessor for his torts.

This action is derived from article 1382, etc., Civil Code.

This article corresponds to a similar article of our Civil Code, p. 604.

That relates to damages, and has nothing to do at this point with the claim here.

The first contract of lease contains the clause that the defendant bound himself not to transfer the lease. The content of the plaintiff's claim is that, under that clause of the contract, the defendant Schlieder, was without authority to transfer the right of renewal, as this right involves the necessity of a new contract for a different amount as to rental, both as relates to amount and to condition. The condition is that the defendant must sell an article of beer which enters into the condition of the contracts as one of the conditions; that is, the tenant <sup>1000</sup> must sell the beer as manufactured by his lessor.

How far that restrictive clause applies to the right of renewal we are not especially concerned with at this time. We think the ground previously stated above is sufficient. There are certain none the less that it removes still further the original lessor from the subtenant, and adds to the impossibility in law of the latter instituting a suit against the defendant to compel him to renew the lease.

The defendants are without remedy here, but a judgment has been obtained, and we have reason to infer some damages have been taken towards its execution, and that the <sup>1000</sup> plaintiff has at least been ordered to be placed in possession of the property. The appeal is devolutive.

The owner cannot be restrained from taking possession of the property.

The action is for damages, and the defendants are without right to be reinstated in the possession of the property of the lessor or his transferee, the plaintiff.

The following is a Latin maxim: "In loco facti imprestabilis sub est damnum et inter esse." Damages in place of act not performed and which cannot be performed.

For reasons assigned, the judgment appealed from is affirmed.

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*The Renewal of Leases as Affecting Assignees and Tenants* of the original lessee is discussed in the note to *Drake v. Board of Education*, 123 Am. St. Rep. 463.

*There is no Privity of Estate or Contract* between a lessor and the under-tenant of his lessee: See the note to *Washington Nat. Gas. Co. v. Johnson*, 10 Am. St. Rep. 564; *Williams v. Michigan Cent. R. R. Co.*, 133 Mich. 448, 103 Am. St. Rep. 458; *Weander v. Claussen Brewing Assn.*, 42 Wash. 226, 114 Am. St. Rep. 110. See the note on subletting to *Mitchell v. Young*, 117 Am. St. Rep. 91.

# CASES

## IN THE

# COURT OF APPEALS

### OF

## MARYLAND.

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**OREM FRUIT AND PRODUCE COMPANY v. NORTHERN CENTRAL RAILWAY COMPANY.**

[106 Md. 1, 66 Atl. 436.]

**CONNECTING CARRIERS—Loss of Perishables.**—When, in an action against a railroad company for the loss of a shipment of tomatoes, the plaintiff shows a contract to re-ice the refrigerator car at specified stations, and proves that the shipment arrived at the destination in a heated condition; and the defendant's evidence shows that the car, though not its contents, was inspected at the station specified in the contract, but that the inspectors did not re-ice the car because they thought it unnecessary, an instruction to the jury that the defendant performed every duty it owed to the plaintiff is erroneous, in that it usurps the functions of the jury and assumes the existence of facts in favor of the defendant. (p. 465.)

**CARRIER OF PERISHABLES—Duty to Ice Cars.**—A railroad company is not relieved from its contract with a shipper of tomatoes to re-ice the refrigerator-car at specified stations, by a rule of the company not to re-ice cars unless six hundred pounds of ice are put in the tanks. (p. 466.)

**CONNECTING CARRIERS—Presumption of Negligence.**—When proof that a carrier received goods in good condition which are subsequently lost or injured, the burden of proof rests upon it to show delivery in the same condition to the next carrier or to the consignee. (p. 466.)

O. Baker and George E. Robinson, for the appellant.

Shirley Carter, for the appellees.

<sup>11</sup> **BRISCOE, J.** This is a suit brought by the Orem Fruit and Produce Company of Baltimore City, a corporation organized under the laws of Maryland, against the Northern Central Railway <sup>12</sup> Company and the Pennsylvania Railroad Company, to recover damages for an alleged breach of

tract in failing to safely carry in a refrigerator-car four hundred and seventy-nine crates of tomatoes from Baltimore City to Montreal, Canada.

The declaration in substance states that on the 19th of July, 1904, the defendants were common carriers of goods for hire from Baltimore City to divers places in the United States and Canada; that on this date the plaintiff delivered to them, as such carriers, four hundred and seventy-nine crates of tomatoes, of the aggregate value of nine hundred and fifty-eight dollars, to be carried in a refrigerator-car from Baltimore to Montreal, Canada, and there to be delivered to J. R. Clogg & Co.; the defendants at the same time agreeing to re-ice the refrigerator-car in which the tomatoes were shipped at Wilkesbarre, Pennsylvania, and Oneonta, New York, but the defendants did not do so. It further states that the defendants wholly neglected their duty in this respect, and by the neglect to safely carry and re-ice the car according to the contract, the tomatoes were wholly lost or destroyed and the plaintiff sustained loss and damage to the extent of one thousand dollars.

The case was tried in the Baltimore City court and from a judgment in favor of the defendants, the plaintiff has appealed.

There are six bills of exceptions in the record; five of them relate to the rulings of the court below upon the admissibility of evidence and the sixth to its rulings upon the prayers.

As the action of the court in rejecting the plaintiff's prayer and in granting the defendant's prayer which withdrew the cause from the consideration of the jury present the important questions in the case, it will be considered at once.

The undisputed facts of the case briefly stated are these: The plaintiff had been a large shipper of fruit and produce from Baltimore City, their place of business, to Montreal, Canada, in refrigerator-cars belonging to the appellee. On the 19th of July, 1904, the appellant delivered to the appellees, as common carriers, in the city of Baltimore four hundred and seventy-nine crates of tomatoes to be carried in one<sup>12</sup> of their refrigerator-cars from Baltimore City to the place of destination, Montreal, Canada. The route of the car was over several systems of railroads, to wit, from Baltimore to Sunbury, Pennsylvania, over the Northern Central Railway; from Sunbury to Wilkesbarre over the Sunbury Division of the Philadelphia and Erie Railroad, operated by the Pennsylvania Railroad Company; from Wilkesbarre by the Delaware and Hudson Company to Rouse's Point, New York, and by

the Grand Trunk Railroad from the last-named point to Montreal, Canada, the point of destination.

The tomatoes were received by the Northern Central Railroad Company at Baltimore in good condition and were put in a car for transportation under the terms of a bill of lading set out in the record.

The car was inspected and properly iced in Baltimore before leaving that city, at 5:40 P. M. on July 19, 1904, and arrived in Montreal, on the 22d of July, 1904, in a "bad" condition, the ice tanks empty and the tomatoes dead. The sum realized from the sale of the tomatoes amounted to thirty-seven dollars and fifty-nine cents, whereas, if the tomatoes had not been injured and damaged, the plaintiff would have received from eight hundred dollars to nine hundred dollars.

According to the terms of the contract between the plaintiff and defendant, stated in the bill of lading, the car was re-iced at two points, viz., at Wilkesbarre, Pennsylvania, on the line of appellees, a distance of about two hundred and thirteen miles from Baltimore, and at Oneonta, New York, on the line of the Delaware and Hudson Railroad, a connecting carrier, one hundred and sixty-seven miles from Wilkesbarre. The distance from Oneonta to Montreal being about two hundred and fifteen miles, making the entire route of the car about four hundred miles.

It further appears that one of the defendant's lines ended at Sunbury, Pennsylvania, and the other at Wilkesbarre, Pennsylvania, but they had a through billing arrangement with the Delaware and Hudson Railroad. The re-icing of the car is noted on the card waybill which goes with the car and is delivered to the connecting carrier. The card shows the number of the car, the car number, its destination, routing and the consignor.

It is admitted that the car was not re-iced either at Wilkesbarre, <sup>14</sup> Pennsylvania, or Oneonta, New York, according to the terms of the bill of lading. The car inspector for the Pennsylvania Railroad Company testified that he inspected the car at Wilkesbarre, and made the entry in his record "ice required"; that he lifted the lids on top of the refrigerator car and saw that the ice was about four inches from the top; that it was the rule of the company that if they could not get six hundred pounds of ice in the ice-tank, they considered the car full and they do not put any more ice in it; that he did not re-ice the car, that he lifted the lid of the ice-tank and found the ice within four inches from the top, and concluded that no ice was required.

The witness Burroughs, assistant yardmaster of the Delaware and Hudson Railroad, testified that he inspected the car at Oneonta, New York, on July 20, 1904, and found the ice had melted about a foot from the top, and he did not deem it necessary to re-ice it.

There was evidence to show that the refrigerator-car was delivered by the Pennsylvania Railroad Company at Wilkesbarre, and was received by the Delaware and Hudson Railroad Company in good order. The car was inspected but not its contents.

There was evidence also to the effect that the temperature in Baltimore, July 19, 1904, was highest ninety-seven degrees, lowest seventy-seven degrees; at Wilkesbarre, on July 20th, highest eighty-three degrees, lowest sixty-eight degrees; at Oneonta on July 21st, highest eighty-four degrees, lowest fifty-five degrees; at Montreal, July 22d, highest seventy-two degrees, lowest fifty-six degrees.

The foregoing statement is condensed from the evidence, as presented in the record, and it will be seen upon this state of facts the court below granted the defendants' prayer which withdrew the case from the jury. The prayer is as follows: "The defendants pray the court to instruct the jury that since by the uncontradicted evidence in this case, it is shown that the defendants performed every duty they and each of them owed to the plaintiff in the transportation of the tomatoes mentioned in the evidence, while on their respective lines, and duly delivered the said tomatoes and the car <sup>15</sup> containing them to the next succeeding carrier at the end of their lines respectively, to wit, at Sunbury, Pennsylvania, and Wilkesbarre, Pennsylvania, that the verdict of the jury must be for the defendants."

This prayer is open to several objections, and under the facts of the case should have been rejected. It wholly usurped the functions of the jury, and told them that by the uncontradicted evidence the defendants had performed every duty they and each of them owed to the plaintiff in the transportation of the tomatoes, and had duly delivered them and the car containing them to the connecting carrier. It also assumed the truth of the evidence offered on the part of the appellee, and excluded from the consideration of the jury the whole evidence produced by the plaintiff. In the case of *Calvert Bank v. Katz*, 102 Md. 56, 61 Atl. 411, it is said it is manifest error for the court to assume the existence of facts, and take away from the jury the finding of the same.

The prayer granted at the instance of the appellee in this case has been condemned by a number of decisions of this court: *Corbett v. Wolford*, 84 Md. 426, 35 Atl. 1088; *Boyle v. McCann*, 10 Md. 118; *Jones v. Jones*, 45 Md. 144; *Nash v. Bank v. Baltimore & O. R. R. Co.*, 99 Md. 661, 105 Atl. 134, 32 Rep. 321, 59 Atl. 134.

It will be seen that the instruction absolutely ignored the plaintiff's theory of the case, and the contract to re-ice the car at the points designated.

According to the undisputed evidence, the appellee neglected to re-ice the car at Wilkesbarre, Pennsylvania, at Oneonta, New York, according to the express terms of the bill of lading, and had therefore failed to perform their part of the contract. The rule relied upon by the appellee to relieve them from the performance of their duty, "that the company did not re-ice unless they could get six hundred pounds of ice in the ice-tanks," can have no application in this case, because this rule was not embraced in the contract between the appellant and appellees, and there is no evidence that the plaintiff had knowledge of the existence of such a rule. *Atchison & N. R. R. Co. v. Miller*, 16 Neb. 661, 21 N. W. 100. The case of *Western Md. R. R. Co. v. Landis*, 95 Md. 53, 53 Atl. 11, relied upon by the appellees, is entirely inapplicable to this. In *Landis* case the evidence showed that the cattle were not injured at the time the cars were delivered by the Western Maryland Railroad Company to the Cumberland Valley Railroad, the connecting carrier. In this case there is no evidence that the tomatoes, the contents of the car, were inspected at Wilkesbarre. The witness testified that the car was in good order when delivered, but its contents were not inspected. In *Meredith v. Seaboard Air L. R. R. Co.*, 137 N. C. 40, 18 S. E. 1, it is held, on proof that a carrier received goods in good condition, the burden of proof rests upon such carrier to show delivery in the same condition to the next carrier. To the consignee, such proof being within its power: *Michigan Cent. R. R. Co. v. Michigan Cent. R. R. Co.*, 107 U. S. 102, 1 Sup. Ct. 425, 27 L. ed. 325; *United States v. Denver R. R. Co.*, 107 U. S. 84, 24 Sup. Ct. Rep. 33, 48 L. ed. 106; *Hoffman v. Maryland V. R. R. Co.*, 85 Md. 391, 37 Atl. 214.

There was no error in the rejection of the plaintiff's prayer. It did not correctly recite the facts necessary to be found by the jury, under the evidence in the case, and was properly refused.

Nor was there error, in the ruling of the court, in refusing to admit the testimony sought to be introduced in the



exception. The evidence was not material or relevant to the issue in the case. We do not understand that this exception is pressed in this court. It is not relied upon in the appellant's brief. The second exception is not properly before the court, and need not be considered here.

The questions raised by the third, fourth and fifth exceptions may be considered together, and can be disposed of without discussing them seriatim. The ground of the objection to the questions embraced in these exceptions is that the questions were leading, and the witnesses were not shown to have had the requisite knowledge of facts, upon which to base an opinion.

We concur in the action of the court, as set out in these exceptions, and can see no error in the rulings thereon.

The questions were manifestly leading, and no proper foundation had been laid for the introduction in evidence of the 17 opinions of the witnesses, sought by the questions to be elicited from them.

For the error in granting the defendant's prayer, the judgment must be reversed and a new trial awarded.

Judgment reversed and a new trial awarded, with costs to the appellant.

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*If a Common Carrier Undertakes to Carry Perishable Commodities* in refrigerator-cars, it should provide a supply of ice ample for the purpose, not only at the point of shipment, but also at such places along its lines as will reasonably insure a safe transit to the point of destination, and failing to do this the carrier is guilty of negligence: Taft Co. v. American Express Co., 133 Iowa, 522, 119 Am. St. Rep. 642. When a carrier undertakes to transport fruit in a properly iced refrigerator-car, it is liable for a failure to comply with such undertaking, although it has an agreement with an independent contractor to furnish the car and the refrigeration therefor: St. Louis Iron Mountain etc. Ry. Co. v. Renfroe, 82 Ark. 143, 118 Am. St. Rep. 58.

*The Liability of an Initial Carrier* for the torts and negligence of connecting lines is discussed in the note to Pennsylvania Co. v. Loftis, 106 Am. St. Rep. 604; and the burden of proof as between connecting carriers to show who is at fault for a loss or injury is discussed in the note to Beede v. Wisconsin Cent. Ry. Co., 101 Am. St. Rep. 392. As to whether a presumption of negligence arises against the last carrier in case it delivers goods in a damaged condition, see St. Louis etc. Ry. Co. v. Coolridge, 73 Ark. 112, 108 Am. St. Rep. 21; Rolfe v. Lake Shore etc. Ry. Co., 144 Mich. 169, 115 Am. St. Rep. 388; St. Louis etc. R. R. Co. v. Pearce, 82 Ark. 353, 118 Am. St. Rep. 75.

## COGGINS &amp; OWENS v. CAREY.

[106 Md. 204, 66 Atl. 673.]

**PARTY-WALLS.**—The Term "Party-wall" is Usually Applied to Such Walls as are built on the land of another for the benefit of both in supporting timbers used in the construction of contiguous buildings. And a division wall may become a party-wall by agreement, either actual or presumed. (p. 476.)

**REFORMATION OF DEED.**—Sufficiency of Proof.—To Authorize a court of equity to correct, upon parol evidence, mistakes in deeds, only such full and strict evidence is required as is sufficient to satisfy the mind of the court. (p. 478.)

**REFORMATION OF DEED.**—A Mistake in a Deed by Interchanging the words "party of the second part" instead of "party of the first part" may be corrected in equity. (pp. 478, 479.)

**PARTY-WALL.**—Right to Make Windows.—A Party-wall is a Solid Wall, and one of the owners has no right to open windows therein against the objection of the other, whether or not the wall is intended to use the wall. (p. 479.)

**PARTY-WALL.**—Injunction Against Windows.—When One of the Owners of a party-wall opens windows therein, the other owner may have a mandatory injunction requiring them to be closed and the wall made solid. (p. 480.)

Francis T. Homer, James McEvoy, Jr., and George R. Ellis, for the appellants.

J. B. Hall, Jr., and James Piper, for the appellees.

**206 ROGERS, J.** This is an appeal from the circuit court of Baltimore City. The subject matter of the appeal is a deed and agreement, entered into between the parties to this suit on May 2d, 1905. The deed in question conveyed to the appellants, Coggins and Owens, a strip of land ten and one-half inches ( $10\frac{1}{2}$  in.) wide, and one hundred and sixty and one-half feet ( $168\frac{1}{2}$  ft.) long on the east side of Carey street; ninety-three feet (93 ft.) five inches (5 in.) south of German street, in the city of Baltimore. The deed contained certain covenants and conditions, relating to the use of a strip of land standing one-half on the land of the appellees, and one-half on the land conveyed to the appellants, and to the respective rights of the parties in subsequent extensions upward and eastward of this wall.

The appellees (plaintiffs below) contended that the appellants had no right to the wall already erected, and that part erected subsequently to the making of the deed of May 2d, 1905, was a party-wall, and that the appellants (defendants below) had no right to open and maintain windows in this party-wall. They further, that there was a typographical error in the

which should be corrected in order to express the understanding and agreement of the parties.

After testimony taken in open court and argument by counsel, the full relief prayed was granted, with costs to the appellees, and it is from this decree that the present appeal is taken.

The testimony shows that the appellees had erected, sometime prior to April, 1905, on a lot in Baltimore City, known as 21 South Charles street, a three-story warehouse. That the appellants, who owned the vacant lot adjoining that of the appellees, approached Mr. James Carey, some time in April, 1905, with a proposition to buy a strip of land ten and one-half inches wide on the north side of appellee's property, which strip of land ran to the center line of the north wall of the warehouse then standing, and therewith acquire one-half of the north wall of the appellee's warehouse. After some short delay the appellees offered to sell for two thousand five hundred dollars, but <sup>207</sup> the appellants only offered fifteen hundred dollars. The appellants then, by letter of April 1, 1905, offered to buy for eighteen hundred dollars the land. The appellees made a counter proposition on April 4, 1905, to sell the ten and one-half inches of land for the sum of eighteen hundred dollars, provided certain conditions and covenants were inserted in the deed. Let us look at these letters:

"April 1st, 1905.

"Mr. Francis K. Carey, City.

"Dear Sir. In regard to the use of the north wall of No. 21 South Charles street, in the construction of our warehouse on Lot No. 19, with reference to which the writer called upon you yesterday morning, would say, we have talked the matter over between ourselves, and have conferred with several builders. Without exception they all state that the usual custom in circumstances of this kind, is for the buyer to pay one-half of the cost of building the wall and to buy half of the ground, at the price per front foot that ground in the vicinity is bringing. The offer of \$1,500 made you about conforms to this custom. After due consideration we have concluded that the use of the wall, and the purchase of ten and one-half twelfths ( $10\frac{1}{2}$  twelfths) front feet of your ground, would be worth \$1,800 to us. And we hereby offer you this amount for the concessions we ask. We request that you take immediate action and give us your decision as early as convenient.

"Yours truly,

"COGGINS & OWENS,

"F. V. COGGINS."

To which appellees replied as follows:

"21 S. Charles St. Partition Wall.

"Messrs. Coggins & Owens, 102 North Frederick Street, Baltimore, Md.

"Gentlemen: I acknowledge receipt of your letter of 1st, 1905, in above matter. I am authorized by the owner of the lot adjoining your lot on the south, to say, (here follows description of the land) including the right to that party brick wall which is now erected on said strip, upon the following conditions which are to be made part of the transfer to run with the land:

"First. That the brick wall, part of which will be located on said strip and the balance on the remaining part of the sellers, shall be used as a partition wall between the warehouse now erected on the lot belonging to the sellers and the warehouse to be erected on your adjoining lot. If purchasers desire wall to run a greater depth than the north wall now standing, said wall is to be erected entirely at their expense and in the same line and of the same thickness as the wall now standing, with <sup>208</sup> the privilege to the sellers to use any new part of said wall at any time as a party wall, without any additional charge or cost therefor.

"Second. That in case you elect to build your wall higher than the north wall of the warehouse belonging to the sellers, the right is reserved to the sellers, if they hereafter add to the height of their warehouse, to use said additional wall as a party wall, without any additional cost to them.

"Third. That in case either the warehouse belonging to the sellers or the warehouse to be erected by you is so far destroyed by fire as to either cause the destruction of said partition wall or necessitate its being taken down, it shall be immediately rebuilt at the joint cost of the owners of the lot now owned by the sellers and the owners of the lot now owned by you, and in case either has to build at his expense, the other shall not use said wall until he shall pay his proportionate part of the cost of the same, which proportionate part of the cost shall be due and payable within thirty days (30) after the completion of said wall.

"Fourth. If, in the erection of your warehouse, any injury is done to the said wall or to the warehouse owned by the sellers, or its contents, the cost of such injury is to be paid by you and you are to guarantee the sellers against all loss or injury which may happen to them, by reason of the use of you of the said wall as a partition wall.

"Fifth. You are to pay to the sellers the sum of eighteen hundred dollars (\$1,800) in cash, upon the execution and delivery of the deed which is to be prepared by you in a manner satisfactory to me, for the purpose of carrying out the above conditions. The title to the land to be in fee simple and marketable, subject to the easement on the twenty (20) feet in the rear of Wine alley, which easement prevents the erection of the party wall on this part of the lot; and if the title is not satisfactory to your attorney, the transaction will be declared off and all parties released from any obligation. In reference to the price of eighteen hundred dollars (\$1,800) the sellers did not think they would consider a lower figure than two thousand dollars (\$2,000) but have now decided to accept this figure, with the conditions contained in this letter.

"Sixth. The transaction is to be completed within thirty (30) days from the date of this letter.

"You will observe, of course, that the hesitation we feel about the matter is due to the fact that we have already narrowed our lot by building our north wall entirely on our land. If <sup>200</sup> the wall is at any time destroyed and you or the then owners of your lot should take the same position with us that was taken by the Diamond Match Company and should refuse to unite in the erection of a partition wall, we would have to build the wall again entirely upon our own property and would narrow our lot by nearly a foot more, which would be out of the question. We, therefore, wish the transaction to take such shape as to give permanency to the partition wall without regard to the plans of either party. In other words, we wish to have an absolute guarantee running with the land, that in case the wall is destroyed, a similar wall will at once be erected on the same ground, at the joint cost of the owners of the two lots.

"Very truly yours,

"FRANCIS K. CAREY."

Answer of Coggins & Owens:

"Baltimore, Apr. 7, 1905.

"Mr. Francis K. Carey, Calvert Building, City.

"Dear Sir. We beg to acknowledge receipt of your proposition. We have turned your letter over to our Attorney Mr. Horton S. Smith, who will investigate the Title and arrange the transfer. We wish to thank you for having given this matter your prompt attention and we appreciate your efforts in our behalf. Again thanking you, we are,

"Yours truly,

"COGGINS & OWENS."

In October of 1905 Francis K. Carey addressed the following letter to appellants:

"Oct. 30, 1905

"Estate of James Carey, Party Wall 21 S. Charles Street  
"Messrs. Coggins & Owens, Baltimore, Maryland.

"Gentlemen: My brother called my attention to the fact that in building your warehouse owned by the estate of James K. Carey, you have opened windows in the party wall overlooking the rear of our lot adjoining you on the south.

"Under the agreement of May 2nd, 1905, between your estate and the estate of James Carey, no such right was reserved to you, and, it is necessary that the matter should be brought to your immediate attention. I will be glad to have a talk with you at my offices if you will make an engagement with me by telephone. There are serious practical reasons why it is important of the question for these windows to remain, which I will be glad to explain to you when we meet.

"Very truly yours,

"FRANCIS K. CAREY

Then followed several letters between Mr. Willis, counsel for Coggins & Owens, and Mr. Carey, which resulted in a decision on the part of Messrs. Coggins & Owens to close the windows.

On the 21st of December, 1905, the appellees filed their bill of complaint, in which, after setting forth substantially the facts above recited and complaining of the thirty windows inserted in the extended wall and the injury resulting therefrom to them, and that they are deprived of so much of the land as is used for one-half of said wall as extended eastward from the northwest corner of their warehouse without benefit to them, the said appellees, and that the opening of the windows seriously depreciates the commercial value of their appellee's property and its salability, and they pray for a mandatory injunction and general relief, and file as a part of the bill a deed between the parties dated May 2, 1905, which contains these words:

"This Deed made this second day of May, nineteen-hundred and five by and between Susan B. Carey under and by virtue of the powers conferred upon her by the last will and testament of James Carey deceased which is recorded in the records of the Register of Wills of Baltimore County in T. W. M. 72, folio 466, etc. Susan B. Carey, life tenant, Thomas B. Carey, John E. Carey, James Carey, Jr., A. Morris Carey, Francis K. Carey and Susanne C. Allison remaindermen, being all of the devisees under the will of James Carey and

said, as parties of the first part and Frank V. Coggins and William A. Owens co-partners trading as Coggins & Owens as parties of the second part. Witnesseth that whereas the parties of the first part are the owners of Lot No. 21 on the east side of South Charles Street in the City of Baltimore and the parties of the second part are the owners of the lot adjoining on the north and known as No. 19 South Charles Street <sup>211</sup> the dividing line being seventy-one feet eleven and one-half inches southerly from the south east corner of South Charles street and German street and running thence easterly to Wine alley; and Whereas to enable the parties hereto to use a wall now standing in the northern most outline of lot No. 21 as a party wall and to insure its use forever, as a party wall between the warehouse now standing on lot No. 21 and the warehouse to be erected upon lot No. 19 these are executed. Now therefore in consideration of the foregoing and of the further consideration of the sum of eighteen hundred dollars (\$1,800) paid by the parties of the second part to the parties of the first part prior to the delivery hereof and the performance of the covenants and agreements hereinafter set out to be performed by the parties hereto the said Susan B. Carey under and by virtue of the powers conferred upon her by the will of James Carey, deceased, Susan B. Carey life tenant, Thomas K. Carey, John E. Carey, James Carey, Jr., A. Morris Carey, Francis K. Carey and Susanne C. Allison, the devisees under the said will do grant and convey subject to the said covenants and agreements unto Frank V. Coggins and William A. Owens, copartners, trading as Coggins & Owens, their heirs and assigns in fee simple all that lot of ground lying and being in Baltimore City and more particularly described as follows: (Here follows a description of the property as heretofore mentioned.) Together with the buildings and improvements thereon erected and all and every the rights, alleys, ways, waters, privileges and appurtenances to the same belonging or in any way appertaining. To Have and To Hold the above described and mentioned lot of ground together with the portion of the said wall standing and the rights and privileges and appurtenances thereto belonging unto and to the use of the said Frank V. Coggins and William A. Owens, co-partners, trading as Coggins & Owens, their heirs and assigns, in fee simple, subject however to the operation and effect of the following conditions and covenants (which is intended and expressly agreed shall run with and bind the land hereby conveyed and shall be kept by each and all the persons owning or occupying the two adjoining lots aforesaid) whereby the said parties of the first

part for themselves their heirs, executors, administrators assigns covenant by to and with the parties of the second part their heirs, executors, administrators or assigns and the parties hereto of the second part for themselves their heirs, executors, <sup>212</sup> administrators and assigns covenant by to and with the parties hereto of the first part their heirs, executors, administrators or assigns in manner following that is to

"1. That the brick wall part of which will be erected located on the strip of land hereby conveyed and the balance of the land of the parties of the first part shall be used as a partition wall between the warehouse now erected on the Lot No. 21 belonging to the parties of the first part and the warehouse to be erected on the Lot No. 19 belonging to the parties of the second part and if the parties of the second part elect to erect their wall to a greater depth eastwardly from Chestnut street than the present wall now standing on Lot No. 21 the said wall is to be erected entirely at the expense of the parties of the second part and in the same line and of the same thickness as the north wall now standing on Lot No. 21 with full privilege to the parties of the second part their heirs, executors, administrators and assigns to use this new wall without any additional costs or charges therefor.

"2. In case the parties of the second part elect to build a wall higher than the north wall now standing on Lot No. 21 the right is reserved to the parties of the first part their heirs, executors, administrators and assigns if they hereafter elect to add to the height of their warehouse to use the additional wall without further cost to them.

"3. That in case either the warehouse belonging to the parties of the first part on Lot No. 21, or that belonging to the parties of the second part on Lot No. 19, shall be destroyed by fire so as to cause the destruction of the party wall or necessitate its being taken down it shall be immediately rebuilt at the joint cost of the owners of the lot now owned by the parties of the first part and the owners of the lot owned by the parties of the second part and in case either elects to rebuild at his expense the other shall not use the said wall until he has paid his proportionate amount of the cost of the same which proportionate part of the cost shall be determined payable within thirty (30) days after the completion of the said wall.

"4. That if in the erection of the warehouse on Lot No. 19 any injury is done to the wall or warehouse of the parties of the first part or its contents the cost of such injury shall be paid by the parties of the second part and also any loss



jury sustained by the parties of the first part by reason of the use of the said wall as a partition wall and the said parties of <sup>213</sup> the first part hereby covenant that they will warrant specially the property hereby conveyed and that they will execute such other and further assurances of the same as may be requisite. Witness the hands and seals of the parties hereto. Which is duly signed by all the parties. Witnessed, acknowledged and recorded."

The appellants answered this bill and admit the allegations contained in paragraphs 1, 2, 3 and 4, and as to 5, 6 and 7, admit placing of the windows, but deny that they project through and over the center line of said wall, or that any damage accrues to the plaintiffs, and further allege that plaintiffs were advised of their intention to so place said windows and that plaintiffs did not object.

The defendants filed an amended answer denying the allegations of the plaintiffs' third paragraph and stating that the wall was to be in the nature of a party-wall, and also deny that plaintiffs have any right to use any part of the wall to be erected as a party-wall. On June 9, 1906, the complainants filed an amended bill praying that the deed of May 2, 1905, may be altered and reformed by the striking out of the word "second" and inserting "first" for the purpose of making the said deed conform to the true agreement which was entered into between the parties hereto, and that it may be decreed that the complainants, their heirs, executors, administrators and assigns, shall have the privilege to use the new wall erected without any additional cost or charge therefor, for a mandatory injunction and general relief.

To this amended bill the defendants made answer, denying specifically the several allegations of the amended bill.

It will be observed from a careful reading that this controversy has arisen from the fact that in preparing the deed from the letter of April 4, 1905, the words "parties of the first part" and parties of "the second part" have been substituted for the words "sellers" and "purchasers" used in that agreement. There is no doubt in our minds that the decree signed by the learned judge below which granted the relief prayed should be affirmed.

We have been able to reach no other conclusion from the <sup>214</sup> letter of April 4, 1905, the testimony in the record, and the situation of the respective properties, that the deed should be reformed and corrected so that the first paragraph thereof containing the covenants and conditions shall read as follows: "That the back wall, part of which will be erected and located

on the strip of land hereby conveyed, and the balance of the land of the parties of the first part, shall be used as a party-wall between the warehouse now erected on the Lot No. 19 belonging to the parties of the first part and the warehouse to be erected on the Lot No. 19 belonging to the parties of the second part; and if the parties of the second part desire to erect their wall to a greater depth easterly from Court street than the present wall now standing on Lot No. 19, the said wall is to be erected entirely at the expense of the parties of the second part, and on the same line and of the same thickness as the north wall now standing on Lot No. 21, with the privilege to the parties of the first part their heirs, executors, administrators and assigns to use this new wall without any additional costs or charge therefor."

In *Barry v. Edlavitch*, 84 Md. 95, 35 Atl. 170, 33 L. Ed. 294, Judge Page, delivering the opinion of this court, said: "The term 'party-wall' is usually applied to such walls which are built on the land of another, for the common benefit of both, in supporting timbers, used in the construction of contiguous buildings. And a division wall may become a party-wall by agreement, either actual or presumed."

In *Graves v. Smith*, 87 Ala. 450, 13 Am. St. Rep. 308, 5 L. R. A. 298, there was an agreement, in terms created a party-wall, with the right to the adjacent owner to use the same "in the erection of any building which he may wish to build on his own lot." The court held that under these circumstances that the cross-easement of appellation was "violated by the attempt of the defendant to create openings for the windows." So in *Brooks v. Curtis*, 50 N. Y. 6, 6 Am. Rep. 545, the language of the deeds and the acts of the parties show that it was their intention that the wall, which stood one-half on each lot, should be a party-wall for the common use of both lots, and that such an easement included the right to increase the <sup>215</sup> height of the wall, provided it be done without detriment to the strength of the wall or to the property of the adjacent owner. So in *Brown v. W.*, 40 Md. 15, Judge Robinson says, without attempting a precise definition of the term "party-wall," it is sufficient to say that ordinarily it means a wall built partly on the land of one and partly on the land of another, for the common benefit of both, in supporting timbers used in the construction of contiguous buildings: 22 Am. & Eng. Ency. of Law, 237. See *sey v. Habersack*, 84 Md. 117, 35 Atl. 96.

In *Dorsey v. Habersack*, 84 Md. 117, 35 Atl. 96, this court said: "A division wall may become a party-wall by agree-

either actual or presumed, and although such wall might have been built exclusively upon the land of one": *Brown v. Werner*, 40 Md. 15.

In this case the land and a wall already erected and the right to build an extension of wall was purchased as a party or division wall and the consideration agreed upon by the parties paid. Ascertaining the intention of the parties from the written instrument, as we must do, it is perfectly manifest the appellees intended to sell, and the appellants intended to buy, the standing wall of appellees' warehouse as a party-wall. If there could be any doubt about it, the recital in the agreement would seem to settle it, as it says, "That the brick wall, part of which will be located on said strip and the balance on the remaining land of the sellers, shall be used as a partition wall between the warehouse now erected on the lot belonging to the sellers and the warehouse to be erected on your adjoining lot. If purchasers desire wall to run to a greater depth than the north wall now standing, said wall is to be erected entirely at their expense, and in the same line and of the same thickness as the wall now standing, with the privilege to the sellers to use this new part of said wall at any time as a party-wall, without any additional cost or charge therefor." Again: "That in case you elect to build your wall higher than the north wall of the warehouse belonging to the sellers, the right is reserved to the sellers, if they hereafter add to the height of their warehouse, to use said additional wall as a party-wall, without any additional cost to them." And again, if said wall <sup>216</sup> shall be destroyed, "it shall be immediately rebuilt at the joint cost of the owners of the lot now owned by the sellers and the owners of the lot now owned by you." So we think there can be no reasonable doubt as to the fact that these parties intended that this should be a party-wall.

But the appellants claim because the deed says, "With the privilege to the parties of the second part their heirs, executors, administrators and assigns to use this new wall without any additional costs or charges therefor," was inserted in the deed instead of the "first" part the appellees are bound by the same, having signed and delivered the same to the grantees after ample opportunity had to examine the same.

Why or how the mistake was made we know not, but we are clearly of opinion after reading the agreement of April 4th, the testimony in the record, and considering the relation in which the parties stood to each other, the subject matter, and the objects to be obtained by the sale and purchase, that

the decree of the court below should be affirmed. Unless correct the mistake made in the deed by changing "second" to "first," the deed is very confusing and meaningless. If the wall is erected entirely at the expense of the party of the second part, why should the deed then say with privilege for them to use it without additional cost or charge thereon? What other cost or charge except the cost of the wall would the privilege of using the wall impose? It is apparent on the face of the deed that the privilege of using the wall was conferred meant to be given to the sellers without cost in order to maintain plain that they were not expected to contribute anything toward the cost of the erection of the wall in return for use of it. The third paragraph, we think, throws some doubt on this view, which says in the case of its (the walls) destruction by fire each party is to pay one-half of the costs. If a reconstructed wall is to be a party-wall, certainly the wall to be replaced must have been a party-wall. No right to use windows is reserved.

Assuming the deed should be corrected, and we think it is ample proof in the record to support the assumption, equity grant the relief asked?

<sup>217</sup> The power of courts of equity to reform, upon evidence, mistakes in deeds is so well settled that it may be assumed as a concession in this case. The only difficult questions of this character, the certainty and extent of proof required to establish the mistakes. While the courts have found much conflict in the cases upon this point outside of our own state, the rule here is that only such full and convincing evidence is required as will be sufficient to satisfy the mind of the court: *Coale v. Merryman*, 35 Md. 382. It is conceded indeed it could not be denied that courts of equity have jurisdiction in cases of mistakes, and it is equally well settled that if parties come to a settlement upon terms mutually agreed upon, and error or mistake occur in the settlement, a court of equity will entertain a bill to rectify the settlement and make it conform to the intention of the parties, and it was also decided that "it was competent for a plaintiff to sue for the specific performance of an agreement in writing, and to vary it by parol proof upon the ground of mistake, and after having it thus corrected, to insist upon its execution, and this is so "even when the answer of the defendant denies the mistake": *Gill v. Claggett*, 4 Md. Ch. 470; *Cooper v. Husbands*, 11 Md. 492.

The amended bill alleges clearly and fully that a mistake was made by the insertion of the words "party of the se-

part" instead of party of the "first part" in the deed of May 2, 1905. That this was a mutual mistake we think is borne out by the testimony. The plaintiffs certainly claim it ought to be party of the "first part." The written agreement of April 4th most conclusively bears it out, and Mr. Owens in his testimony says he called Mr. Smith's attention to the fact that the insertion of party of the "second part" seemed to him to be meaningless, but was told it was for his protection. The general rule is thus stated in Bispham's Equity, section 469: "A person who seeks to certify a deed on the ground of mistake must establish in the clearest and most satisfactory manner that the alleged intention to which he desires it to be made conformable continued concurrently, in the minds of all parties <sup>218</sup> down to the time of its execution, and must be able to show exactly and precisely the form to which the deed ought to be brought."

Here we have the agreement of April 4th and the testimony of Mr. Owens and the declarations of Mr. Carey. And in Adams' Equity, 169, 170, it is said: "It seems, however, that the instrument may be corrected if it is admitted or proved that it has been made in pursuance of a prior agreement, by the terms of which both parties meant to abide, but with which it is in fact inconsistent; or if it is admitted or proved that an instrument intended by both parties to be prepared in one form has by reason of some undesigned insertion or omission been prepared and executed in another. So again, when a solicitor, being instructed to prepare a settlement of a particular sum, inserted by mistake double the amount, and the settlement was executed without discovery of the mistake, a bill was sustained to rectify it." These general principles have been frequently announced by this court and elsewhere: Keedy v. Nally, 63 Md. 311; Second Nat. Bank v. Wrightson, 63 Md. 81; Wood v. Patterson, 4 Md. Ch. 335; Boulden v. Wood, 96 Md. 332, 53 Atl. 911.

Assuming this to be a party-wall throughout its entire length and height, and that the appellees have the right to use all or any part of this wall at any time without expense, it is well established in law that the wall should have been a solid or blank wall. Apart from the legal aspect of a party-wall, the deed, speaking of the wall, says it must be erected "in the same line and the same thickness as the north wall now standing on lot No. 21."

The maintenance of windows by the owner of a party-wall against the objection of the other is inconsistent with the title and right of the latter. By usage the words "party-wall" and

"partition wall" have come to mean a solid wall: *Jones on Easements*, sec. 687. One may be enjoined from making openings for doors or windows in a party-wall though there be neither allegations nor proof that the other owner intends to use the wall. Whether the other party intends to use the wall or not is quite immaterial, since he has acquired a complete <sup>219</sup> right in the wall which might be the subject of sale or transfer, and he should be protected in this right: *Jones on Easements*, sec. 688.

One of the uses of a party-wall is to afford a complete division between adjoining buildings, and the opening of windows in such a wall is an injury with redress by injunction: *Jones on Easements*, sec. 690.

In the next place it (a party-wall) is intended to serve the purposes of a complete division between adjoining buildings. This forbids the construction of spaces in it which do not divide. It is no answer to say that the dominant owner is ready to fill up the openings whenever the servient owner desires to use the wall as a party-wall. That very statement admits that it has not been maintained as a party-wall, and a servitude only renders lawful occupation an actual party-wall: *Jones on Easements*, 691. In *Graves v. Smith*, 87 Ala. 13 Am. St. Rep. 60, 6 South. 308, 5 L. R. A. 298, it is held that a party-wall must ordinarily be construed to mean a solid wall without windows or openings—quoted in *Barry v. Idell*, 84 Md. 95, 35 Atl. 170, 33 L. R. A. 294.

As to the propriety of asking for a mandatory injunction in this case it seems to be well settled that it is the proper remedy. *High on Injunctions* says: "But the rule is well established that an injunction is the appropriate remedy to prevent an adjacent owner of real property from opening or enlarging windows through a party-wall between the premises. A mandatory injunction may properly be granted requiring the closing up of the windows already opened. And in such a case the injunction will be broad enough to compel the defendant not merely to patch up the openings; but to make the wall as solid as a party-wall should be": *High on Injunctions*, 332; *Jones on Easements*, 724.

It follows from what we have said the decree of the court of Baltimore City passed in this case must be affirmed. Decree affirmed, with costs to the appellees above and

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*The Right to Make Windows and Other Openings in a Party-Wall*—discussed in the note to *Dunscomb v. Randolph*, 89 Am. St. Rep. 100.

## LINZ v. SCHUCK.

[106 Md. 220, 67 Atl. 286.]

**CONTRACT—Refusal to Perform—Promise of Extra Pay.**—If one who has contracted to dig a cellar refuses, after part performance, to go on with the work because he encounters substantial difficulties unforeseen when the contract was entered into which will increase the cost of excavation, a promise by the other party to pay extra compensation if the contractor will complete the work is enforceable; and it is not essential to the validity of this new contract that the original contract should be expressly rescinded. (p. 484.)

**CONTRACT.—A Mere Moral Obligation** is not such a consideration as will support a contract. (p. 485.)

W. W. Parker, John M. Staum and Augustus M. Denhard,  
for the appellant.

B. H. Hartogensis and Wm. C. Smith, for the appellee.

<sup>225</sup> **BOYD, J.** The appellee sued the appellant on the common counts for a balance claimed to be due for work done and materials provided, etc., under the following circumstances: The appellant owned a house known as No. 3038 Elliott street, at the corner of Canton street in Baltimore City, which was built without a cellar, was not plastered or partitioned off on the second story, and the rear was arranged for a stable. The appellee entered into a contract in writing with the appellant which states: "Cellar to be dug under the entire store to the partition wall between kitchen and store to a depth of seven feet, and walls to be underpinnd with good hard brick laid in cement. . . . Cellar to be connected with sewer and cemented," and provides for work to be done in the kitchen, the second story of the house, and a number of other things not necessary to mention. It concludes, "I will do the work and furnish material for the sum of fifteen hundred dollars (\$1,500)." The paper was drawn in the shape of an estimate or bid, but was <sup>226</sup> accepted by the appellant, and the appellee identified it as his contract.

The appellee began the work in April, 1903. He gave the contract to build the cellar to a subcontractor, who started to excavate. The appellee thus described the conditions of the ground: "The house stood on a hard crust about three feet thick and the foundation of that house didn't extend through that hard crust; it was built on that crust and the more we got through that the more we got into a swamp, like the bottom of an old creek, black, muddy stuff and soft and they tried to

dig and dig and it all ran into this place and finally a big hole would cave off and fall in every now and then and they continued on that way to get a trench dug to connect the place with the sewer so we thought we could drain the place better." His foreman notified him that the house was cracked and he then got lumber and drove "lagging" in to hold the ground. He testified that he notified Mr. Preston, the engineering inspector of the city, who went there with one of his assistants; that they "took sticks and shoved them down into the ground about fourteen feet deep; that Mr. Linz was present upon this occasion." He also said that Mr. Preston testified that no cellar could be made, and he should fill in what was taken out and he stopped the work. He further testified that the appellant called on him "off and on" and wanted to know "whether we couldn't make a cellar there; wouldn't it be possible in some way to overcome it even if a small one could be made." They finally thought they "could make a little cellar under some cellar there," and he said, "Let the thing lay and let the ground drain into the sewer and maybe we can make it provided you pay the additional cost and stand the consequences." He demanded a writing from the appellant and he said "his word was as good as mine, and if I put a cellar there he would see that I got pay for it; that he would pay for the additional work I was compelled to do to make a cellar." In another place he stated: "He says if I want to get a cellar under there he would reimburse or pay the additional cost, whatever it was, to get a cellar there; that the house was no good to him without a cellar." In 1927 he went to work again, dug out eight feet, then drove down eight feet long, used "concrete and cement in the trench to form our footing," and went to great expense and trouble to make the cellar under the new arrangement.

The appellant introduced evidence which tended to show that some of the trouble about the cellar was owing to the negligent way in which the appellee's men did the work, and that the bad condition of the soil did not extend as far as the appellee said it was, but there can be no doubt that the conditions were altogether different from what appeared on the surface or what was anticipated. The appellee also testified that before he made the offer he "wanted to know what the ground was, and defendant took plaintiff in the corner of his building [which was on the opposite side of the street] and he showed me he had a cellar dug there, and it was right, and the soil was nice and sound there on the other side, and when I started I wouldn't have any trouble,



made my figures on his say so." After the work was begun the owner of the adjoining property sued the appellant and the appellee for damages to her house sustained by reason of the excavation, and the suit was compromised by the appellant buying the house and the appellee agreeing to put it in proper condition. That was No. 3036 Elliott street.

The principal question in the case is whether the plaintiff was entitled to recover for the additional costs and expenses incurred, by reason of those conditions, on the promise of the appellant to pay him for them. The precise question for our consideration is presented by the plaintiff's fifth prayer, which was granted. After referring to the written contract made in April or May, 1903, and the refusal of the plaintiff in June, 1903, to perform and complete said contract, the prayer further submitted to the jury to find whether "said refusal on the part of the plaintiff was induced by substantial and unforeseen difficulties in the performance, which would cast upon the plaintiff additional burden not anticipated by the parties when the contract was made, and if they further find that after said refusal <sup>228</sup> by the plaintiff, the defendant, to induce the plaintiff to resume the work thus abandoned, promised him to see him through and to stand the consequences, and that, relying upon said promise the plaintiff completed the work, then their verdict may be for the plaintiff," etc. That prayer seems to have followed quite closely the language used in *King v. Duluth M. & N. Ry. Co.*, 61 Minn. 482, 63 N. W. 1105, which case, notwithstanding unfavorable criticism by some writers, in our opinion announces a principle which is not only just and equitable, but is easily reconcilable with the general rule that a promise to do, or actually doing, that which a party to a contract is already under legal obligation to do, is not a valid consideration to support the promise of the other party to the contract to pay additional compensation for such performance: In *King v. Duluth, M. & N. Ry. Co.*, after stating that general rule, it is added: "In other words, a promise by one party to a subsisting contract to the opposite party to prevent a breach of the contract on his part is without consideration." The court then cited *Ayers v. C. R. I. etc. R. R. Co.*, 52 Iowa, 478, 3 N. W. 522; *Linginfelder v. Wainwright Brewing Co.*, 103 Mo. 578, 15 S. W. 844; *Vanderbilt v. Schreyer*, 91 N. Y. 392, and other cases, most of which are among those relied on by the appellant, as sustaining and illustrating the general rule which the supreme court of Minnesota unhesitatingly and emphatically approved of. Indeed, the court said that the doctrine of *Munroe v. Perkins*, 9 Pick. 298, 20 Am. Dec. 475;

Goebel v. Linn, 47 Mich. 489, 41 Am. Rep. 723, 11 N. V. Rogers v. Rogers, 139 Mass. 440, 1 N. E. 222; Bryant v. 19 Minn. 396, and Moore v. Detroit Locomotive Works, Mich. 266, as it is frequently applied, did not commend to their judgment or sense of justice. Those are some number of cases which have sustained actions for additional compensation on various theories—some on the ground of waiver, others on the ground that the party for whom the work was done had the election of suing the other party for damages for breach of contract or to make a new contract, or others that it was a modification of the original contract. Chief Justice Start, of the Minnesota court, in the concurring opinion, said: "It is entirely competent <sup>229</sup> for the parties to a contract to modify or waive their rights under it, and ingraft new terms upon it, and in such a case the promise of one party is the consideration for that of the other. Where the promise to the one is simply a repetition of an existing legal promise, there can be no consideration for the promise of the other party, and there is no warrant for inferring that the parties have voluntarily rescinded or modified their contract. But where the party refusing to execute his contract does so by reason of some unforeseen and substantial difficulties in the performance of the contract, which were not known or anticipated by the parties when the contract was entered into, and which cast upon him an additional burden not contemplated by the parties, and the other party promises him extra pay or benefits, if he will execute his contract, and he so promises, the promise to pay is supported by a valid consideration. In such a case the inference arising from the transaction, if unmodified by equitable considerations, is rebutted, and the presumption arises that by the voluntary and mutual promises of the parties their respective rights and obligations under the old contract are waived, and those of the new or modified contract substituted for them. Cases of this character form an exception to the general rule, etc. The opinion then goes on to say that, on the other hand, when there are no unforeseen additional burdens, which make the refusal to perform the promise of extra pay, equitable, and such refusal and promise of extra pay are one transaction, the promise is without consideration and the case is within the general rule. It then holds that what unforeseen difficulties and burdens will make the refusal to perform equitable, so as to bring it within the exception to the general rule, must depend upon the facts of each particular case.

We have thus referred to, and quoted from, that case at unusual length, because the principles therein announced seem to us to be, not only well and clearly stated, but just, and founded on reasons that any court of justice should hesitate to reject, unless they conflict with some binding authority or <sup>230</sup> established rule of law, which, in our judgment, they do not. When two parties make a contract based on supposed facts which they afterward ascertain to be incorrect, and which would not have been entered into by the one party if he had known the actual conditions which the contract required him to meet, not only courts of justice, but all right thinking people, must believe that the fair course for the other party to the contract to pursue is either to relieve the contractor of going on with his contract or to pay him additional compensation. If the difficulties be unforeseen, and such as neither party contemplated, or could have, from the appearance of the thing to be dealt with, anticipated, it would be an extremely harsh rule of law to hold that there was no legal way of binding the owner of property to fulfill a promise made by him to pay the contractor such additional sum as such unforeseen difficulties cost him. But we do not understand the authorities to sustain such a rule; on the contrary, they hold that the parties can rescind the original contract, and then enter into a new one, by which a larger consideration for the same work and materials that were to be done and furnished under the first contract can be validly agreed upon. Persons competent to contract can as validly agree to rescind a contract already made as they could agree to make it originally, but we are met with the contention (which it must be admitted is sustained by courts of high authority) that while this is true, yet after a contract is broken by one of the parties the other cannot waive his right to treat it as no longer existing, and bind himself to pay more than the original contract called for, unless the original contract is actually rescinded.

Such authorities are based upon the ground that there is no consideration for the promise, and in that connection we will review the decisions of this state as to whether a moral obligation is sufficient to support a contract, as there is some conflict between them, and consequently a misunderstanding as to what the law of this state is on that subject. In *State v. Reigart*, 1 Gill, 1, 3 Am. Dec. 628, our predecessors held that "A contract founded upon an equitable duty, such as would be enforced <sup>231</sup> by a court of equity, or upon a moral obligation, which no court of law or equity can enforce, or to do that which an honest man ought to do, or upon the waiver of

a legal right by the party entitled to it is maintained sufficient consideration." That decision in reference moral obligation was based on what Lord Mansfield held in *Hawkes v. Saunders*, Cowp. 289, although at that time the doctrine had been overruled in England: *Eastwood v. Kenyon*, 11 Ad. & E. 438. In *Ellicott v. Turner*, 4 Md. 476, though Le Grand, C. J., said, "We regard the moral obligation resting on the defendant's testator, as a sufficient consideration to support his promise to pay," the decision was really based on the fact that the testator had promised to pay for the services before they were rendered. After quoting what Lord Mansfield said in *Hawkes v. Saunders*, Cowp. 289, Judge Le Grand added: "This language of Lord Mansfield, however, must be understood as applying only to cases of promise where there was a pre-existing obligation, legal or equitable, to pay, and not as extending to those cases of cases which arise out of the moral affections alone." In *Drury v. Briscoe*, 42 Md. 154, Judge Stewart said: "If the husband was under a moral obligation, which no court could enforce, and promised to pay the claim, the husband's honesty and rectitude of the same is a sufficient consideration" in that case there was a valuable consideration, and the promise was not dependent upon the principle above stated.

In *Ingersoll v. Martin*, 58 Md. 67, 42 Am. Rep. 322, the court, through Judge Alvey, held that "a mere moral obligation simply would not be a sufficient legal foundation for a promise." After quoting from Lord Mansfield, and stating that more recent decisions had considerably modified his statement that, "Where a man is under a moral obligation which no court of law or equity can enforce, and promises to pay, his honesty and rectitude of the thing is a consideration," Judge Alvey said: "It is now understood, both in England and in this state, as being so restricted as not to apply or extend to that class of cases which arise out of the moral duties and affections alone. There must be something more to support an express promise to <sup>232</sup> pay," citing *Ellicott v. Turner*, 4 Md. 476, and *Eastwood v. Kenyon*, 11 Ad. & E. 438. In that case the question was directly involved, and the law of this state seemed to be considered settled on the subject as will be seen by Brantly's Law of Contracts, 67. But in *Robinson v. Hurst*, 78 Md. 59, 44 Am. St. Rep. 266, 26 Atl. 956, 20 A. 761, a statement is made in the opinion that "This court has never, when called upon, hesitated to say that a moral obligation is a sufficient consideration to support a promise to pay," and the reporter stated that in the syllabus.

opinion of the court refers to the Maryland cases above cited, including *Ingersoll v. Martin*, 58 Md. 67, 42 Am. Rep. 372, the effect of which was in some way overlooked. As that statement was not necessary for the purposes of the case, and the citation of previous cases shows that it was not the intention to overrule that of *Ingersoll v. Martin*, we cannot so accept it, and the rule as announced in *Ingersoll v. Martin* must still be accepted as the law of this state on that subject. We have thus referred to the subject at some length in order that the error in *Robinson v. Hurst*, 78 Md. 59, 44 Am. St. Rep. 266, 26 Atl. 956, 20 L. R. A. 761, be corrected, and to show what the law of this state now is, for if it was still as announced in *State v. Reigert*, 1 Gill, 1, 39 Am. Dec. 628, there would be no necessity to look for a consideration other than the moral obligation resting on the appellant.

We are, however, of the opinion that this prayer can be sustained on the ground stated in *King v. Duluth etc. Ry. Co.*, 61 Minn. 682, 63 N. W. 1105, and other cases, which is, as expressed in that case, that "by the voluntary and mutual promises of the parties, their respective rights and obligations under the original contract are waived, and those of the new or modified contract substituted for them." When there is such a strong moral obligation as there was in this case to give the appellee relief, it would be making an exceedingly technical distinction to hold that the promise would have been binding if the original contract had been expressly rescinded, but that is not binding because there was no express or actual rescission, although the facts show that it was undoubtedly intended by the parties that neither should be held to the terms of the original contract. Of course, it will be borne in mind that the <sup>223</sup> court in *King v. Duluth etc. Ry. Co.*, 61 Minn. 682, 63 N. W. 1105, only applied the principle announced to cases where the refusal to perform was equitable and fair; and the difficulties were substantial, unforeseen and not within the contemplation of the parties when the original contract was made. The opinion also excluded from the application of the principle mere "inadequacy of the contract price which is the result of an error of judgment, and not of some excusable mistake of fact." We need not go further than the doctrine announced by that case; but there are many others based upon the principle of waiver, some of them not being affected or governed by the motive of the promisee in refusing to perform the original contract, and we do not want to be understood by referring to or quoting from them as meaning to adopt all that is said in them.

In *Meech v. Buffalo*, 29 N. Y. 198, it was held that a municipal corporation, with power to construct public improvements, could bind itself to pay an increased compensation to a contractor, in consequence of the enhanced cost of the work by reason of a fact not within the knowledge of the contractor at the time of the making of the original contract. In *Michaud v. McGregor*, 61 Minn. 198, 35 W. 479, contractors undertook to build a house on the lot of the promisor, in the city of Duluth. In the course of construction they met with unexpected obstacles, unknown to either party when the contract was made, being rocks and boulders on the surface of the lots which had been placed there by the city. The contractors refused to proceed with their contract unless paid for extra work in removing the rocks, which the agent of the owners agreed to do, provided they would render a strict account of such extra work and aid in securing satisfaction of appellant's damages. The contractors assented to the terms and performed their part. It was held the contract was supported by a valid consideration. In *Goebel v. Linn*, 41 Mich. 489, 41 Am. Rep. 723, 11 N. W. 284, Judge Coolidge sustained an action on a note which included the price of the work in addition to the original contract price. He referred to the expected and extraordinary circumstances <sup>234</sup> arising in the case goes further than most we have found, and it has been suggested that it has been overruled by *Widiman v. Linn*, 83 Mich. 241, 47 N. W. 231, but *Goebel v. Linn*, 41 Mich. 489, 41 Am. Rep. 723, 11 N. W. 284, was not only not overruled, but was cited to the court, and the court simply said it and the other cases did not bear out the contention of the defendant, without in any way intimating dissatisfaction with that case. In *Osborne v. O'Reilly*, 9 N. J. Eq. 467, 9 Atl. 209, complainant had agreed to obtain excavation, blasting, etc., on a railroad, as a contractor under defendant at a fixed price. The agreement was made under certain misrepresentations of the contractor as to the character and quality of the work to be rendered, whereas in fact the rock proved to be much harder than represented, more expensive to drill and worthless for use forward for foundations, culverts, etc. The contractor promised to allow the complainant an additional sum per cubic yard and it was held that his estate was liable to account therefor. New promises have been held to be valid on various grounds in a number of cases, all of which we do not adopt, in addition to those already cited we refer to *Cooke v. M*

70 Ill. 96; Lawrence v. Davey, 28 Vt. 264; Connelly v. Devoe, 37 Conn. 570; Courtenay v. Fuller, 65 Me. 156; New Jersey Trust Co. v. Nat. Gas Co., 71 N. J. L. 29, 58 Atl. 104; Agee v. Patch Mfg. Co., 77 Vt. 13, 58 Atl. 792: See, also, 30 Am. & Eng. Ency. of Law, 1197, where it is said that when the contractor refuses to perform his contract, and the builder promises to pay him additional compensation in consideration of the performance of the contract, the authorities are not in accord, but adds that "the prevailing rule seems to be, however, that such a promise is valid, as an abandonment of the original contract and the creation of a new contract."

In Anson on Contracts, 76, after speaking of the well-known case of the sailors not being entitled to recover more than their contract called for, it is said: "It would have been otherwise if risks had arisen which were not contemplated in the contract. For instance, such a contract as that which the seamen had entered into in the case just cited contains an implied <sup>235</sup> condition that the ship shall be seaworthy." Mr. Brantly, on page 70 of Law of Contracts, after referring to the other doctrine, says: "But the rule of other cases is that the promise is valid because the promisee is entitled to choose between the risk of being sued for a breach of his contract and the prospect of loss from going on at the original price. It also seems that the new promise of additional compensation amounts to a novation or a substituted contract. While a contract is executory on both sides, the parties are at liberty to rescind it by substituting a new one in its place."

So without further citation of authorities we are of the opinion that the fifth prayer of the plaintiff was properly granted for reasons stated above. It follows that the first, second, fourth, sixth and seventh prayers of the defendant were properly rejected, as they in different forms present views contrary to the plaintiff's prayer. The third was also properly rejected, as there was some evidence to prove the delivery of the materials. We see no error in admitting the evidence referred to in the first exception. Under the plaintiff's theory he was to be paid the cost of making the cellar and the bills he paid or was liable for were admissible. The objection to the use of the bill of particulars was not well taken, but at any rate the subsequent agreement of counsel that the items set out in it appeared in the bills rendered by certain parties named relieved it of all question. It was a proper precaution for the protection of the defendants to see that such items were in the bill of particulars, and it was cer-

tainly proper for the plaintiff to show that items claiming payment for were there. We do not understand why the book of plaintiff mentioned in the third exception was objected to. He claimed to make the entries of payments by him in the book. If there could have been injury by reason of the form of the question in the seventh bill of exceptions, it was not answered, and another question was asked, which was not excepted to. It was certainly admissible to prove by the defendant, or any other witness, such deliveries of lumber, etc., as he knew of. The first six exceptions to strike out <sup>236</sup> testimony were too general to inform us just what testimony was referred to, but there is no reason why such testimony as is mentioned in the seventh part of those exceptions was not admissible. Payments had been made to the plaintiff from time to time, and it was proper to show on what part of the work the money was paid, so as to enable the jury to determine what, if anything, was due on the work in controversy. The testimony of Mr. Preston was relevant under our view of the seventh exception announced above. Objection to that was presented in the seventh bill of exceptions. The eighth embraces a part made at the conclusion of the testimony, to strike out testimony tending to prove the making of a new promise, which had been admitted subject to exception. After what we have said above, it is unnecessary to further consider the question. Finding no reversible errors in any of the testimony, the judgment will be affirmed.

Judgment affirmed, the appellant to pay the costs.

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*A Promise Made to a Person* to induce him to perform an act which he is already bound in law to perform is without consideration and is ordinarily not binding: *Spencer v. McLean*, 20 Ind. App. 626, 128 Ind. St. Rep. 271. And a subsequent agreement, not forming any part of an original contract, nor supported by the original consideration, is void, nor by any new consideration, is void: *Macfarland v. Heim*, 128 Ind. St. Rep. 327, 48 Am. St. Rep. 629. If a contract of employment is made for a stipulated monthly salary for one year, an agreement during the year to pay more, unsupported by any change in the hours, character of the work, or other consideration, is void: *Davis v. Morgan*, 117 Ind. St. Rep. 97, 47 Am. St. Rep. 171.

*Moral Obligations as a Consideration* to support an express contract are discussed in the note to *Ferguson v. Harris*, 39 Am. St. Rep.



## OFFUTT v. OFFUTT.

[106 Md. 236, 67 Atl. 138.]

**SPECIFIC PERFORMANCE—Certainty of Terms of Contract.** In order to warrant the specific performance of a contract, it must be definite and certain in its terms, and free, not only from ambiguity, but likewise from all shade or color of ambiguity. (p. 495.)

**SPECIFIC PERFORMANCE—Discretion of the Court.**—Specific performance is not a matter of right in the litigant, but it is one of sound judicial discretion controlled by established principles of equity, and will be granted or withheld by the court upon a consideration of all the circumstances of each particular case. (p. 495.)

**SPECIFIC PERFORMANCE—Promise of Support in Consideration of Marriage.**—Where a man, in proposing marriage, writes to the woman "That I have tolde you and rote to you you are first with me above all other you are one that my honner before God that I have plege myself to take care of and support as long as you live," and she marries him in consideration of this assurance, the letter is evidence sufficiently definite to entitle her to a specific performance against his heirs by a decree in equity providing means for her support out of his estate. (p. 498.)

Robert B. Peter, for the appellant.

Edward C. Peter, Charles W. Prettyman and H. W. Talbott, for the appellees.

**237** **ROGERS, J.** This is an appeal from a decree of the circuit court for Montgomery county dismissing the appellant's bill of complaint.

The record discloses that Luther M. Offutt, late of Montgomery county, a widower without children, departed this life on the thirtieth day of November, 1904, intestate, leaving a widow, three sisters and several nephews and nieces, all of whom are made parties plaintiff and defendants to this suit.

That in June, 1890, the complainant established a school in Montgomery county, near the home of said Luther M. Offutt. That soon after the appellant came to said neighborhood the said Luther M. Offutt began to visit her; said Offutt then being sixty-two and the appellant thirty-nine years of age. That after a short acquaintance the said Luther M. Offutt asked the appellant to marry him, but was refused. That he continued his suit, however, while she remained in the county and was repeatedly refused by her. That in November, 1891, appellant returned to Washington, D. C., and from that time until June, 1901, the said Offutt continued to visit appellant, urging her to marry him, offering as an inducement that she should have all he possessed; appellant being then fifty years of age and said Offutt seventy-three.

That all that time she was living with friends, surrounded by all the comforts of city life and enjoying the society of refined and cultivated persons, to which she had been accustomed all of her <sup>238</sup> life. That she had enjoyed many opportunities for cultivating her mind, having been a daughter of a Professor of Modern Languages at the Naval Academy at Annapolis, Maryland, and having taught and traveled extensively abroad. That said Offutt lived on a farm in a sparsely settled community. That the appellant was so attached to that if she married said Offutt she would have to make many sacrifices for his sake, and exchange the comforts of city life for a life on a farm, with few, if any, of the conveniences to which she had been accustomed. But that said Offutt persisted in his declarations of love for the appellant and promised repeatedly that she should have all the property he owned. That he valued his farm at fifty thousand dollars, which would be hers if she married him, as all of his personal property, amounting in the aggregate to several thousand. That appellant, after consulting with her sister in regard to the matter, wrote a letter to said Offutt as coming from her sister, and suggested that his property should be divided between her and her sister. That she should have all his property should be committed in writing. That in reply to said letter, that said Offutt wrote the following letter:

"Montgomery Co. Md.

"Great Falls June 25

"My dear Darling sweet intended wife I am astonished to see you to think that you have so little confidence in me. I have told you and rote to you you are first with me and with others you are one that my honner before God that I have pledged myself to take care of and support you as long as you live and no one else. Who has a better rite to you what is mine will be yours and what is yours will be mine You will be as myself I will never turn from you no one hoe has the best rite to what I have got but you do ennything that is rite for you I want you to be satisfied and contented and happy you will be in the hands of me that care more for you then you do for yourself I will do ennything that you want me to do that is rite and to make you and happy and contented and I will fix it in any way that will please you and I don't want no one to have it but yourself don't you worry your mind about it we will fix that to suite ous both whatever way we want you wantted will done to have you to be better than any one ells that you are today with me but I ant <sup>239</sup> w

you don't love me as I doe you I am siffide with you and don't want to ask enny one advice when I please myself I don't care hoe it displeases it is the same with me I don't ask ennyone to tell me what I shall doe I will do what I believe is right and when I am rite I am sattifid and I no am rite I always please myself first and others come next I don't ask your sister or enny else to supporte you that my parte to care of I have all the respect for your sister and family if I didnt I woulde have for you what I otten have I would have bin to see see you but for your letter you ritte to me on the 12th of June that you ment possible that I mustent rite or come to see you till you rite to me I was in Washington two or times but I was afraid to come to see you it wasent I didnt want to come to see you and I went to see you but I didnt see you I thought you didnt care to see me I think this ottobe satisfactory to you I would like very much to see you and have a talk with you I want you to give a decided answer in your letter you rite as I am bin in dout longer nof you have time onof to doe what you intended to doe one way other I am tired of long answer Good by from your true and best friend on earth that you have if you nue it.

"LUTHER M. OFFUTT."

That appellant received said letter, addressed in her own handwriting and postmarked Great Falls, June 26, 1901. That appellant confiding in the undertaking and promise of said Offutt in said letter contained, married said Offutt on 15th of October, 1901. That a month and five days after the ceremony of marriage was performed, in execution of the promise by said Offutt contained in said letter, they decided that said Offutt should execute a will devising and bequeathing all of his estate to this appellant. That on the twentieth day of November, 1901, said Offutt did sign said will, but it not being properly attested, was refused probate by the orphans' court of Montgomery county after his, Offutt's, death. That the apprehensions of appellant as to the consequences of the change of her condition were well founded. That, added to her many other inconveniences, soon after her marriage the health of said Offutt became very bad, and that the greater part of her married life was spent nursing said Offutt through a long and serious illness; His last sickness being of <sup>240</sup> nearly fifteen months' duration. That said Offutt died without having carried out his promise contained in his letter of June 25, 1901, or having in any way provided for this appellant. That said Offutt

died, seised and possessed of certain real estate, subject to a mortgage of seventeen hundred and seventy dollars and personalty worth thirteen hundred and eighty-two dollars and thirty-five cents and cash one thousand and three dollars and sixty-eight cents. That the appellant performed all the requirements of said agreement except the part to be performed, and that heirs of said Luther M. Offutt refuse to convey said property to this appellant, and that the administrator refuses to perform said agreement, and declares he will not recognize or carry out said agreement or agreement of June 25, 1901.

The bill then prays for a receiver, specific performance and general relief and process against those interested in the property. The defendants answered making a general denial, and upon the statute of frauds. There is testimony tending to show, we think, conclusively that the letter of June 25, 1901, was written by said Luther M. Offutt and received by the appellant in due course of mail. There is also testimony as to the value of the real estate to be approximately one thousand dollars and the personalty at something over one thousand dollars. There is also testimony tending to show that the appellant left a comfortable home in the city of Washington and surroundings most agreeable and pleasant in their nature.

The learned court, after a very able and exhaustive opinion of the facts and law, as we have said, dismissed the appellant's bill, thus denying her all relief. In this we think the court erred. We entirely agree with the learned judge in their view of the law, that when a verbal contract is made in relation to, or upon consideration of, marriage, the contract alone is not a part performance upon which to enforce a specific execution. This rule, which is firmly established, is based upon the express language of the statute requiring a promise made in anticipation of, and followed by, the marriage is the exact case contemplated by the statute. It is plain that the marriage adds nothing to the very circumstances described by the statutory provision which makes writing essential. In fact, until a marriage <sup>241</sup> takes place there is no binding agreement independent of the marriage, so that the marriage itself is a necessary part of the contract made upon consideration of it, which the legislature has said must be in writing: *Crane v. Gough*, 4 Mo. 187; *Hunt v. Hunt*, 171 N. Y. 396, 64 N. E. 159, 59 L. R. A. 101; *Lloyd v. Fulton*, 91 U. S. 479, 23 L. ed. 363; *McAnnulty v. McAnnulty*, 120 Ill. 26, 60 Am. Rep. 552, 11 N. D.

But we cannot agree with the learned court below that the letter of June 25, 1901, is so vague and indefinite in its terms that the complainant is entitled to no relief. On the contrary, we think its terms are a definite and specific proposition, and an acceptance on the part of the plaintiff, such as ought to be binding in a court of equity. We recognize that the contract must be definite and certain in its terms, and must be free, not only from all ambiguity, but likewise from all shade or color of ambiguity: *Dixon v. Dixon*, 92 Md. 432, 48 Atl. 152; *Horner v. Woodland*, 88 Md. 511, 41 Atl. 1079; *Waters v. Howard*, 8 Gill, 262.

Specific performance is not a matter of right in the litigant, but is one of sound judicial discretion controlled by established principles of equity, and it will be granted or withheld by the court upon a consideration of all the circumstances of each particular case. It must be so clearly proven as to satisfy the court that it constitutes the actual agreement between the parties.

Now, let us examine this letter of June 25, 1901, by this test. By whom was it written? Every item of evidence in the record tends to show that it was written by Luther M. Offutt to the plaintiff. The handwriting was proved to be his, posted from Great Falls, his postoffice, received by the plaintiff, in due course of mail, directed in the handwriting of the plaintiff, and explained why she directed it, and, as the court below remarked, "Indeed, it is doubtful whether anyone else could or would have been guilty of such an effusion." The letter was in the possession of the plaintiff, filed in evidence by her, and is in perfect accord with the declarations and intentions of the deceased to the plaintiff for eleven years or more, and further, there is not the slightest evidence in this case that plaintiff procured this letter <sup>242</sup> in any other than a proper manner. We will assume, therefore, that this letter is a genuine production of Luther M. Offutt, and is properly in evidence in this case, and, further, that the offer and promise therein contained, must be construed most strongly against the proposer. Does it furnish evidence of a contract that is definite and certain in its terms, and that is free from all ambiguity? Here is a suitor of eleven years' standing, required to put his proposal in writing, and attempts to do so, and his marriage to the lady to be the reward, and this solemn promise follows: "That I have tolde you and rote to you you are first with me above all other you are one that my honner before God that I have plege myself to take care of and support as long as

you live." Is this definite? "I have pledge myself to care of and support as long as you live." Whom does he promise to support? Miss Seager—how long? As long as she lives. Why? If she will marry him. Does she marry him? She does. Does he provide for her support as long as she lives? No. Is the plaintiff under this state of law entitled to relief in a court of equity, the promisor having died without in any manner performing his promise? I think yes, upon the plainest principles of equity and justice.

In *Stilley v. Folger*, 14 Ohio, 610, the court says: "If a deed, we think it may be considered as well settled law that almost any bona fide and reasonable agreement made before marriage to secure the wife the enjoyment of either her own separate property or a portion of the property of her husband, whether during coverture or after death, may be carried into execution in a court of chancery." *McNutt v. McNutt*, 116 Ind. 545, 19 N. E. 115, 2 L. R. A. 371, 372, said: "Executory agreements made between a man and a woman, who afterward marry, and which then become binding at the common law, in the application of the conscientious principles of equity will be specifically enforced as to either husband or wife at the suit of the other." This doctrine is fully recognized in *Phillips v. Phillips*, 83 Mich. 47 N. W. 110. That was a case in which a man of sixty years and a woman forty-six agreed before marriage to execute to her a deed for a one-half undivided interest in ninety-five acres of land, and she was to deed back to him the same land with a life interest. He performed his part and she would not. They separated after marriage and he brought a bill to compel performance on her part. The court granted the relief prayed and said, while there is testimony in the case tending to show that defendant married the plaintiff rather from mercenary motives than love or affection, yet there is nothing in the record to warrant the conclusion that his intellect or will had become enfeebled by age, or that the execution of the deed was obtained by any improper or undue influence. Both understood the situation fully. They had known each other twenty years. The terms of the agreement were discussed frequently, and the reasons stated why she wanted the deed. Both understood the full purpose of the arrangement, and deliberately made it. He fulfilled it by the marriage and delivery of the deed, and she violated it by refusing to execute the lease. Neither party was receiving of much consideration. But a court of equity can do all it can do or ought to do when it shall have d

the specific performance of the antenuptial contract which he fully, and she only partially, performed.

In *Miller v. Goodwin*, 8 Gray (Mass.), 542, Judge Metcalf says: "A marriage between parties, who have previously made contracts with each other, which are to be performed presently, or during the marriage, the marriage releases or extinguishes such contracts." This has been the law from the time of Edward IV: Coke's Littleton, 264B; 1 Blackstone's Commentaries, 442. Such contracts, however, when made in contemplation of marriage, and respecting the property of either of the parties, though released or extinguished at law, are held good in equity, and will be enforced by a court of chancery against the heirs of the party in default: *Holthan v. Ryland*, Nels. Ch. 205; *Haymer v. Haymer*, 2 Vent. 343; 2 Vern. 480; 2 Spence's Equity Jurisprudence, 506, 661; 2 Story on Equity, 1370.

In *Moore v. Allen*, 26 Colo. 197, 77 Am. St. Rep. 255, 57 Pac. 698, the court says: "He has failed to carry out his agreement, but by his promise upon which she relied, she has been induced to enter into a relation <sup>244</sup> from which she cannot recede, and which she is powerless to change. The result of his deception and artifice is such a fraud upon plaintiff in error, and has placed her in such a situation, that the promise to convey is taken out of the statute; or perhaps, more accurately speaking, equity will not permit it to shield such a fraud": *Green v. Green*, 34 Kan. 740, 55 Am. Rep. 256, 10 Pac. 156; *Peck v. Peck*, 77 Cal. 106, 11 Am. St. Rep. 244, 19 Pac. 227, 1 L. R. A. 185; *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418.

In *Jacobus' Exr. v. Jacobus*, 20 N. J. Eq. 49, where a "good and sufficient support" had been reserved, the court say, must be construed to mean such as is proper for a mother and the head of a family, with the fortune and rank of her husband and his children.

And again in *Chubb v. Peckham*, 13 N. J. Eq. 207, it is said: "But having been entered into voluntarily and in good faith, the parents are entitled to their support at the hands of the grantees so long as the avails of the property conveyed or the means of the children will suffice for that purpose. There must be a decree for specific performance and a reference to a master to ascertain and report what would be a suitable provision, weekly or otherwise, for the comfortable support and maintenance of the complainant, and also of his wife, according to the terms and provisions of the contract."

And in *Clancy v. Flusky*, 187 Ill. 605, 58 N. E. 594, 52 A. 277, the same doctrine is held, and also in *Tilton v. T* 9 N. H. 385.

In *Thompson v. Stevens*, 71 Pa. 161: "If the [plaintiff] would stay with him [testator] as long as she lived, he would provide and give her full and plenty after he was gone, so that she need not to work." Now, certainly, here is a measure by which the amount can be ascertained, and which is the case within the rule of certainty to a common instance. Consideration being had of the condition in life of the plaintiff, what annuity would place her in such circumstances that she need not work.

But we are not without authority in our own state. In *Donnelly v. Edelen*, 40 Md. 117, where the testator by his will provided for his daughters a home during their lives on the farm devised to his son, together with a reasonable <sup>245</sup> and moderate support therefrom, Judge Alvey, delivering the opinion of this court, says: "And without entering at all into an investigation as to what would be a compensation for the loss of the home on the farm, so as a local habitation or place of residence, the proof is abundant to show that the amounts decreed to be paid to several complainants are entirely inadequate to afford a reasonable and moderate supply of food and clothing. regard being had, in making the estimate, not only to the value and yield of the estate devised, but to the condition and life of the testator, and of his children, for whom the provision is made"; and that the whole net income of the farm may be required to furnish this reasonable and moderate support, can make no difference. Neither the devisee nor the defendant claiming under him could or can rightfully appropriate any part of the net income from the farm, so that the reasonable and moderate support of the single daughter of the testator be supplied. And if the net income from the farm be insufficient for this purpose, it is alike the matter of the complainants and the defendants, and referred to the court. *Tolson v. Tolson*, 8 Gill, 376, and *Willett v. Carroll*, 13 Md. 459. So that we are of opinion that the decree of the court must be reversed, and the cause remanded, that the proceedings may be referred to the auditor to ascertain what such testimony as may be produced before him what would be a proper sum to be allowed the complainant below for support, regard being had, in making the estimate, not only to the value and yield of the estate of the decedent, but



M. Offutt, but to the condition and habits in life of Luther M. Offutt and his wife, for whom the provision is made.

It follows from what we have said that the decree of the lower court must be reversed, with costs to the appellant above and below.

Decree reversed and cause remanded that proceedings may be taken in conformity with the views herein expressed.

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*An Agreement to Marry* is a sufficient consideration to support an antenuptial contract fixing the property rights of the parties: *Appleby v. Appleby*, 100 Minn. 408, 117 Am. St. Rep. 709; *Unger v. Mellinger*, 37 Ind. App. 639, 117 Am. St. Rep. 348. Where a woman has been induced to enter into a contract of marriage by an oral promise on the part of the man to convey lands to her, which promise he fails to perform, the result is such a fraud upon her as will take the promise to convey out of the statute of frauds, and, as between them, equity will enforce the contract: *Moore v. Allen*, 26 Colo. 197, 77 Am. St. Rep. 255.

*An Agreement to Make or not to Make a Will* is valid; but the evidence to sustain such a contract must be clear, positive and convincing: *Freeman v. Morris*, 131 Wis. 216, 120 Am. St. Rep. 1038, and cases cited in the cross-reference thereto.

*While the Awarding of Specific Performance* by a court of equity rests largely in the discretion of the court (*Boldt v. Early*, 33 Ind. App. 434, 104 Am. St. Rep. 255), still when a contract is in writing, certain in its terms, based upon a valuable consideration, fair and just in all its provisions, and capable of being enforced without hardship to either party, it is as much a matter of course for a court of equity to decree its specific performance as for a court of law to award damages for its breach: *Marshall v. Keach*, 227 Ill. 35, 118 Am. St. Rep. 247.

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## DONNELLY v. SUPREME COUNCIL CATHOLIC BENEVOLENT LEGION.

[106 Md. 425, 67 Atl. 276.]

**BENEFIT SOCIETY—Tribunals of the Order.**—It is competent for the members of a benefit society to agree that questions arising between them and the order relating to property rights may be referred to and settled by tribunals established within the order, and courts will not undertake to inquire into the regularity of the procedure adopted and pursued by those tribunals in reaching their conclusions. (p. 502.)

**BENEFIT SOCIETY—Exclusive Jurisdiction of Tribunals.**—Where the tribunals of a benefit society have power to decide a disputed question, their jurisdiction is exclusive, whether there is a by-law stating such decision to be final or not, and courts cannot be invoked to review their decisions of questions coming properly before them, except in cases of fraud. This is true whether the member does not press his claim at all before the tribunals of the

order, or whether he carries it through the final tribunal, or whether he goes through only a part of the hearings which he might have made by the order. It is the existence of a tribunal, properly erected and charged with the duty of determining the rights of the members between themselves and the order, which is a bar to a suit in equity by a member against such order in regard to any question so presented to the tribunals of the member's own choice. (p. 503.)

**BENEFIT SOCIETY—Reasonableness of By-law.**—A by-law of a benefit society is reasonable and binding on a member which provides for the payment of a permanent disability benefit dependent upon the member being destitute of means of support at the time of his arrival at the age of expectancy. (pp. 501, 504.)

Chas. W. Heusler and E. Allan Sauerwein, for the appellant.

Richard B. Tippet and William S. Bansemer, for the appellee.

<sup>426</sup> **BURKE, J.** John Donnelly, the appellant, sues the Supreme Council, Catholic Benevolent Legion, a corporation organized under the laws of the state of New York. The defendant is a fraternal and beneficial organization, its particular business and object being "to unite fraternally all Roman Catholics personally acceptable, of sound bodily health, for social, benevolent, and intellectual improvement, and to afford moral and material aid to its members and dependents by establishing a fund for the relief of sick and distressed members, and a benefit fund from which, on satisfaction of the death of a member who has complied with the lawful requirements, a fixed sum is to be paid to the member or dependents of such member as he shall have directed; and from which benefit fund another fixed sum is to be paid to a member who shall have complied with all lawful requirements, and who shall have become permanently disabled from attending to business or gaining a livelihood."

In 1882 the plaintiff made application for membership in the defendant corporation, in which application he promised and agreed to make punctual payment of all dues and assessments for which he might become liable, and to conform in all respects to the laws, rules and usages then in force, which might thereafter be adopted by the Supreme Council of the Catholic Benevolent Legion. On the twelfth day of November, 1882, the defendant issued to him a benefit certificate wherein it promised to pay to him out of its funds the sum of two thousand <sup>427</sup> five hundred dollars, upon due proof that he had become entitled thereto under the provisions of the law relative to permanent disability. At the time of the plaintiff's application for membership, and at the time

suing the benefit certificate, the provisions of the defendant's constitution and by-laws relating to the payment of disability benefits were as follows: Section 3, article 2 of the constitution provided that it should establish a benefit fund, from which, on satisfactory evidence of the death of a member, who had complied with all the lawful requirements of the order, a sum not exceeding five thousand dollars should be paid to the family or dependents, as such member may have directed, and from which said fund a sum not exceeding two thousand five hundred dollars should be paid to a member who had become permanently disabled from attending to business, or gaining a livelihood, and who should then have complied with all the lawful requirements of said body corporate. No application for a disability benefit could be made until the member had arrived at the age of expectancy fixed by the printed table of the laws of the order. By section 2, chapter 1 of the laws of the defendant it was provided as follows: "Five thousand dollars shall be the largest amount paid by this legion on the death of a member. Two thousand five hundred dollars shall be the largest amount paid for a permanent disability benefit. Five thousand dollars shall be paid on the death of every sixth grade member; three thousand dollars on the death of every fourth grade member; two thousand dollars on the death of every third grade member; one thousand dollars on the death of every second grade member; and five hundred dollars on the death of every first grade member. And one-half of the amount of each grade may be paid to a member of that grade who shall have become permanently disabled from attending to his business, or gaining a livelihood, *and is destitute of the means of support when he shall have arrived at the age of expectancy.*"

The plaintiff contends that the portion of the above by-law which makes the payment of the permanent disability benefit dependent upon his being destitute of the means of support <sup>428</sup> at the time of his arrival at the age of expectancy is invalid, and not binding upon him. It was stipulated in the certificate issued to the plaintiff, and upon which this suit is based, that the constitution and laws of the defendant society in force at the time of issuing said certificate, and the laws thereafter enacted by the defendant society, together with the application for membership made by the defendant, should constitute the contract between the plaintiff and the defendant. The plaintiff was a sixth grade member, and claims to be entitled to receive the sum of two thousand five hundred dollars as a disability benefit under the terms of his certificate.

The defendant had established tribunals within its order to which claims such as the plaintiff's were to be referred; these tribunals were clothed with full power to determine the validity and to allow, or reject them—an appeal being taken from these different tribunals to the supreme council under the provisions of the by-laws of the society relating to such claim such as that sued for in this case, the plaintiff had made three different applications for the payment of the amount which this suit is brought. His claim was denied by the order, and, notwithstanding this, he contends that a court at law has jurisdiction to hear and determine the validity of his claim against the defendant, and in support of his contention it is urged, first, that the tribunals established by the order could not legally pass upon his claim; secondly, that these tribunals might lawfully pass upon the claim; thirdly, that the plaintiff still has a right, after the order has rejected his claim, to bring his suit at law, because there is no provision in the by-laws of the order that the finding of this established tribunal shall be final; third, because the by-law of the order which provides that no disability benefit shall be paid, unless the member is found to be destitute of the means of support when he shall arrive at the age of expectancy, is not binding upon him; fourthly, that the order is null and void, being, it is argued, inconsistent with the constitution of the order, and was not passed in pursuance of the authority derived from it; and fourth, because the finding of the tribunal was defective.

<sup>420</sup> As to the first and fourth reasons assigned in support of the right to maintain the suit, it is sufficient to say that this court has expressly decided that it is competent for the members of an order such as the defendant to agree to refer questions between the members and the order relating to property rights may be referred to and settled by the tribunals established within the order, and the courts will not undertake to inquire into the regularity of the procedure adopted and pursued by those tribunals in reaching their conclusions. Each of these propositions was distinctly established in the case of Osceola Tribe No. 11, O. R. M., v. Schmidt, 100 Pa. 98, in which this court adopted the rule laid down in the supreme court of Pennsylvania in *Black & White Sewing Soc. v. Vandyke*, 2 Whart. 309, 30 Am. Dec. 263, in which the beneficial society has decided under its by-laws that a member was not entitled to benefits. Judge Grason, who delivered the opinion in Schmidt's case, quotes with approval the following language of Chief Justice Gibson: "Into the regularity of these proceedings it is not permitted us

The sentence of the society, acting in a judicial capacity, and with undoubted jurisdiction of the subject matter, is not to be questioned collaterally, while it remains unreversed by superior authority." These are private beneficial institutions operating on the members only, who, for reasons of policy and convenience affecting their welfare, and perhaps their existence, adopt laws for their government, to be administered by themselves, to which every person who joins them assents. They require the surrender of no right that a man may not waive, and are obligatory on him only so long as he chooses to recognize their authority. In the present instance, the party appears to have been subjected to the general laws and by-laws according to the usual course, and if the tribunal of his own choice has decided against him, he ought not to complain. It would very much impair the usefulness of such institutions if they are to be harassed by petty suits of this kind, and this probably was a controlling consideration in determining the matter of assessing benefits and passing upon the conduct of members: *Anacosta Tribe of Redmen v. Murbach*, 13 Md. 91, 71 Am. Dec. 625.

<sup>430</sup> The proposition that the member is not precluded from suing at law, after he has exhausted his remedies within the order, unless the contract specifically provides that the decisions of the tribunals of the order shall be final, is supported by the decisions of some states, among which are the states of Illinois and Indiana. But the Maryland rule is otherwise. That rule was expressed with clearness and precision by the learned judge who decided this case below to be, that when the tribunals of the order have power to decide a disputed question, "their jurisdiction is exclusive, whether there is a by-law stating such decision to be final or not, and that the courts cannot be invoked to review their decisions of questions coming properly before them, except in cases of fraud. This is true whether the member does not press his claim at all before the tribunals of the order, or whether he carries it through the final tribunal, or whether he goes through only a part of the hearings which he might have in the order. According to the law of this state, it is the existence of a tribunal properly erected and charged with the duty of determining the rights of the members as between themselves and the order, which is a bar to a suit in court of a member against such order in regard to any question so confided to the tribunals of the member's own choice.

The rule contended for by the appellant might subject the order to litigation over every question of property right affect-

ing the member, would render the tribunals of the order tically useless, and would defeat the object for which were established. In *Osceola Tribe No. 11, O. R. Schmidt*, 57 Md. 98, there was no law providing the decision of the tribe should be final, and this omission urged as a reason why the suit could be maintained, but the court applied the rule declared in *Anacosta Tribe of Men v. Murbach*, 13 Md. 91, 71 Am. Dec. 625, to the case and held that the adverse decisions of the tribunals of the order constituted a bar to the plaintiff's right to recover. The by-law which the plaintiff assails as void was adopted and was in force at the time he became a member of the Legion. It is, in our opinion, a wise and <sup>431</sup> reasonable regulation, designed to conserve the funds of the order for the benefit of that class of persons to aid and care for who was one of the chief reasons for its existence. A man "permanently disabled from attending to business or gain a livelihood" might be a man in comfortable circumstances or a millionaire, and to admit such a person to share in the disability benefit fund would be not only unreasonable but would in many instances divert the funds of the order from the objects never contemplated by its founders—from the poor and distressed to the well-to-do and wealthy. The constitution and by-laws of the defendant provide a wise and harmonious system by which the benevolent purposes of the order may be accomplished.

Since the argument of this case the attention of the court has been called to the case of *Ayers v. Grand Lodge of the Ancient Order of United Workmen*, decided by the court of appeals of New York, April 16, 1907, and reported in 100 N. Y. 280, 80 N. E. 1020. That case, so far as the questions involved in this appeal are concerned, is indistinguishable from the case at bar. In that case the contract between Emory D. Fuller, the insured, who became a member of the order in 1885, and the defendant contained no restrictions as to his business or occupation. More than twenty years after the benefit certificate had been issued to him the order, without his consent, adopted a by-law suspending from membership those engaging in the business of selling intoxicating liquors as a beverage. Previous to January 1, 1904, Fuller had never engaged in the business of selling liquor, but on that day, in connection with one Chett, his copartner, he began to carry on a hotel at Vicksburg, New York, and the firm employed a bartender, who sold intoxicating liquors for them in the usual way over the

Fuller died in 1904, and proofs of death were made out in due form, but the defendant refused to pay the amount stipulated to be paid by the certificate, or any part thereof, upon the ground that the insured ceased to be a member of the order by engaging in the business of selling intoxicating liquors at <sup>433</sup> retail after the passage of the by-law mentioned. The lower court found that when Fuller joined the order he had a right to engage in the liquor traffic, and that said order, by a rule subsequently made, could not cut off that right which had become vested; that the defendant had the right to make reasonable by-laws, but the by-law in question, made without notice to the insured, was unreasonable, and therefore void as to him, and, being a member in good standing at his death, the plaintiff was entitled to recover the amount claimed. The court of appeals of New York, in considering this state of facts, said: "The defendant promised by the contract which it made with the assured to pay the beneficiary designated by him upon his death the sum of two thousand dollars. The obligation of that contract was not limited by the occupation of the assured; for, in the absence of any restriction made by the parties, he had an absolute right to engage in any lawful business he might select. After this contract had been in force for more than twelve years, and he had paid all of his assessments as they became due, and had complied with all the rules and regulations of the defendant, an attempt was made to restrict him in the choice of an avocation by amending the by-laws to that effect without his consent. When he had been insured for over nineteen years, and had reached an age when other insurance could not be procured without a decided increase in cost, and perhaps not at all, he engaged in a new business requiring less strength and activity, and died within a few months thereafter. He continued to pay his dues after making the change, and, as the trial court expressly found, the duly authorized officer of the defendant knew when he received such dues that the insured "was engaged in the hotel business." The amended by-law, if enforced, according to its terms, would deprive him of a right which he acquired by contract nearly twenty years before, and which he had preserved by paying to the defendant substantial sums of money every year during that period. The reservation of a general power to amend the by-laws, without reserving the specific right to so amend them as to restrict the occupation, did not permit an <sup>433</sup> amendment in that respect, and the attempt made, without the consent

of the assured, was beyond the power of the defendant absolutely void as to him."

The by-law to which the plaintiff in this case objected had been enacted before he became a member of the order. He knew of its existence at the time he became a member, and made it a part of his contract with the defendant, and he acquiesced in it for many years, and he will not now be permitted to repudiate it. The facts stated in the defendant's motion, which the plaintiff demurred, brings this case fully in line with the principles announced in Schmidt case (57 Md. 443), *Weigand v. Fraternities Accident Order*, 97 Md. 443, 530, and constitute a complete bar to the suit. The judgment will, therefore, be affirmed.

Judgment affirmed, with costs to the appellee as above.

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*A Member of a Beneficial Order* claiming to be entitled to benefits must first seek his remedy in the tribunals of the order, and the determination therein in substantial compliance with the constitution is final and conclusive of the right to such benefits; but if he refuses or neglects, upon proper demand, to thus determine his right to benefits, or refuses to pay them after they have been ascertained to be due to the member, he is then entitled to sue in the civil courts for recovery: *Myers v. Jenkins*, 63 Ohio St. 101, 81 Am. St. Rep. 431; *See*, also, *Grimbley v. Harrold*, 125 Cal. 24, 73 Am. St. Rep. 431; *Bryam v. Sovereign Camp etc.*, 108 Iowa, 430, 75 Am. St. Rep. 431; *Langnecker v. Trustees of Grand Lodge etc.* 111 Wis. 27, 80 Am. St. Rep. 860. But it has been affirmed that in the absence of a finding in the constitution or by-laws of a benevolent association that a member is not entitled to sue, such findings of its tribunals that a member is not entitled to sue are not conclusive, they are not conclusive, notwithstanding a custom to the contrary, so as to preclude a resort to a court of law: *Wuerthner v. Workingmen's Ben. Soc.*, 121 Mich. 90, 80 Am. St. Rep. 484.

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## MARYLAND TELEPHONE AND TELEGRAPH COMPANY v. RUTH.

[106 Md. 644, 68 Atl. 358.]

**TELEGRAPH POLE**—Removal by Owner of Fee.—The removal of a telegraph pole in a private alley, without permission of the owner, is a trespass; and if it interferes with the use of the alley by an abutting proprietor who owns the fee, he may, after notice to the telegraph company and reasonable opportunity to remove the pole, cut it down in a peaceable manner; and he is not liable to the company for incidental injuries which the pole and its wires may suffer by falling. (p. 510.)

**ESTOPPEL**—The Fundamental Element of an Estoppel.—The party sought to be estopped has said or done something on which the person, in whose favor the estoppel is invoked, has acted or relied to his prejudice. (p. 512.)



**TELEGRAPH POLE**—Consent to the Erection by Reversioner. The owner of the reversion cannot authorize the erection of a telegraph pole in an alley against the prohibition of the lessee in possession under a lease for ninety-nine years. (p. 512.)

Frank Gosnell and Jesse Slingsluff, for the appellant.

John E. Semmes and Jesse N. Bowen, for the appellee.

<sup>650</sup> SCHMUCKER, J. The appellant sued the appellee in the superior court of Baltimore City for damages for cutting down a telephone pole which it had erected on a private alley in the rear of his residence. The defendant filed the general issue pleas and the case was tried before the court without a jury. The trial resulted in a judgment for the defendant and the plaintiff appealed. The record contains but one bill of exceptions, which is to the court's action on the prayers. The facts appearing from the record are substantially as follows:

The appellee and his wife, Cora E. Ruth, owned as tenants in common in 1906 a leasehold estate, renewable forever, subject <sup>651</sup> to a redeemable ground rent created by a lease from William Penrose in 1903, in their residence known as No. 212 North Fulton avenue in Baltimore City. The lot on which the house stood was fourteen feet front by ninety feet deep to a ten-foot private alley, of which it was entitled to the use in common by the express terms of the lease. The rear end of the lot was described in the lease as "running southerly on the east side of said alley." That form of description must be construed, under the act of 1892, Chapter 684, to have passed to the lessee and those claiming under him the title of the lessor to the center of the alley, subject to its use in common as an alley, there being in the lease, so far as the record shows, no reservation to the lessor of all of the title to the alley.

In the latter part of February, 1906, the telephone company, through one of its engineers, applied to Ruth and his wife at their residence for permission to erect in the alley back of their lot a pole for telephone and electric light wires. The permission asked for was positively refused by both Ruth and his wife. Notwithstanding this refusal the company, on March 2, 1906, when, according to the testimony of Ruth and his wife, they were both absent from the premises, erected on the alley immediately adjacent to their lot a tall pole, sixteen inches in diameter at its base, and subsequently attached to the upper part of it cross-arms, and hung a transformer

and strung wires thereon. The top of the pole as erected the cross-arms projected over Ruth's lot.

When Ruth came home and saw the pole in position once employed as his counsel, James Fluegel, Esq., w his behalf, first by telephone and then by letter, demand the company that it remove the pole, and notified it that it did not promptly do so he would apply to equity for injunction to compel its removal. The company made no reply to this letter, but on March 14th its employés so straightened the pole as to practically remove the projection of its cross-arms over the Ruth lot, but permitting it to remain standing in its original position in the alley adjacent to Ruth's lot. In the meantime Ruth filed the bill for the injunction and the company answered it by denying his right to relief.

<sup>652</sup> Ruth then employed as counsel John E. Semmes, who on April 7, 1906, wrote at length to the company on his behalf, calling its attention to its attitude and conduct with reference to this pole, and informing it that Ruth intended to abandon his equity proceeding and remove the pole himself unless the company promptly took it away, and requested a reply to the letter without delay. The company having made no reply to this letter, Ruth had the pole cut down on March 13th, and on the next day Mr. Semmes, as his counsel, notified the company of the fact and requested it to remove the pole which was then lying in the alley, offering at the same time to remove it himself if the company wished him to do it. There is no evidence that any disturbance or breach of the peace was caused by cutting down the pole, and it was stated in the argument of the appeal without contradiction that the pole had been cut by an expert and tied up so that they would not hurt anyone, and the pole chopped down by competent men in a careful manner under the direction of Mr. Semmes. No effort was made to lower the transformer from the cross-arm of the pole before it was cut down, and that appliance was badly injured by falling to the ground with the pole. The evidence shows that the transformer consisted of an iron box and its contents weighing from one hundred and fifty to two hundred pounds and costing about forty-five dollars. It was fastened by hooks or bolts to the cross-arm near the top of the pole, and, although the employés of the company generally use a block and tackle to raise and lower transformers, weighing not more than this one could be, and frequently were, handled by the use of a rope alone.

Mr. Penrose, the owner of the reversion in fee in the Ruth lot, testified that the company had also applied to him for

mission to erect the pole and that he had declined to give it. On cross-examination he admitted that he may have said to the plaintiff's counsel that he "didn't give permission for the pole to be there, that he didn't want to get mixed up in it, and didn't care one way or the other."

There was evidence in the record tending to show that the presence of the pole at the rear of defendant's lot interfered <sup>653</sup> materially with the use of the alley by him and his family, and also evidence of an opposite tenor.

At the close of the testimony the plaintiff offered eight prayers and the defendant offered four. The court granted the plaintiff's second and fourth prayers and rejected the others, and all of the defendant's prayers, and in lieu of the defendant's second and fourth prayers made a ruling of law as follows: "The court rules as a matter of law that if the court, sitting as a jury, finds that the alley in the rear of the premises of the defendant was a private alley, laid out for the benefit of the property of the defendant and other property abutting thereon, and that the plaintiff, without a permit and without permission from anyone possessing authority to grant such permission, placed in the said alley upon that portion of it binding upon the lot of the defendant a pole, and that the erection of the said pole by the plaintiff interfered with or tended to interfere with the necessary, reasonable and proper use of the said alley by the defendant for the purpose for which the said alley was laid out; and if the court, sitting as a jury, shall further find, that the defendant gave the plaintiff notice to remove the said pole, and that after the lapse of a reasonable time after such notice had been given, the said pole was not removed, and that then the defendant proceeded to remove the said pole by cutting the same down, then and in that event the plaintiff is not entitled to recover."

This ruling of the learned judge below, in our opinion, correctly stated the law of the case. The erection of the pole by the company under the circumstances set forth in the evidence and required by the court's instruction to be found as matter of fact was in defiance of the rights of the owners of the Ruth lot, and constituted an unlawful invasion of, and trespass upon, their land: *Broome v. New York etc. Tel. Co.*, 42 N. J. Eq. 141, 7 Atl. 851, approved in *Chesapeake etc. Tel. Co. v. Mackenzie*, 74 Md. 36, 28 Am. St. Rep. 219, 21 Atl. 690.

Our predecessors in *American Tel. & Tel. Co. v. Pearce*, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200, and *Mackenzie's case*, definitely decided that, planting telephone or telegraph poles along a public highway <sup>654</sup> or a railroad right of way for

other than railroad use, in the country where the title abutting owner runs to the center of the road subject right of way, is an appropriation of private property, unlawful, unless the right to do so has been acquired by contract or condemnation. The same principle applies with equal force to the planting of poles in a city on a public alley such as the one in this case, where the title of the abutting owner extends to the center of the alley; although a different principle would control the erection of poles on the public streets of the city whose beds are owned by the municipality. The rule is the same whether the title of the abutting owner be a leasehold or a fee: *Shipley v. Western Md. R. R. Co.*, 99 Md. 115, 56 Atl. 968.

The maintenance of the pole in its position in the alley resulted in the interference with the use of the alley by the defendant required by the court's instruction to be found. The evidence, constituted a nuisance, interfering with the rights, and he was legally authorized to abate it, provided he did so in such manner as not to disturb the public peace or put in peril innocent third persons or their property. See *Nuisances*, 318; *Am. & Eng. Ency. of Law*, p. 79. *Day v. Day*, 4 Md. 262; *Turner v. Holtzman*, 54 Md. 148, 39 Am. Rep. 361.

If the nuisance thus created by the company be regarded as a private one, the defendant had a right at common law to abate it without committing a breach of the peace. If, on the other hand, it be treated as a public nuisance, the case falls within the proposition asserted by this court in *Turner v. Holtzman*, 54 Md. 148, 39 Am. Rep. 361, where we said: "Without stopping to inquire whether anyone whose property is not injured or interfered with by a public nuisance has a right to abate it, about which there is some conflict in the decisions, there can be no doubt whatever that any person whose property is injured or interfered with may abate it, provided the abatement does not involve a breach of the peace." The evidence in the present case shows that no breach of the peace was caused by cutting down the pole, nor was any injury to third persons or their property caused thereby. It may appear that one or more of the cross-arms on the pole were broken when it fell and the transformer was injured, but we do not think that, in view of the nature of the trespass committed by the company in erecting these structures, it is entitled to complain of the loss thus inflicted. The company was armed with the power of condemnation for an easement for the erection of the pole, and if, under

circumstances, it proceeded forcibly and in entire disregard of the defendant's rights to erect it so as to injure and annoy him, it cannot expect the law to be too strictly applied to him in its favor when he, without any breach of the peace, cut the pole down. Not only did the company commit a trespass in erecting the pole, but it proceeded to attach to it the cross-arms and transformer after a definite and positive notice from the defendant to remove the pole. The transformer was a heavy object suspended high in the air, the removal of which would have been difficult for, and might have been dangerous to, anyone attempting it without previous experience in that particular class of work. The interest of the party menaced by a nuisance should govern in determining the degree of care and expense to be observed in protecting from injury the objects constituting the nuisance during their removal by him: *McKeesport Sawmill Co. v. Pennsylvania Co.*, 122 Fed. 184.

In granting the plaintiff's fourth prayer the court ruled that the defendant was liable for not only actual but also exemplary damages if it found from the evidence that he had acted in a wanton and reckless manner in removing the pole and its appliances. That was as favorable a statement of the law as the plaintiff was entitled to have upon that branch of the case.

The plaintiff's rejected prayers, except the fifth and sixth, were based upon hypotheses plainly inconsistent with the court's rulings, and do not require special notice from us. The fifth prayer asserted the proposition that even if the defendant had the right to remove the pole, he was guilty of a trespass in cutting it down during the pendency of his equity suit for a mandatory injunction to require the company to remove it. This prayer and the discussion of it in the appellant's brief rests mainly upon the doctrine of estoppel. It is contended <sup>656</sup> that the company was entitled to take the defendant at his word and suppose that no action would be taken toward removing the pole until the equity proceedings had been terminated. The fundamental element of an estoppel is that the party sought to be estopped has said or done something in reliance on which the person, in whose favor the estoppel is invoked, has acted or relied to his prejudice. That element is not found in the present case. The company was not induced to erect the pole by the conduct or statements of Ruth or his wife, both of whom positively refused to assent to its erection. Nor can the notice given to the company by the letter from Mr. Fluegel of Ruth's intention to apply for a mandatory injunction be held to amount

to a proposition to submit a matter of difference between them to judicial determination and await the result. The bill treats the company as a trespasser and contains a positive command for the removal of the pole. Furthermore, Mr. Fluegel's letter, written six days before the pole was cut down, shows the company that his client intended to abandon the equity proceeding and remove the pole unless the company consented at once. Moreover, the company, after the receipt of Fluegel's letter, instead of waiting to have its right of the premises determined by the equity proceeding, continued its invasion and defiance of Ruth's rights by attaching the former and cross-arms to the pole and stringing its wires across from. The company can hardly, under such circumstances, be heard to insist that he be required to await the result of a long equity suit against a powerful corporation, while in the meantime to be at liberty to aggravate the status of the fresh aggressions. By its answer to the bill for an injunction the company had categorically denied the right of the plaintiff to relief and shown no disposition to facilitate the termination of the issue by means of that suit. Under the circumstances we think that Ruth was entitled to a writ of right of abating the nuisance after reasonable notice of the company of his intention, but he thereby lost his right to a further prosecution of the equity suit.

The plaintiff's sixth prayer was based upon the hypothesis <sup>657</sup> that permission from the owner of the reversion in the bed of the alley would justify the company in erecting a pole against the prohibition of the owner of the lot. That theory is manifestly untenable. The lease was for ninety-nine years, renewable forever, and the rent reserved it was redeemable at the pleasure of the lessee. No right of re-entry by the landlord is alleged or shown in the case. He was not in possession, nor entitled to possession, of the demised premises, and an entry thereon by the company would have been a trespass. He could obviously grant no license to a licensee from him no other or greater right to enter the premises than himself had.

We find no error in the rulings of the learned judge and we will affirm the judgment appealed from.

Judgment affirmed, with costs.

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*Telegraph and Telephone Poles in a street are usually regarded as additional servitude, and cannot rightly be placed therein without compensation being made to abutting owners: See the note in Hurst v. Ft. Wayne etc. Co., 106 Am. St. Rep. 261; Chesapeake Co. v. Mackenzie, 28 Am. St. Rep. 229.*

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**MASSACHUSETTS.**

**PITCHER v. OLD COLONY STREET RAILWAY COMPANY.**

[196 Mass. 69, 81 N. E. 876.]

**APPEAL AND ERROR—Error Respecting a Branch of the Case, When does not Warrant a Reversal.**—If, in an action to recover for injury claimed to have been suffered by the plaintiff through the negligence of the defendant, the jury finds, either that the plaintiff did not exercise due care, or that the defendant was not negligent, the verdict must stand, if justified by the evidence, though there may have been error in another branch of the case. (p. 514.)

**STREET RAILWAYS—Negligence in Suffering Baggage to Remain on the Floor.**—It is not negligence on the part of a street railway company or its employes, as a matter of law, to suffer baggage or a satchel to remain on the floor where a passenger has placed it, though it happens afterward that another passenger stumbles over it, and falling, is injured by striking her head against the door of the car. (p. 514.)

**STREET RAILWAYS, Care and Diligence Which must Exercise.**—A street railway company is not bound to exercise toward its passengers the utmost care and diligence in providing against injuries which can be averted by human care and forethought, but only the highest degree of care consistent with the practical carrying on of its business. (p. 514.)

**STREET RAILWAYS—Duty to Keep Aisles, Entrances and Exits Free from Obstructions.**—A street railway company is not bound, under all conditions, to keep aisles, entrances and exits free from all obstructions by the use of the highest possible degree of care. (p. 515.)

**STREET RAILWAYS—Custom not to have Racks for Baggage.** Evidence that it is customary not to have racks for baggage and parcels in a street-car and to permit passengers to put baggage and dress-suit cases on the floor is admissible, not for the purpose of proving a custom as such, but as bearing on the question whether the railway company exercised the degree of care required of it, and, on the contrary, evidence of a custom precisely opposite would be admissible for the same purpose. (p. 515.)

L. G. Blair and C. S. Hill, for the plaintiff.

Asa P. French and J. S. Allen, Jr., for the defendant.

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<sup>70</sup> MORTON, J. The female plaintiff, whom we speak of as the plaintiff, stumbled, in the act of leaving the car, over a bag or satchel which another passenger had placed upon the floor, and pitched forward, striking her head against the door and receiving the injuries complained of. The plaintiff was seated near the middle of the car, and the jury, in answer to a question submitted to them by the presiding judge, that the car was of the ordinary street passenger type, with a seat running lengthwise of the car on each side. The jury also found, in answer to questions specially submitted to them by the presiding judge, that the accident was not caused by the conductor's negligence, and that the plaintiff was not in the exercise of due care, and returned verdicts for the defendant. The cases are here on exception by the plaintiff to the admission and exclusion of evidence to the refusal to give certain rulings that were requested and to certain instructions that were given.

The answers of the jury to the questions that were submitted to them were in the nature of special findings: *Ellis v. Boston & Lowell R. Co.*, 187 Mass. 408, 73 N. E. 475; *Spurr v. Shelburne*, 130 Mass. 429; *Mair v. Bassett*, 117 Mass. 356; and if there was evidence warranting a finding that there was no negligence on the part of the defendant or that the plaintiff was not in the exercise of due care, and there was no error in respect to the instructions which the finding was warranted in the rulings or instructions on the admission or exclusion of evidence, then the verdict must stand, even though there may have been error in the instructions in the other branch of the case.

We think that there was evidence warranting the verdict that there was no negligence on the part of the defendant, and we see no error in regard to the instructions or refusals, or in the admission or exclusion of evidence thereunto. Considering the character and description of the accident, it could not be ruled as matter of law that it was negligent of the conductor to suffer the bag to be put and to remain upon the floor, and the jury must have found under the instructions that the court that it was <sup>71</sup> not so placed as to obstruct the passage of the plaintiff out of the car, or to render the passage way dangerous to a person in the exercise of due care. The defendant was not bound, as the plaintiff asked the judge to instruct the jury, "to exercise toward her the utmost care and diligence in providing against those injuries which might be averted by human foresight," but, as the judge instructed the jury, it owed to her "the highest degree of care which was consistent with the practical carrying on of its business":



*v. Lynn etc. R. R.*, 168 Mass. 528, 47 N. E. 427; *Kuhlen v. Boston etc. Ry.*, 193 Mass. 341, 118 Am. St. Rep. 516, 79 N. E. 815, 7 L. R. A., N. S., 729. It would have been error to instruct the jury as requested, "that under all conditions the aisles, entrances and exits shall be kept free from all obstructions by the use of the highest possible degree of care and caution on the part of . . . street railway companies" engaged in the transportation of passengers.

In view of the conclusion to which we have come on this branch of the case, it is unnecessary to consider whether there was any error in the rulings or instructions in relation to the plaintiff's due care.

In the rule that was offered there was nothing which forbade passengers to take hand bags or satchels into the cars and deposit them on the floor, and it was therefore rightly excluded.

Evidence that it was customary not to have racks for baggage or parcels in street-cars, and that there was a custom allowing passengers to put hand baggage and dress-suit cases on the floor, was admissible, not for the purpose of proving a custom as such, but as bearing upon the question whether the defendant exercised the degree of care required of it: *Cass v. Boston etc. R. R.*, 14 Allen, 448; *Maynard v. Buck*, 100 Mass. 40; *Lane v. Boston etc. R. R.*, 112 Mass. 455. It would not follow that, if the defendant did as others did, it was necessarily exercising the degree of care required of it. The ordinary methods might be careless, and therefore furnish no excuse. It is not to be presumed, however, that they would be, but rather the contrary. As bearing upon the defendant's case, we can have no doubt that the plaintiff would be entitled to show, if it was a fact, that it was customary to have racks in street-cars for hand baggage and satchels, and not to allow passengers to put them on the floor in the aisles: *Myers v. Hudson Iron Co.*, 150 Mass. 72 125, 15 Am. St. Rep. 176, 22 N. E. 631; *Dolan v. Boott Cotton Mills*, 185 Mass. 576, 70 N. E. 1025. No good reason can be given why the defendant should not be allowed to show the converse of that proposition.

The result is that the exceptions must be overruled.  
So ordered.

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*The Care Required of Railroad Carriers toward passengers is the highest practicable care which capable and faithful railroad men would exercise in similar circumstances: St. Louis etc. Ry. Co. v. Stewart*, 68 Ark. 606, 82 Am. St. Rep. 311; *Birmingham Ry. etc. Co. v. Baird*, 130 Ala. 334, 89 Am. St. Rep. 43; *Le Blanc v. Sweet*, 107 La. 355, 30 Am. St. Rep. 303. However, they are not insurers of the safety of their passengers; they are held to reasonable care only, and that

care means the highest care consistent with the proper transaction of their business: *Millmore v. Boston Elevated Ry. Co.*, 195 Mass. 120, 120 Am. St. Rep. 558; *Kuhlen v. Boston etc. Ry. Co.*, 193 Mass. 118, 118 Am. St. Rep. 516.

*Street Railway Companies* are common carriers of passengers and are bound to exercise the utmost skill, diligence and care consistent with the business in which they are engaged: *Street Ry. Co. v. McClellan*, 54 Neb. 672, 69 Am. St. Rep. 707; *Cott v. Seattle etc. Ry. Co.*, 41 Wash. 618, 111 Am. St. Rep. 111. See the note on the duties and liabilities of street railroad companies to their passengers in 118 Am. St. Rep. 461.

### WOOD v. SKELLEY.

[196 Mass. 114, 81 N. E. 872.]

**EVIDENCE, Proper Course of When Writing is Offered.**—**Appears on Its Face to have been Altered.**—When a note is offered in evidence which on its face appears to have been altered, the proper course is for the presiding judge to determine, upon inspection, in view of the state of the evidence at the time, whether the proof in explanation of the alteration shall then be required before the instrument is admitted. His action in this respect rests in sound discretion, to the exercise of which no exception lies.

**PRACTICE—Improper Time for Presenting Prayers.**—The presentation of prayers for rulings with a view to the judge to pass upon them in the midst of the examination is irregular. (p. 519.)

**WRITING, Altered, When Properly Admitted in Evidence.**—If a note is offered in evidence appearing on its face to have been altered, but a witness has already testified that it was signed in an altered condition, it is proper for the judge to permit it to be admitted in evidence without first requiring other testimony. (p. 519.)

**JURY TRIAL—Instructions, When Properly Refused.**—Instructions asked for are not applicable or are contrary to the evidence, they are properly refused. (p. 519.)

Action on a promissory note which, with the interest thereon, was appearing thereon when offered in evidence, was as follows:

“\$750.00

one year

Dec. 9,

“On demand after date we promise to pay to the order of James F. Skelley Seven Hundred and Fifty Dollars at the bank in Boston.

“Value received without interest.

“No. \_\_\_\_\_.

“FREDERICK FREEMAN

“2 18/28

“Due \_\_\_\_\_ 44068”

Indorsed: “Waiving demand and notice

“JAMES F. SKELLEY

“LILLIAN M. FREEMAN

“WILLIAM L. WOOD

Before the note was shown to the jury, the defendant requested and the court refused to rule as follows:

"1. There is on the face of this note a manifest alteration in the erasure of the letters 'out' in the word 'without'; which alteration the plaintiff is bound to explain to the court before the note can be shown to the jury.

"2. There is an apparent alteration inconsistent with the terms of the written instrument, offered by the plaintiff, in the adding to or writing in above the defendant's indorsement on the back of the note the words 'waiving demand and notice,' and this the plaintiff is bound to explain to the court before the note can be shown to the jury.

"3. On a scrutiny of the note there are evident material alterations which the plaintiff must explain to the court before the note can be shown to the jury.

"4. The alterations in the written instrument offered by the plaintiff are patent, and before it can be shown to the jury he must explain the same to the court.

"5. The alterations on the note offered by the plaintiff being patent and visible on inspection, it is the province of the court to decide whether or not they are material, and they, the alterations, must be satisfactorily explained by the plaintiff to the court before the note can be shown to the jury, otherwise judgment must be for the defendant."

After the note was received in evidence and before the argument, the defendant requested the following rulings:

"1. That on the whole evidence plaintiff cannot recover and the judgment should be for the defendant.

"5. If the jury believe that part of the evidence of the defendant, that the note was written 'without interest,' and that subsequent to its delivery to the payee the letters 'out' in the word 'without' were erased, interlined, or crossed out, so that the note was made to read 'with interest,' it, the jury, are to presume that the alterations were made by the plaintiff, or with his knowledge, and fraudulently in so far as legal fraud attaches to a willful change of an instrument by one of the parties thereto, and the plaintiff cannot recover.

"9. The plaintiff can in no event recover more than the face of the note and interest from December 9, 1904.

"13. The jury may also take into consideration, as bearing on the good or bad faith of the plaintiff, that a considerable part of his business is the taking over of commercial paper, as bearing on the probabilities of whether such alterations as appear on the note would put him on his guard as to legal infirmities in the instrument.

"14. The alterations on the note offered by the plaintiff being open and patent, the burden of proof is upon the plaintiff throughout to satisfy the jury beyond a reasonable doubt that he acted in good faith and without notice of any legal defects in the instrument."

The court refused to so rule, and, on the contrary, instructed the jury as follows:

"If you find that this note as it is now is in the same condition, and especially with reference to 'with interest' and 'demand and notice,' that it was when it was delivered, then there is no defense shown with reference to material alterations, because none, of course, would exist. If, on the other hand, you should find upon this evidence that the note was materially altered as I have explained it, after the hearing, then the plaintiff, claiming to be the holder in due course, has the burden upon him of satisfying you that he is a holder in due course, and took the note without knowledge of any material alterations."

Verdict and judgment for the plaintiff and the defendant on the alleged exceptions.

M. W. Breck, for the defendant.

A. W. Putnam and O. E. Jackson, for the plaintiff.

117 RUGG, J. The plaintiff called as a witness one John E. Ely, a man, a party to the note, who testified, among other things, that he saw the defendant sign the note in suit, and that it was then in the same condition and read exactly the same as it was at the trial. Erasures and an interlineation appeared on the face of the note, as shown in the copy. Thereupon the defendant objected to the introduction of the note in evidence, and, in the midst of the trial asked the court to rule in his favor, stating that these were material and patent alterations on the note, and that the plaintiff was bound to explain them to the court before the note could be shown to the jury. In answer to his exception to a refusal to grant this request the court said that the plaintiff relies upon *Ives v. Farmers' Bank*, 2 Allen, 236, and that the case supports no such proposition. The proper practice is, when a note is offered, which appears to have been altered, for the presiding judge to determine, upon inspection and inquiry, of the state of the evidence at the time, whether further evidence in explanation of the alterations shall then be required, or whether the instrument be admitted. His action in this respect is to be left upon his sound discretion, to the exercise of which no exception lies: *Ives v. Farmers' Bank*, 2 Allen 236; *Ely v.*

Gray, 439; Graham v. Middleby, 185 Mass. 349, 70 N. E. 416. In the present case, one witness has already testified that the defendant signed the note, when it was in the same condition <sup>118</sup> when it was offered in evidence. Under these circumstances it was the duty of the judge to permit it to be read. His refusal would have been a wrong to the plaintiff. Moreover, the presentation of prayers for rulings and requesting the judge to pass upon them, in the midst of the examination of a witness, were wholly irregular.

The first request for ruling presented by the defendant at the close of the evidence has not been argued. Plainly it could not have been given. There is no evidence in the bill of exceptions to which the next request is applicable. We cannot conceive of any evidence as to which such a statement as this request embodies could be sound. The next request could not have been granted, for the reason that there was abundant evidence to warrant the jury in finding that the note, when signed by the defendant, was so written as to carry interest from its date.

The next request was properly refused. There was no evidence that the handling of commercial paper constituted "a considerable part of the plaintiff's business. Although he testified that he was familiar with negotiable instruments, it does not appear what his business was. There was no question but that he was on his guard as to the note, for he testified that he noticed the alterations and made inquiries about some of them and received satisfactory explanations. Without deciding whether the request did not point to a collateral issue, it is enough to say that it was not applicable to any phase of the evidence. The final prayer was properly refused, because it stated the burden of proof as required of the commonwealth in criminal cases and not that required of plaintiffs in civil actions. No exception was taken to the rulings given by the judge as to burden of proof.

Exceptions overruled.

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*The Alteration of Written Instruments* is the subject of a note to Burgess v. Blake, 86 Am. St. Rep. 80. Evidence explanatory of alterations, and the province of court and jury in determining whether an alteration was unauthorized, will be found discussed on pages 127 to 134 of this note.

## SIBLEY v. NASON.

[196 Mass. 125, 81 N. E. 887.]

**NEGLIGENCE, CONTRIBUTORY, with Respect to a Team in the Public Streets.**—One who is crossing the streets in front of a dray approaching drawn by two horses, which are then walking, who has entered a crowded street-car and is standing on the rear board looking for a seat, is warranted in assuming that he has a place of safety where he need not pay any further attention to the team. (p. 522.)

**NEGLIGENCE in Injuring Person on a Street-car by Team and Dray.**—If, in daylight, where there is no obstruction to the view, a team of horses attached to a dray and moving on a walk is so careless as to crush with the hub of one wheel a person standing on the rear board of a street-car, a finding that the teamster was negligent is justifiable. (p. 522.)

**STREET RAILWAYS and Teams in the Streets, Duty to Avoid Injuring Passengers by the Latter.**—A team in the public streets should be so guided as not to injure people rightfully upon the rear board of a street-car. (p. 522.)

**EVIDENCE to Show that a Team by Which the Plaintiff was Injured was Controlled by the Defendant.**—Where a plaintiff has been injured by a team and dray, which the defendant refused to control, it is proper, as tending to show his ownership, to receive in evidence a report signed by the defendant and published by the manager of a casualty company in which the defendant disclaims his ownership, though the purpose for which such statement was made does not appear. (pp. 522, 523.)

**JURY TRIAL—Taking Papers to the Jury-room.**—It is the duty of the trial judge whether he shall permit exhibits to be taken by the jurors to their room. (p. 523.)

**BANKRUPTCY—Right of Bankrupt to Maintain an Action for Tort After—An Action for Damages to His Person is not barred by the Bankruptcy.**—He may, therefore, maintain an action for such damages suffered by him before his adjudication in bankruptcy. (p. 523.)

**BANKRUPTCY—Property Which does not Pass to Assignee.**—Under the bankruptcy act, property acquired after the filing of the petition and before the adjudication does not pass to the assignee. (p. 524.)

**BANKRUPTCY—Damages Recoverable, When may be Recovered for Loss of Time.**—Though, in an action by a bankrupt for personal injuries suffered by him before filing his petition, he is not entitled to recover the value of his wages strictly speaking, he may recover compensation on account of his pain and suffering and the value of his time while prevented from working. (p. 524.)

**BANKRUPTCY—Right of Bankrupt to Recover for Damages of Physician Which have not been paid for and Against Payee.**—Which He is Protected by His Discharge.—A plaintiff in an action for personal injuries is entitled to recover for reasonable expenses for nursing and physician's care rendered necessary by the negligence of the defendant, though the bill for such services arose after the discharge in bankruptcy. Because plaintiff may treat such debts of honor, he may recover for them in an action for damages for injuries due to the negligence of the defendant. (p. 525.)

Action of tort by the plaintiff, Sibley against George W. Nason and George E. McLellan for personal injuries suffered while entering a street-car on Congress street, Boston. The action was discontinued as to the last-named defendant. The trial judge was asked by the defendant to rule that the plaintiff was not entitled to recover because he was not in the exercise of due care and there was no evidence of the negligence of the defendant, and further, because plaintiff having been adjudicated a bankrupt after the suffering of the injury, he could not prosecute the action, and even if he could so prosecute, he was not entitled to recover the value of the services of his physician not shown to have been paid for, nor for the value of the plaintiff's time and services. The judge refused to rule as asked by the defendant, and, on the contrary, instructed the jury as follows with respect to the liability incurred by the plaintiff for the services of his physician:

"One question is raised about his doctors' bill of six hundred dollars and the bill of ninety-five dollars, if I am right about the amount. There has been some question of whether he has a right to recover that, and the question of bankruptcy was discussed, and the fact that he had his discharge in bankruptcy, and that he would not have to pay the six hundred dollars and the ninety-five dollars. Well, I rule to you, for the purposes of the trial, that he is entitled to recover that if you find that it is a reasonable bill, although he would not be obliged to pay it. I think that is the law, gentlemen. I think he is entitled to recover that sum, and whether it seems to you equity or not, need not trouble you. I rule to you that if he is entitled to recover, if you find those two sums reasonable sums, he is entitled to recover for those two sums; but he can recover only such sums for medical services as are reasonable charges."

Verdict for the plaintiff for one thousand and seventy dollars, of which six hundred and ninety-five dollars were for the services of the physician. The defendant alleged exceptions.

H. F. Lyman, for the plaintiff.

E. C. Stone, for the defendant.

<sup>128</sup> RUGG, J. Four contentions have been argued in behalf of the defendant. His other exceptions are treated as waived.

1. It is urged that there was not sufficient evidence to warrant a finding of due care on the part of the plaintiff. He had boarded an electric street-car at a crowded corner and

was standing, momentarily, with both feet upon the board, looking for a seat and on the point of stepping the car. He crossed the street about ten feet in front of the approaching dray of the defendant drawn by two horses who were walking, and paid no attention to it after reaching the running-board. He was warranted in assuming that he had reached a place where he need pay no further heed to the team: *Spofford v. Harlow*, 3 Allen, 176; *Powers v. Boston & Northern St.* 154 Mass. 60; *Pomeroy v. Boston & Northern St.* 154 Mass. 507, 79 N. E. 764. This exception must be overruled.

2. There was evidence which justified a finding that the defendant's driver was negligent. There was no conflicting testimony that the dray was so driven that the hub of one wheel crushed the ankles of the plaintiff, while he was upon the running-board of a car, which had stopped before he could reach the curb of the sidewalk to board it. He passed in front of the defendant's horses to reach the car. All this happened about half-past 5 o'clock on a sunny afternoon. It is difficult to see how the jury could have reached any other conclusion than that the teamster was negligent. A teamster is so guided as not to injure people rightfully upon the board of a street-car. The distinction is plain between this situation and *Holt v. Cutler*, 185 Mass. 24, 69 N. E. 300, upon by the defendant.

3. At the trial the plaintiff requested the defendant to admit that he owned the team which was alleged to have caused the <sup>129</sup> accident. This the defendant refused to do. No criticism can be made of this refusal, as he was under no obligation to help the plaintiff prove his case. It was a material issue to show that the dray, which caused the accident, was at the time being used in the service of the defendant. As one link in making the chain of evidence necessary to connect the defendant with the accident, it was competent to show that the defendant owned the team. It is contended that this fact, coupled with other circumstantial evidence, might be sufficient: *Commonwealth v. Sherman*, 129 Mass. 439, 78 N. E. 78; *Norris v. Anthony*, 193 Mass. 225, 258. As tending to prove ownership of the team by the defendant, there was admitted in evidence a report submitted by the defendant, procured by one Havens, a resident of the Maryland Casualty Company, in which the defendant stated, among other things, that he was the owner of the team. This was a statement of a material fact in the case, and of an admission. It does not appear from the copy of the report annexed to the bill of exceptions for what pur-



was made, or that the defendant was insured, but even if that fact did appear, it would not render incompetent a statement signed by the defendant: *Perkins v. Rice*, 187 Mass. 28, 72 N. E. 323. It was discretionary with the trial judge whether to permit this exhibit to be taken by the jury to their room.

4. Several questions are raised respecting the effect upon the plaintiff's right to maintain his action and the damages he may recover, growing out of the fact that in March, 1904, he was duly alleged a bankrupt and that the ordinary proceedings were had, the accident having occurred on the 11th day of July, 1902, and this action having been begun on the 9th of August, 1902. It first is urged that the plaintiff is debarred from the right to maintain his action by reason of the bankruptcy. The bankruptcy act (U. S. Stats., July 1, 1898, c. 541) provides in section 70a, that, "The trustee . . . shall . . . be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, . . . to all (5) Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him . . . (6) rights of action arising upon contracts or from the unlawful taking or detention of, or <sup>130</sup> injury to, his property." This action having been brought for damages to the person of the plaintiff, could not by any means have been transferred by him: *Rice v. Stone*, 1 Allen, 566; *Robinson v. Wiley*, 188 Mass. 533, 74 N. E. 923; *Flynn v. Butler*, 189 Mass. 377, 75 N. E. 730. It was not property nor a right of property until it was reduced to a judgment: *Stone v. Boston & Maine R. R.*, 7 Gray, 539. It could not be reached by trustee process: *Thayer v. Southwick*, 8 Gray, 229; *Wilde v. Mahaney*, 183 Mass. 455, 67 N. E. 337. Nor could it be reached in equity by a creditor's bill: *Bennett v. Sweet*, 171 Mass. 600, 51 N. E. 183; *Billings v. Marsh*, 153 Mass. 311, 25 Am. St. Rep. 635, 26 N. E. 1000, 10 L. R. A. 764. The liability being disputed, the claim was not subject to taxation, and therefore could not be levied upon or reached by the assessor or tax collector: *Deane v. Hathaway*, 136 Mass. 129. Thus it appears that the claim which the plaintiff was prosecuting against the defendant is not properly described by any of the phraseology in subsection 5. Subsection 6 is limited to rights of action arising upon contract or respecting property, and does not include an action of tort for personal injuries. It is not, and never has been, the policy of the law to coin into money for the profit of his creditors the bodily pain, mental anguish or outraged feelings of a bankrupt.

None of the federal or English bankruptcy acts, nor of insolvency statutes, have gone to that length. It has been held that the following actions do not pass to the true assignee: Malicious prosecution (*In re Haensell*, 91 Fed. 2d 100, 101; *Noonan v. Orton*, 34 Wis. 259, 17 Am. Rep. 441; *Franklin v. Burnett*, 84 Ky. 23); slander (*Dillard v. Collins*, 22 Ky. 343); seduction of servant (*Howard v. Crowther*, 8 Ky. 601 & W. 601); malicious attachment (*Brewer v. Dew*, 11 Ky. 625 & W. 625); deceit (*In re Crockett*, 2 Ben. 514 Fed. C. 3402); malicious trespass (*Rogers v. Spence*, 12 Clark 700); trespass to ship (*Bird v. Hempsted*, 3 Day, 272, 273, Dec. 269); trespass accompanied by personal annoyance (*v. Buckett*, [1901] 2 K. B. 449); negligence of an agent (*Wetherell v. Julius*, 10 Com. B. 267). See *Tinker v. C.* 193 U. S. 473, 24 Sup. Ct. Rep. 505, 48 L. ed. 754.

It is also urged that the plaintiff is not entitled to recover as an element of damage, for the wages which he would have earned between the date of his accident and his adjudication in bankruptcy. If the defendant's requests for instructions be construed narrowly, they were refused properly, for the reason <sup>131</sup> that under the bankruptcy act property acquired between the date of the filing of the petition and the date of the adjudication in bankruptcy does not pass. But if the question broadly, the contention cannot be sustained. The cause of action for which plaintiff was entitled to recover damages on account of the pain and suffering, which he endured and was likely to endure, as well as his loss of wages was indivisible: *Doran v. Cohen*, 147 Mass. 342, 17 N. E. 398. Moreover, the wages which the plaintiff might have earned if not injured, are not strictly recoverable. The value of his time, while prevented from working by reason of the negligence of the defendant, is a proper element to be considered in fixing the damages: *Braithwaite v. Hall*, 168 Mass. 398, 17 N. E. 398; *Whipple v. Rich*, 180 Mass. 477, 63 N. E. 520. Personal injury is the gist of the action. The other elements of damage are incidents only of this main cause of action. Prayers 8 and 9 were therefore properly refused.

The final question argued was that the plaintiff was not entitled to recover for debts incurred for physicians' services never paid by the plaintiff, but proved against his estate in bankruptcy or included in his schedules. A plaintiff who brings an action for personal injury is entitled to recover for reasonable expenditures for nursing and physician's care rendered necessary by the wrongful act of the defendant: *Turner v. etc. R. R.*, 158 Mass. 261, 33 N. E. 520; *McGarrahan v.*

York etc. R. R., 171 Mass. 211, 50 N. E. 610; Atwood v. Boston Forwarding & Transfer Co., 185 Mass. 557, 71 N. E. 72; Scullane v. Kellogg, 169 Mass. 544, 48 N. E. 622. It may be assumed that the bills incurred by the present plaintiff for physicians' services would be barred by his discharge in bankruptcy. This fact, however, does not prevent the plaintiff from treating such obligations as debts of honor. It is through no virtue of the defendant that the plaintiff will be enabled to interpose any defense to the payment of a reasonable charge for these services for the amelioration of his suffering, but rather the clemency of the law to his financial distress. Under these circumstances, the law ought not to prevent or discourage the exercise of a debtor's conscience respecting his past indebtedness: See Klein v. Thompson, 19 Ohio St. 569; Denver etc. R. R. v. Lorentzen, 79 Fed. 291, 24 C. C. A. 592.

Exceptions overruled.

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*In the Recent Case of Shaffer v. Roesch, 215 Pa. 287, 64 Atl. 511, a recovery against the owner of a wagon for damages was had by a person who was struck by the wagon while in the act of stepping from the running-board of a street-car into the car.*

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### SQUIRE v. LEARNED.

[196 Mass. 134, 81 N. E. 880.]

**LANDLORD AND TENANT—Covenant to Renew Lease, Effect upon of the Breach of Covenant not to Assign.**—If there has been a breach of a covenant not to assign a lease, such breach constitutes a good defense to a suit to specifically perform a covenant to renew the lease. (p. 526.)

**LANDLORD AND TENANT—Covenant not to Assign Lease, Effect upon of an Assignment by the Will of the Lessee.**—A bequest by the lessee of his lease to his executors, to be followed by their transfer to themselves as trustees under the will, and their actual transfer to themselves accordingly, do not constitute a breach of a covenant not to assign such lease. (pp. 527, 528.)

G. L. Mayberry and J. M. Gibbs, Jr., for the plaintiffs.

R. M. Morse and W. P. Everts, for the defendant.

<sup>135</sup> LORING, J. The sole defense set up in this suit is that the bequest by the lessee of his leasehold estate here in question to his executors, or, at any rate, the transfer of it by the executors to themselves as trustees (which the defendant insists <sup>136</sup> has taken place), is a breach of the covenant not to assign the lease.

If a breach of this covenant of the lease is made out in one of these two ways, a defense is made out to this bill for specific performance of the lessor's covenant to renew: *Ga. v. Albree*, 103 Mass. 372.

Authority may be found in two early decisions and early dicta for the position that the bequest by a lessee of a leasehold interest to some one other than his executor is a breach of a covenant or condition not to assign the term: *Harbert v. Harbert*, Dyer, 45b; *Berry v. Taunton*, Cro. Eliz. 33; *C. v. Taunton v. Barrey*, Poph. 106. And see dicta to that effect in *Knight v. Morey*, Cro. Eliz. 60; *Dumper v. Cro. Eliz.* 815. See, also, *Sheppard's Touchstone*, 144. But the authorities on this point are not all one way. *Forster v. Swan*, Styles, 482, is a decision to the contrary. And in *Crusoe v. Bugby*, 3 Wils. 234, it was said that "the courts of Westminster have always looked nearly into these conditions of covenants or privisos; that the devising a term was a doing away with it, putting it away, that the lessee becoming a bankrupt was putting it away, that a dying intestate was a putting it away; so, being in debt by confessing a judgment and having the term taken in execution was the like; but none of these amounted to an assignment, or to be a breach of the covenant or condition." Again in *Doe v. Bevan*, 3 Maule & Bayley, J., said that "in *Crusoe v. Bugby* . . . it was admitted that a devise of the term by the lessee is a breach of the covenant not to assign. Such, also, has been the general impression in the minds of the profession for a series of years."

It is admitted in all the cases that the transmission of a lessee's interest to the administrator of his estate is not a breach of the covenant not to assign. The fact that when a lessee dies intestate there is no voluntary act on his part is not so decisive of that if there were no other reason. In such a case the transfer is by operation of law alone: See, in this connection, *Field, J.*, in *Weil v. Raymond*, 142 Mass. 206, 7860; *Smith v. Putnam*, 3 Pick. 221; *Bemis v. Wilder*, 100 Mass. 446.

That, however, is not true in case of a bequest by will. In case of the transmission of a leasehold interest by will there is an act on the part of the lessee. It is conceded, however, by all, and expressly stated in *Parry v. Harbert*, Dyer, 45b, and in *Taunton v. Barrey*, Poph. 106, that a bequest by a lessee to his executor is not a breach of the covenant not to assign.

In the case at bar the bequest of the leasehold interest is a bequest to the executors upon certain trusts in the will by which the leasehold interest was bequeathed. That fact would not, in our opinion, take the case out of the doctrine laid down in *Parry v. Harbert*, Dyer, 45b, and *Taunton v. Barrey*, Poph. 106, that a bequest by a lessee to his executor is not a breach of the covenant not to assign, even if the conclusion reached in those cases is to be supported. A bequest to executors is always a bequest to them for others and not for themselves. We are of opinion that the imposition of particular trusts on the executors which under our probate practice makes it proper, if not necessary, to transfer the estate from themselves as executors to themselves as trustees, is in this connection of no consequence.

But in our opinion the cases of *Parry v. Harbert* and *Taunton v. Barrey* ought not to be followed. On the contrary, we are of opinion that the decision in *Fox v. Swan*, Styles, 482, and the doctrine laid down in *Crusoe v. Bugby*, 3 Wils. 234, and *Doe v. Bevan*, 3 Maule & S. 353, is the correct one.

The question in all these cases is one of construction. The reason why the bequest to an executor is not a breach of the lessee's covenant not to assign is that from the insertion of that covenant (a general covenant not to assign) in a lease for a specified term of years the court cannot impute to the parties to the demise an intention to permit the leasehold interest to go to the administrator, and to prevent the lessee from making a will and disposing of his property, including the leasehold interest in question. If it had been the intention of the parties to bring the leasehold interest to an end on the lessee's death, a provision to that effect could have been inserted. So if it had been their intention to provide that the leasehold interest should not pass by will although it could vest in an administrator, a clause to that effect could have been adopted: See, for example, *Anonymous*, 3 Leon. 67, S. C. sub nom. *Parry v. Herberts*, 4 Leon. 5. In the absence of such or similar specific provisions, the insertion of a general covenant not to assign ought not, in our opinion, to <sup>138</sup> be construed to prevent the transmission of the leasehold interest either to an administrator or to an executor or legatee.

This conclusion is enforced in the case at bar by the fact that the lease in terms provides that the leasehold shall go to the lessee's "personal representatives," and by the further fact that the covenant not to assign is in terms binding on the lessee "or others having his estate in the premises."



upon the view taken of it by the presiding judge, and is a matter which must be left largely in his discretion, although his decision is not necessarily final. (p. 532.)

**EMINENT DOMAIN—Evidence of the Value of Land for a Special Purpose.**—Though land is sought to be taken for use as a water supply for a municipality, the presiding judge may, in his discretion, refuse to receive the evidence of experts tending to show its value for a special purpose, where it does not appear that the value of the land cannot be shown without departing from the usual rule. (p. 533.)

**EMINENT DOMAIN—Value of Land Where Taken for a Special Purpose—Instructions for the Jury.**—Where land is sought to be taken for a water supply or other public use, the jury must be instructed that its market value is not to be increased by the fact that it had been taken for the special purpose in question. (p. 534.)

**EMINENT DOMAIN—Evidence of Value of Property for a Special Use.**—Though property is sought to be acquired for water supply of a municipality, the land owner is not entitled to prove by what communities or municipalities the water could be used for a water supply. (p. 534.)

**JURY TRIAL—Instruction, Failure to Ask for Qualification of.** Where an instruction given properly states the law so far as it goes, but a qualification might properly be added, still the failure to add it cannot be urged on appeal, where the addition or qualification was not asked for in the trial court. (p. 535.)

**EMINENT DOMAIN—Instruction as to the Consideration of the Value of Property for a Special Purpose.**—In a proceeding to obtain compensation for land taken by a municipal corporation for a water supply, the following instruction is proper: "I said that you could consider the evidence of the uses to which this property was adapted, all the uses. Upon that, in connection with those uses, you can take into account in the Sargent case the fact that there was or was not, as you find it to be from the evidence, a supply of water upon the premises. If that would give an added value to the property in the mind of any purchaser in the open market and in the mind of any seller in the open market, you could take that into account, but you could not use it to mark up a price beyond the fair market value of the property, you could not give to the Sargents in their case the value of the land, for instance, to the town of Merrimac as a water supply. That you are not to do. If the fact that it was adapted to use as a water supply, if you find that to be a fact, would have affected the mind of anybody in dealing with the property, that you can take into account, but that is the extent to which you can go, and you may think that that, practically, as the land was situated, did not affect its value at all. On the other hand, you may think that it added to or decreased its value." (p. 535.)

**EMINENT DOMAIN—Instruction Respecting Special Value of the Property to the Municipality Seeking to Acquire It.**—In a proceeding to obtain compensation for land taken for a water supply by a municipality, it is proper to instruct the jury that the petitioner is not entitled to recover beyond the fair market value of the land to the respondent. (p. 536.)

Proceeding to obtain compensation for land taken by the respondent, the inhabitants of Merrimac, for a water supply. Among the instructions asked for by the municipality were the following:

"6. If the fair market value of the land before and time of the taking had been increased by the chance or probability that the town of Merrimac would need or require the land for the purpose of a public water supply, then the petitioner is not entitled to recover that market value.

"7. But in the case last supposed the petitioner was entitled to recover only the fair market value of the land for all purposes other than that of supplying said town with water.

"8. If the fair market value of the land before and time of the taking had been increased by the chance or probability that the town of Merrimac or some other town would need or require the land for the purpose of a public water supply, then the petitioner is not entitled to recover that market value.

"9. But in the case last supposed the petitioner was entitled to recover only the fair market value of the land for all purposes other than that of supplying any such town with water.

"10. The petitioner is not entitled to recover the fair market value of the land for the purpose of supplying Merrimac or any other town with water.

"11. The petitioner is not entitled to recover the value of the land to the respondent.

"12. The petitioner is not entitled to swell the damages beyond the actual fair market value of the land by any consideration of the chance or probability that the petitioners have acquired authority by legislation to carry the water pipes for the purpose of supplying the town of Merrimac or any other town."

The exceptions considered by the appellate court were taken by the petitioner.

H. I. Bartlett, for the petitioner.

B. B. Jones and T. H. Hoyt, for the respondent.

<sup>172</sup> LORING, J. This is a petition under Statutes of chapter 281, section 4, to obtain compensation for the taking of a lot of land by the respondent for a water supply. The question contained good water adapted in quantity and quality for the supply of the town. There was evidence that the water in question was the only ground water in the neighborhood for the needs of the respondent, but that there was a pond of water nearby which would be fit in respect of quantity and quality if treated by filtration. The case is here taken by the petitioner.



1. The first set of exceptions are those taken to the exclusion of the testimony of two experts called by the plaintiff, Duff and Allen by name. Since the questions which the presiding judge refused to let Allen answer include the one question asked Duff, we shall consider those questions and those only.

Allen was a civil engineer by profession and had had a large experience as an engineer in the construction of waterworks for municipalities and water companies. He also had had a large experience in the cost of developing systems of obtaining and producing water supplies, and had testified as an expert in a number of cases involving the value of waterworks and the <sup>173</sup> value of water delivered as a commodity by a water company, and knew of sales made of waterworks in New England, the United States and in England.

Allen further testified that in one case he had "testified to the value of the water in bulk," and "as to the value of the land" in a case before commissioners for land taken in Brookline, on the shores of Charles river, in which driven wells were placed by the town, although he did not know anything of the value of the land other than as a source of water supply.

In respect to the land here in question he knew the sources of water supply in Merrimac and the neighboring towns, and knew the kind of water furnished by the land in question and the amount of it; and from his knowledge he testified that the owner of this lot of land "was almost sure to find a market for it for water supply purposes." There was no suggestion that he knew anything of the value of land in the neighborhood of the locus.

The presiding judge, on objection being made by the respondent, refused to allow Allen to testify (1) what the value of the land here in question was for a water supply at the time of the taking; or (2) what the value of this land was for all the uses to which, in the judgment of the witness, it was adapted; (3) what the value of the water in this land was, situated as it was at the time of the taking; (4) by what municipalities or communities could the water in this lot of land be used; (5) what was the fair value of the land and water because of its special adaptation as a source of water supply to the communities for which it has a special adaptability; (6) what was the value of the locus, having regard to its special value and adaptability to filter and store water; and (7) assuming that there is in Merrimac no other source of water supply sufficient for the needs of the town unless the water is treated, what . . . would be the value of this piece of land and the water in it as a source of water supply to the town—the value to the

town—over and above the other source of supply by and treatment.

What the petitioner was entitled to recover was the market value of the land of her testator as it was at the time of the taking. Market value in this connection does not mean the same thing that market value means when the value of flour or other things dealt in daily in the market is spoken of. A lot of land cannot have a market value in the same sense of the word. What is meant by the market value of land is the value of the land in the market—that is to say, the value for the purposes of sale.

The market value to which the petitioner was entitled was made up of the value in the market of the land apart from its special adaptability for water supply purposes, plus such value as a purchaser would have added to that value because of the chance that the land in question might be some day used for water supply: *Moulton v. Newburyport Water Co.*, 124 Mass. 163.

The underlying contention of the petitioner is that it was for the presiding judge to tell the jury that she is entitled to this added value because of the chance that her land might be used as a water supply, so long as the court refuses to require her to show what additional sum a purchaser would have added on reason of that special adaptability; and that you do not allow her to show that when you refuse to allow her to show this the value of the land for the special purpose.

Without question, this evidence would have thrown the issue on trial. The objection to it was not that it was irrelevant, but that it would or might involve the trial of collateral issues, and for that reason was incompetent; that if this evidence was admitted, the court would or might be itself necessarily involved in the trial of collateral issues, and would confuse the minds of the jury and unduly prolong the trial.

Whether relevant evidence is or is not to be held incompetent on this ground depends upon the view taken of it by the presiding judge (*Yore v. Newton*, 194 Mass. 250, 80 N. E. 100) and is a matter which must be left largely to his discretion, though his decision is not necessarily final: See, for example, *Bemis v. Temple*, 162 Mass. 342, 38 N. E. 970, 26 L. R. A. 100.

The petitioner relies principally upon the cases of *Commonwealth v. Commonwealth*, 175 Mass. 299, 78 Am. St. Rep. 491, 12 N. E. 610, and *Conness v. Commonwealth*, 184 Mass. 541, 69 N. E. 100, where the opinion of an expert as to the value of mill property was admitted upon the trial of petitions to recover compensation.

land taken, in the first case for a sewer, and in the second case for a park, although the land was not then used <sup>175</sup> for a mill. In *Cochrane v. Commonwealth*, 175 Mass. 299, 78 Am. St. Rep. 491, 56 N. E. 610, this court said that "the usual rule should be departed from and testimony of this kind admitted only when, without it, it is impossible to prove the value of the property in question."

In the bill of exceptions in the case at bar it is stated that, "Testimony was introduced on both sides of the market value of the land, most, if not all, of the witnesses for the plaintiff, other than Duff and Allen . . . who were the only experts to the value of water or sources of water supply, stating that they did not consider its value on account of water or as a source of water supply." This means, and necessarily must mean, that some of the witnesses for the petitioner, who knew the value of the land in the vicinity, did or may have testified to the value of the land on account of water or as a source of water supply. The burden is on the excepting party to show error. The result is that the petitioner has not shown that the case at bar was a case where it was impossible to prove the value of the property in question without dispensing with the usual rule, and she has not brought herself within *Cochrane v. Commonwealth*, 175 Mass. 299, 78 Am. St. Rep. 491, 56 N. E. 610.

But the rule acted upon in *Cochrane v. Commonwealth*, 175 Mass. 299, 78 Am. St. Rep. 491, 56 N. E. 610, and *Conness v. Commonwealth*, 184 Mass. 541, 69 N. E. 341, is that in such a case the court will not reverse the decision of the presiding judge in a matter within his discretion. In view of the decision in *Bemis v. Temple*, 162 Mass. 342, 38 N. E. 970, 26 L. R. A. 254, the qualification should be added that the decision of the presiding judge will not be reversed unless plainly wrong.

But although this is, and properly is, the rule, it would be unfortunate if the discretion were not exercised in the same way under the same circumstances. And it is not to be overlooked that this court said in *Conness v. Commonwealth*, 184 Mass. 541, 69 N. E. 341, that in the opinion of the court "it would have been a better exercise of judicial discretion if the testimony . . . had been excluded." And similar evidence was excluded in a case of a similar petition in *Lakeside Mfg. Co. v. Worcester*, 186 Mass. 552, 72 N. E. 81.

To admit the testimony excluded in the case at bar the presiding judge would have had to go one step farther than the court went in *Cochrane v. Commonwealth*, 175 Mass. 299,

78 Am. St. Rep. 491, 56 N. E. 610, and *Conness v. C* wealth, 184 Mass. 541, 69 N. E. 341. In the case at special value of the land which was sought to be proved value for the purpose for which <sup>176</sup> the land had been by the respondent. For that reason the jury had to structured that the market value to which the petitioner titled was not to be increased by the fact that it had taken for the specific purpose in question: *Moultonburyport Water Co.*, 137 Mass. 163. To the same effect *Benton v. Brookline*, 151 Mass. 250, 23 N. E. 846; *Boston*, 158 Mass. 21, 32 N. E. 902; *Bowditch v. Boston*, 107 Mass. 107, 41 N. E. 132; *Mowry v. Boston*, 173 Mass. N. E. 885.

In our opinion, it is likely that the minds of the jury have been distracted if the presiding judge had admitted the value of the land taken for the special purpose for which it had been taken, and at the same time had told them, as he was bound to tell them, that nothing was added to the value of the land to which the petitioner was entitled by the fact that it had been taken for that purpose.

In our opinion, the exception to the exclusion of the money cannot be sustained.

The petitioner has made a separate contention as to the question, "By what municipalities or communities could this land be used for a water supply?" This was excluded "on the ground that it involved the co-ordinate action of the legislature." Since it was the duty of the presiding judge to see to it that the jury should not give to the land of the petitioner an added value because of the act which enabled the defendant town to distribute this water by pipes in the town, the question as it was put was rightly excluded.

2. This brings us to the exceptions taken to the charge by the jury.

The exception taken by the petitioner was "to all of the instructions requested by Mr. Jones [counsel for the defendant] as far as they have been given."

None of the instructions asked for by the defendant, except the exception of the second and third, were given in terms.

The petitioner's counsel in his brief and argument addressed himself to the instructions asked for, which were given in terms, without pointing out what there is in the charge which adopted those asked for and to which her exceptions were pointed.

It is possible from the way in which the exception was <sup>177</sup> and the argument has been conducted that we may

have fully understood the position of the counsel of the petitioner.

In the absence of a request to that effect in behalf of the petitioner, there was no occasion for the presiding judge to qualify the instruction (which it is now admitted was correct) as to the rights of the town in percolating water as owner of the lot in question. The judge told the jury that the town got no absolute right to percolating water, but that if a neighbor cut off such water by wells on his own land, the respondent had not lost anything to which it had a right. The petitioner now complains that the judge should have added that until so cut off the jury could consider the water which the ownership of the locus would give the respondent.

The seventh instruction asked for by the respondent (which must be read with the sixth to be intelligible) was not given by the judge.

<sup>178</sup> The charge of the judge in that connection was as follows: "I said that you could consider the evidence of the uses to which this property was adapted, all the uses. Upon that, in connection with those uses, you can take into account in the Sargent case the fact that there was or was not, as you find it to be from the evidence, a supply of water upon the premises. If that would give an added value to the property in the mind of any purchaser in the open market and in the mind of any seller in the open market, you could take that into account, but you could not use it to mark up a price beyond the fair market value of the property, you could not give to the Sargents in their case the value of the land, for instance, to the town of Merrimac as a water supply. That you are not to do. If the fact that it was adapted to use as a water supply, if you find that to be a fact, would have affected the mind of anybody in dealing with the property, that you can take into account, but that is the extent to which you can go, and you may think that that, practically, as the land was situated, did not affect its value at all. On the other hand, you may think that it added to or decreased its value." That is correct.

The eighth request was not given. To the portion of the charge already quoted the judge added, with respect to the matters covered by the defendant's eighth request: "The petitioner is not entitled, as I have just said, to swell the damages beyond the fair market value of the land by any consideration of the chance or probability that the petitioners might acquire authority by legislation to carry the water in pipes for the purpose of supplying the town of Merrimac or any other town.

You cannot go beyond the fair market value of the property at the time it was taken." That is correct.

The respondent's eleventh request, to wit, "The petitioner is not entitled to recover the fair market value of the land taken from the respondent," was correct: *Moulton v. Newburyport Water Board*, 137 Mass. 163.

Exceptions overruled.

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#### EVIDENCE OF THE SPECIAL VALUE OF PROPERTY FOR A PUBLIC USE.

We must confess a difficulty in understanding and applying the views of the court expressed in its opinion in the principal case. Nothing stated therein conflicts with our conclusion in the case of *Board of Trade Tel. Co. v. Darst*, 85 Am. St. Rep. 297, that when property is taken by proceedings in the exercise of the power of eminent domain is entitled to full compensation, and that such compensation cannot be ascertained without taking into consideration the purposes for which the property is valuable, and hence may be enhanced by considering its value for some special purpose. In the case the property sought to be taken in the principal case, being taken in obtaining a municipal water supply, the court conceded that the fair market value to which the land owner "was entitled was the value of the land in the market of the land apart from its special value for water supply purposes, plus such sum as a purchaser would have added to that value, because of the chance that the land might some day be used as a water supply." Nevertheless the court sustained the action of the trial judge in excluding the testimony of experts of what was the value of the land for water supply at the time of the taking, or for all the uses to which the land might be put. In the judgment of the witness, it was adapted, or evidence of the value of the water in the land, or in what municipalities or communities the water could be used, or what was its value because of its special adaptation as a source of water supply. All of this seems to be comparable to a declaration in a homicide case that the accused is entitled to be acquitted if he acted in self-defense, but that he could not be permitted to prove who was the aggressor, or what were the circumstances attending the killing, or what were the acts of the defendant in causing or inducing the defendant to give the fatal blow. The exclusion of the testimony in the principal case was not on the ground that the witnesses were incompetent or the matters concerning which they were asked might not properly influence the finding as to the guilt of the defendant, but on the ground that the evidence might introduce a collateral issue, and therefore should be excluded, unless otherwise there was some means of proving the market value of the property to be taken. If, as the court conceded, the land owner was entitled to the fair market value of the land, "plus such sum as a purchaser would have added to that value because of the chance that the land might some day be used as a water supply," then it seems

that it was not only proper, but indispensable, that evidence should be received showing whether the land was adapted for water supply purposes, and, if so, whether that fact, added to its market value, and what the probable addition was. Such, we conceive, to have been the view of every other court speaking upon the subject, unless, indeed, it denied in toto that the value of the land for any special use could at all be considered. Thus, evidence may properly be received to show that the lands sought to be taken have a special value for the following purposes and what, because of such value, is the market value of the land and the sum which should be paid to the owner, to wit: that the property had a special value as a site for a ferry: *Little Rock etc. Ry. Co. v. McGehee*, 41 Ark. 202; or a mill: *Fales v. Easthampton*, 162 Mass. 422, 38 N. E. 1131; or for restaurant purposes: *Chicago etc. R. R. Co. v. Catholic Bishop*, 119 Ill. 525, 10 N. E. 372; or for a bridge site: *Little Rock etc. Ry. Co. v. Woodruff*, 49 Ark. 381, 4 Am. St. Rep. 51, 5 S. W. 792; *Young v. Harrison*, 17 Ga. 30; or for manufacturing purposes: *Webster v. Kansas City etc. Ry. Co.*, 116 Mo. 114, 22 S. W. 474; or for an approach by railways or other railway purposes: *Santa Ana v. Harlin*, 99 Cal. 538, 34 Pac. 224; *Lake Shore etc. Ry. Co. v. Chicago etc. R. R. Co.*, 100 Ill. 21; *Johnson v. Freeport etc. R. R. Co.*, 111 Ill. 413; *Webster v. Kansas City*, 116 Mo. 114, 22 S. W. 474; *Gurrie v. Waverly etc. R. R. Co.*, 52 N. J. L. 381, 19 Am. St. Rep. 452, 20 Atl. 56; or to cut up into city lots: *Warden v. Philadelphia*, 167 Pa. 523, 31 Atl. 928; or for a specific agricultural purpose, as for the raising of hops: *Seattle etc. Ry. Co. v. Murphine*, 4 Wash. 448, 30 Pac. 720; or for mining purposes: *Northern Pacific etc. Ry. Co. v. Forbis*, 15 Mont. 452, 48 Am. St. Rep. 692, 39 Pac. 571; or a water supply: *Conan v. Ely*, 91 Minn. 127, 97 N. W. 737; *College Point v. Dennett*, 2 Hun, 669; *Re Daly*, 72 App. Div. 394, 76 N. Y. Supp. 28; *Re Gilroy*, 85 Hun, 424, 32 N. Y. Supp. 891; *Harwood v. West Randolph*, 64 Vt. 41, 24 Atl. 97; or as a reservoir site: *San Diego etc. Co. v. Neale*, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83; *Spring Valley Water Works v. Drinkhouse*, 92 Cal. 528, 28 Pac. 681; *Brown v. Forest Water Co.*, 213 Pa. 440, 62 Atl. 1078; *Alloway v. Nashville*, 88 Tenn. 510, 13 S. W. 123, 8 L. R. A. 123; *Great Falls Mfg. Co. v. United States*, 16 Ct. of Cl. 160; or for the purposes of booms: *Mississippi & R. R. Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206. So, a landlord is entitled to prove that certain historical associations have given additional market value to his land, as where they have been the scene of a great battle: *Five Tracts of Land v. United States*, 101 Fed. 661, 41 C. C. A. 580.

It is true that the ultimate issue is, what is the market value of the lands to be appropriated to the public use, and probably he who is seeking compensation, if he interviewed his witnesses and got them to understand that in this value might be included all lawful considerations which might make his land more desirable to a purchaser, might safely rest his cause on such responses as he could obtain from the witnesses to the question, What is the market value of

such lands? Still, on cross-examination, it would almost appear that before making the answer, the witness had considered the value for some special purpose, and, if so, clearly the answer could not be stricken out as being based upon irrelevant or immaterial considerations. We see no reason why, in the first instance, the attention of the witness may not be directed to the special purpose which the land owner believes enhances the market value of the land, or asked to take it into consideration in making the estimate of the state how much such value was increased thereby. If so done, it induces a collateral inquiry or issue, then such an issue must be brought out by every attempt to place before a court or jury the evidence, and distinguished from the ultimate facts of the case. Nearly all the testimony so far as devoted to questions of fact, proceed by putting before the court or jury, or both, certain disconnected items of testimony, neither affirming nor denying, in themselves, any issue, but when taken in connection with other testimony to sustain or to overthrow the contention of one of the parties with respect to some material issues of the case. These isolated fragments, though they may be the subject of denial and of adverse testimony, are not issues in any proper sense of the term, nor, in our judgment, a separate item of testimony tending to disclose on what the value of the property in question is founded; and while, in the principal case, some court may conceive that the separate item is not essential to the disclosure of the petitioner's claim of value for the market value, still we think that all reasons from the witness' conclusion is drawn, and all items which by being brought together make up the sum which he regards as the market value, should be as proper, if not more proper, for consideration than his statement of what he deems to be that value. A reference to the decisions will illustrate and confirm this view. Thus in *M. & R. R. Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206, 6 S. 113, the plaintiff, being a corporation authorized to construct booms, sought to condemn certain islands to be used for that purpose. The question arose whether the owners were entitled to have consideration of the value of the property for this special purpose. Answering the question in the affirmative, the supreme court of the United States said: "Upon the question litigated in the court below, the company claimed that which the owner of the land condemned was entitled to receive, and the principle upon which the compensation should be estimated is less difficulty. In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in the sale of property between private parties. The inquiry in such cases must be, what is the property worth in the market, viewed merely with reference to the uses to which it is at the time put, or capable of being put, but with reference to the uses to which it is plainly put, that is to say, what is it worth from its availability for such uses? Property is not to be deemed worthless because it is not allowed to go to waste, or to be regarded as valueless because it is not able to put it to any use. Others may be able to use it, and



it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can readily be estimated. So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is, perhaps, impossible to formulate a rule to govern its appraisalment in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general rule, we should say that the compensation of the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future. The position of the three islands in the Mississippi river fitting them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over twenty million of feet of logs, added largely to the value of the lands. The boom company would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river; as, by utilizing them in the manner proposed, they would save heavy expenditures of money in constructing a boom of equal capacity. Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands."

The supreme court of Minnesota has affirmed the right of a land owner to show that a spring existed on the lands sought to be taken from him and gave a special value thereto. It quoted with approval the language copied by us from the opinion of the supreme court of the United States, and added: "Any evidence is competent, and any fact proper to be considered, which legitimately bears on the value of the property": *Conan v. Ely*, 91 Minn. 127, 97 N. W. 737. In affirming the judgment of the trial court, the supreme court of Missouri said: "We think there was no error in allowing the plaintiffs to show, as appreciating the market value of this land, its availability as an approach to Kansas City for railroads and its adaptability for use for manufacturing purposes, these uses being at the time in reasonable anticipation": *Webster v. Kansas City etc. Ry. Co.*, 116 Mo. 114, 22 S. W. 474.

Affirming a judgment where a land owner had been permitted to prove the value of the property as a bridge site, the court quoted with approval the views of the supreme court of the United States, and said: "How is the market value to be proven? This is usually done by calling witnesses who are familiar with the property, and asking their opinion as to such value. Here is one of the recognized exceptions to the general rule that witnesses are to state facts, and not to express opinions. When the witness has made his estimate as to the market value of the property, it is competent to support his estimate by having him describe the property, giving its location, advantages and surroundings, though ordinarily this would be uncalled for, unless his estimate was attacked on his cross-examination; in which case, the party introducing him would have ample opportunity to rebut any facts which appear to be derogatory to his

estimate. How much latitude should be allowed the parties in the way of bringing out in the testimony collateral, or perhaps, they should say cumulative, facts, to support the estimates made by the witnesses, is a matter that must be left very largely to the discretion of the presiding judge. We would not undertake to fix the limits of a discretion so necessary to be exercised. We deem it improper, however, to say that the presiding judge should not suffer the collateral issues to spring up and multiply, or the jury to be overwhelmed with facts and figures which could throw no appreciable light upon the question in hand, namely, the ascertainment of the value of the property. As a general guide to the range within which the testimony should be allowed to assume, we think it safe to say that the land owner should be allowed to state, and have his witnesses state, every fact concerning the property which he would be disposed to adduce in order to place it in an advantageous light, if he were attempting to negotiate a sale of it to a private individual. On the other hand, the jury and the opposing counsel, for the information of the jury, should be allowed to make every inquiry into the property which one about to buy it would feel it his interest to make. . . . It can hardly be doubted that if the property had gone upon the market to sell this property, he would have concealed the fact that it possessed superior advantages as a bridge site. Now, if he would not have concealed it from a purchaser, it would be unfair to him for the court to conceal it from the jury. On the other hand, if one had been about to purchase the property, he would hardly have been so obtuse as to overlook an advantage of value so obvious as its eligibility for a bridge site. Railroad and bridge companies do not condemn all the land they make use of at their location. The amount they obtain in this way constitutes perhaps a small per cent of what they utilize. They are frequently the market as purchasers, and they are sometimes in a position to dictate very reasonable terms. We think that the probability is that there may be for suburban land for railroad and bridge purposes is a recognized factor in the market value of property in some localities. All that lends value to anything that we possess is the fact that other people want it, and are willing to pay the money for it. If it were announced that a point of rocks on the Mississippi at Hopefield, opposite Memphis, was offered for sale, upon the supposition that it is easy to predict that there would be no lack of bidders, the price offered would be very much above what the property would be 'worth as a piece of land.' In their anxiety to secure property so valuable, bidders would hardly delay until they had obtained the right to build a bridge': *Little Rock etc. Ry. Co. v. Woodruff*, 381, 4 Am. St. Rep. 51, 5 S. W. 792.

In *Cox v. Philadelphia etc. R. R. Co.*, 215 Pa. 506, 114 Atl. Rep. 799, 64 Atl. 729, a land owner sought to prove that his land had a special value as a place for the breeding of ducks, and the court sustained his claim in this respect, saying: "In the case at bar it was proper for the plaintiff to call witnesses to show the use

poses for which his land was specially adapted, including that of duck raising. The land owner, in condemnation proceedings, is not limited to any use for which his property is available, but he is entitled to have its value considered for any and all purposes for which it can be used. He may, therefore, show by any competent testimony, expert or otherwise, that it is specially valuable for a certain particular purpose and that purpose must enter into its value before the jury. So, here, it was proper for the plaintiff to show by competent expert testimony the value of his property for duck-breeding purposes, and the jury was required, in passing upon the case, to take into consideration its value for that purpose."

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### WEST v. POOR.

[196 Mass. 183, 81 N. E. 960.]

**NEGLIGENCE—Child Riding Without Invitation or Objection, Liability for Injury to.**—If children, in the absence of a milkman, enter his wagon, he having previously given them rides, and on his return he does not eject them, but drives ahead, leaving them sitting on the seat, they are mere licensees, to whom he owes only the duty of not setting traps for their injury and of refraining from reckless, willful or wanton misconduct tending to their injury, and if one of them suffers injury in attempting to alight, the milkman is not liable, though guilty of a want of ordinary care not amounting to culpable negligence. (pp. 542, 543.)

Two actions of tort, one by a child, by her father and next friend, for personal injuries suffered by her, and the other by the father for expenses incurred for surgical treatment because of such injuries. The trial court ordered verdicts for the defendant, and the plaintiffs alleged exceptions.

T. S. Herlihy and R. E. Burke, for the plaintiffs.

J. H. Casey, N. N. Jones and E. Foss, for the defendant.

<sup>184</sup> **MORTON, J.** The defendant supplied milk to the plaintiff's father, and on the morning of the accident, as he came back to his wagon from delivering milk at a house nearby, he found in the wagon the plaintiff, who was a little more than five years of age, her sister, between two and three, and two others, of seven and four respectively, children of a neighbor and playmates of the plaintiff. The wagon was what is known as a low-down closed milk wagon, with doors at the sides and the floor about a foot from the ground. The defendant had frequently given the children a ride. The defendant drove

a short distance and then stopped, and the two other got out. The horse started up before the plaintiff's sister got out, and the defendant drove a short distance to the house of his next customer, where he made a similar stop. He was sitting on the right-hand side, with the reins in his right hand, and the children were on the left, the plaintiff being next to the door. The defendant attempted, with the reins in his hand, to help the plaintiff out, and after he had taken the plaintiff by the arm to pull her out, and while he was trying to take care of the plaintiff's child, the horse started, and in some way (the defendant could not say just how the accident happened) the plaintiff slipped or fell and the hind wheel went over her leg, and the injuries complained of. The horse was hard-bitten, as the defendant testified, had started "once in a while" and would not always stand still at the regular stopping places. The father of the plaintiff was at work and the mother was sick in bed, under the care of a doctor and a nurse, and the younger children were in the care of the plaintiff's sister, who was nineteen years of age. It does not appear that the older sister knew where the children were or what they were doing, though we do not regard that as essential material.

<sup>185</sup> In getting into the wagon the plaintiff was an invitee, not a trespasser, and the defendant when he came back to find her and the other children in it could have properly ejected her, using no more force than was necessary, without having regard for her tender years: *Daniels v. New York*, 154 Mass. 349, 26 Am. St. Rep. 253, 28 N. E. L. R. A. 248. The fact that the plaintiff had frequently ridden in the wagon did not constitute an invitation for her to get in on the morning of the accident, however necessary it may have been under the circumstances for her to do so. But by allowing her to remain, the defendant must be held to have acquiesced in and consented to her presence. We do not think that he can be regarded as having invited her. On the contrary, it was, it seems to us, the plaintiff or her older sister who had asked the defendant to suggest to him, to take her in, as a favor, and give her a ride, and he had consented to do so. When he came back he found her and the others in the wagon, and he proceeded on his route. He did nothing and said nothing to them, and the nearest analogy that occurs to us is that of a self-invited guest in whose presence the host acquiesces, whose enjoyment he seeks to promote, or that of a guest

bailee. In the former case the degree of care required is that of licensor and licensee (*Plummer v. Dill*, 156 Mass. 426, 32 Am. St. Rep. 463, 31 N. E. 128; *Hart v. Cole*, 156 Mass. 475, 31 N. E. 644, 16 L. R. A. 557), which, as has often been said, requires only that the licensor shall not set traps for the licensee and shall refrain from reckless, willful or wanton misconduct tending to injure him: *Massell v. Boston Elevated Ry.*, 191 Mass. 491, 78 N. E. 108. In the latter case, in order to render the bailee liable, it must appear that he has been guilty of culpable negligence: *Whitney v. Lee*, 8 Met. 91; *Nolton v. Western R. R.*, 15 N. Y. 444, 69 Am. Dec. 623. If the standard of care required was that of a licensor or gratuitous bailee, as we think it was, it is entirely plain that there was no breach of duty on the part of the defendant. It is unnecessary to consider whether, if a higher degree of care had been required, that of the ordinarily prudent man, for instance, there was any evidence that the accident was caused by the defendant's negligence.

Exceptions overruled.

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*Negligence in Dealing with Children* is the subject of a note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 406. The owner of a wagon who places it in charge of a skillful driver is not liable for death of a child who climbs on the vehicle at the invitation of the driver and is killed in alighting therefrom, if the driver is without authority to extend such invitation, and his act is not within the scope of his employment or in furtherance of his employer's business. And a wagon constructed with the bed below the axles for use in hauling stone is not so dangerous and attractive to children as to require the owner to take special precautions for their protection in his use thereof: *Foster-Herbert Cut Stone Co. v. Pugh*, 115 Tenn. 688, 112 Am. St. Rep. 881.

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## WHELOCK v. CITY OF LOWELL.

[196 Mass. 220, 81 N. E. 977.]

**MUNICIPAL CORPORATIONS have no Power to Spend for Other than Public Uses Money Raised by Taxation.** (p. 546.)

**MUNICIPAL CORPORATIONS—Public Uses.—The Erection of a Town House in Which the Inhabitants may Assemble** is a public purpose, for which towns may raise money under a general phrase of the statute empowering appropriations for "other necessary charges." (p. 546.)

**MUNICIPAL CORPORATIONS—Town Halls Used for Some Purpose Which is not a Public Use.—**If the dominating motive for the erection of a hall is a strictly public use, then the expenditure for it is legal, although occasionally it may be devoted to uses which

are not public. If, however, the project of the city is mer-  
able, masking under the pretext of a public purpose, the g-  
sign of entering into the private business of maintaining  
hall for gain, or devoted mainly to any other than a public  
gathering place for citizens generally, such an attempt w-  
perversion of power and a nullity, and no public fund cou-  
propriated for it. (p. 547.)

**MUNICIPAL CORPORATIONS—Public Use—Halls**  
**Meeting of Citizens.**—A commodious, convenient hall in  
citizens may exercise their right of assembling and discussi-  
affairs is an object for which the city may lawfully expen-  
moneys. (p. 550.)

**MUNICIPAL CORPORATIONS, Officers or Commis-**  
**Who Need not be Elected Under any General or Special**  
municipal corporation may, by ordinance, provide for a com-  
act as the agent of the city in the erection of a public hall  
termine the manner in which the members shall be chosen  
by appointment by the mayor, with or without confirmation  
or both branches of the city council, or in any other reaso-  
legal way. (p. 551.)

**MUNICIPAL CORPORATIONS, Appropriation by,**  
**Manner may be Made.**—An appropriation for the use of a c-  
to erect a public hall may be made by order as well as by c-  
bill or resolution. (p. 552.)

**MUNICIPAL CORPORATIONS—Municipal Council,**  
**ings by not in Accordance with Cushing's Manual on the**  
**Practice of Legislative Assemblies.**—Though a common c-  
other legislative body of a city, may have adopted Cushing  
or some other law and practice of legislative assemblies, it  
its power to abolish, modify or waive its own rules intend-  
curity against hasty action. (p. 552.)

Suit by certain inhabitants of the city of Lowell t-  
the city and its treasurer from paying money for the  
of a public hall to replace a building known as Hu-  
Hall, theretofore destroyed by fire. The erection of t-  
ing and the creation of the necessary municipal agen-  
that purpose were provided for in an ordinance as

“Be it ordained by the city council of the city of  
as follows:

“Section 1. There shall be chosen in the manner he-  
provided, four citizens of Lowell who shall hold no o-  
nicipal office, who, together with the mayor for the tin-  
ex-officio, shall constitute a commission to be known  
Huntington Hall commission. The members of said  
sion shall not receive any salary or emolument for  
vices and shall, unless sooner removed in the manner p-  
by law, hold their respective offices until the completio-  
building hereinafter mentioned, and upon the declar-  
the mayor in writing filed with the city clerk that t-  
contemplated by this ordinance has been fully co-  
the authority of said commission shall cease and de-

"Section 2. Within thirty (30) days after the enactment of this ordinance, the board of aldermen and the common council shall meet in joint convention and elect four persons, as above specified to be members of said commission. If any member so elected shall decline to serve, or if by the death, resignation or removal from office of any member of said commission a vacancy shall exist, the city council shall, in joint convention, elect a new member to fill such vacancy.

"Section 3. Said commission shall have the general charge and management of all matters pertaining to the erection of a new public hall to take the place of Huntington Hall recently destroyed by fire; shall select and purchase or otherwise acquire a site therefor, and shall do, or cause to be done, all things necessary for the erection of a suitable and commodious public hall, with such appurtenances and furnishings as they may deem proper. They shall make all contracts in relation thereto, except for the supplies, but no contract so made involving the expenditure of more than three hundred dollars (\$300) shall be valid, and binding upon the city until approved by the mayor in writing; and no expenditure shall be made by said commission under the authority of this ordinance until the city council has duly voted an appropriation therefor.

"Section 4. The chairman of the board of aldermen and the president of the common council shall constitute a committee to submit to said joint convention a list of four names as nominees for commissioners. Such names shall be voted on separately and in case of failure to elect any one or more of the persons so named, new names shall be submitted by said committee until four persons shall have been elected, who, together with the mayor shall constitute such commission."

In July, 1906, an order was made by the common council directing the transfer of three hundred dollars from the "Building Fund" to the general treasury fund to be placed to the credit of a fund to be called "Huntington Hall Commission—Contingent Fund."

The cause, after a hearing before Loring, J., was reported for the determination of the full court.

C. Cowley, for the plaintiffs.

J. G. Hill, for the defendants.

<sup>223</sup> RUGG, J. This is a bill in equity under Revised Laws, chapter 25, section 100, praying for an injunction to restrain  
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the payment of money for the erection of a public hall. *Lowell*. Three questions are raised.

1. The plaintiffs contend that, under the circumstances, the purchase of land and construction of a hall is not a public purpose. The bill alleges, and the court's findings by the single justice is, that the defendant already possesses a city hall with sufficient accommodation for its mayor, board of aldermen, common council, school committee and other public boards and officers. While *Essex* Town Hall, which has been burned and to replace which is proposed to erect the hall now under discussion, was rented for the usual purposes of a public hall, it was frequently used for political rallies and conventions and for public and private meetings of citizens.

Municipalities are creatures of the legislature, with no power to raise as to the raising and expending of money strictly limited to the public purposes for which they are created. They have no power to expend money, which can only come from the treasuries through taxation, for any other than purely public uses. In its last analysis any other principle is a taking of private <sup>224</sup> property, through the medium of a public use, for a private use, which is contrary to fundamental principles of good government.

The erection of town houses in which the inhabitants assemble has been uniformly held to be a public purpose, and which towns might raise money under the general powers of the statute which empowers appropriations for "other necessary charges." This expression has been continuously used in statutes since 1692: *Stats.* 1692, c. 28, sec. 6 (approved March 16); *Stats.* 1785, c. 75, sec. 7; *Rev. Stats.*, c. 15, sec. 1; *Gen. Stats.*, c. 18, sec. 10; *Pub. Stats.*, c. 27, sec. 1; *Laws*, c. 25, sec. 15; *Stetson v. Kempton*, 13 *Mass.* 272, 10 *Dec.* 145; *Spaulding v. Lowell*, 23 *Pick.* 71; *French v. Allen*, 3 *Allen*, 9; *George v. School District*, 6 *Met.* 497; *C. Worcester*, 102 *Mass.* 489, 3 *Am. Rep.* 485; *Worden v. Bedford*, 131 *Mass.* 23, 41 *Am. Rep.* 185; *Kingman v. Boston*, 153 *Mass.* 255, 26 *N. E.* 998, 11 *L. R. A.* 123; *C. wealth v. Wilder*, 127 *Mass.* 1; *Hadsell v. Hancock*, 127 *Mass.* 526; *Friend v. Gilbert*, 108 *Mass.* 408; *Tindley v. Salem*, 171 *Mass.* 171, 50 *Am. Rep.* 289; *Little v. Holyoke*, 177 *Mass.* 58, 17 *N. E.* 170, 52 *L. R. A.* 417. Since 1869, there has been superadded the right of eminent domain in order to take a lot for a town or city hall: *Stats.* 1869, c. 411, sec. 1; *Laws*, c. 25, sec. 45, c. 26, sec. 2, c. 8, sec. 5, cl. 23. That in comparatively rare instances special statutes



thority has been obtained does not argue against the existence of the general power, but is to be accounted for as done through excess of caution or as conferring some additional power not derived from the general law: *Shea v. Milford*, 145 Mass. 528, 14 N. E. 764; *Spaulding v. Lowell*, 23 Pick. 71; *Kelley v. Boston*, 186 Mass. 165, 71 N. E. 299, 66 L. R. A. 429. See Stats. 1884, c. 309, sec. 15.

The plaintiffs do not raise the question as to the right of a city to build a building for the use of municipal boards and officers, but they assert in substance that the proposed hall is not needed for any municipal officer or board, and is intended to be used as a place for holding theatrical exhibitions, dances and other amusements. The burden of proving these allegations is upon the plaintiffs. If the dominating motive for the erection of the hall is a strictly public use, then the expenditure for it is legal, although incidentally it may be devoted occasionally to uses which are not public. If, however, the project of the defendant city is merely colorable, masking under the pretext <sup>225</sup> of a public purpose a general design to enter into the private business of maintaining a public hall for gain, or devoting it mainly to any other than its public use as a gathering place for citizens generally, such an attempt would be a perversion of power and a nullity, and no public funds could be appropriated for it: *Spaulding v. Lowell*, 23 Pick. 71; Opinion of the Justices, 182 Mass. 605, 66 N. E. 25.

The reported facts show a substantial use of Huntington Hall for political rallies, conventions and other public meetings of citizens, although from time to time it has been rented for purposes of amusements and instruction. That the building has been also let for private uses, when not required by the public needs, does not affect the general legal purpose: *French v. Quincy*, 3 Allen, 9. The fact, too, that the old hall was occasionally permitted to be used free of charge for private purposes, although clearly illegal, appears to have been an incidental and not an essential element in its management. Means for the correction of this wrong, if attempted with the new hall, are easily accessible. There has been, on the whole, a failure to show by evidence that the main purpose to which the proposed hall is to be put is private gain and not public gatherings of citizens. The broad question presented, therefore, is whether cities have the power to raise and appropriate money for building such a hall.

Article 19 of the Declaration of Rights declares that "The people have a right, in an orderly and peaceable manner, to

assemble to consult upon the common good; give inst to their representatives, and to request of the legislati by the way of addresses, petitions or remonstrances, of the wrongs done them, and of the grievances they. Article 1 of the amendments to the constitution of the States prohibits Congress from passing any law "ab the freedom of speech . . . . or the right of the peopl ably to assemble, and to petition the government f dress of grievances." Respecting this article in the ration of Rights it was said by Chief Justice Shaw : *Commonwealth v. Porter*, 1 Gray, 476 at page 478: " more concerns the public good than the election of go in all respects qualified, to public offices. The exten almost unlimited rights of suffrage, secured to the p this commonwealth by the constitution and <sup>226</sup> 1 sume and are founded on the right of voters to have t est and freest discussion and consultation upon the and qualifications of candidates, for their informat the means of exercising a sound and enlightened ju in regard to public men and political measures": *Stone v. Charlestown*, 114 Mass. 214; *Commonw Abrahams*, 156 Mass. 57, 30 N. E. 79.

It has been the policy of the legislature to provid enactment of city charters by a special section for the of this constitutional right of assembly and to requir nated city officials to call such meetings under proper stances: *Beverly*, Stats. 1894, c. 161, sec. 9; *Boston*, 1821, c. 110, sec. 25; 1854, c. 448, sec. 60; 1882, c. 204 ton, Stats. 1881, c. 192, sec. 32; *Cambridge*, Stats. 364, sec. 5; 1846, c. 109, sec. 12; *Charlestown*, Stat c. 29, sec. 18; *Chelsea*, Stats. 1894, c. 325, sec. 9; 185 sec. 20; *Chicopee*, Stats. 1890, c. 189, sec. 8; 1897, c. 8; *Everett*, Stats. 1892, c. 355, sec. 9; *Fall River*, Sta c. 257, sec. 20; 1869, c. 245, sec. 50; 1873, c. 245, 1885, c. 269, sec. 23; 1878, c. 239, sec. 4; 1899, c. 371, 1902, c. 393, sec. 41; *Fitchburg*, Stats. 1872, c. 81, *Gloucester*, Stats. 1873, c. 246, sec. 28; see Stats. 1900 sec. 7; 1898, c. 302, sec. 7; 1896, c. 441, sec. 8; 1871 sec. 29; *Haverhill*, Stats. 1869, c. 61, sec. 28; see Stat c. 251, sec. 28; 1901, c. 438, sec. 8; *Holyoke*, Stats. 154, sec. 23; 1896, c. 438, sec. 8; *Lawrence*, Stats. 70, sec. 18; 1888, c. 439, sec. 5; see Stats. 1895, c. 326, *Lowell*, Stats. 1875, c. 173, sec. 34; 1836, c. 128, *Lynn*, Stats. 1850, c. 184, sec. 19; 1849, c. 89, sec. 18; 378, sec. 8; 1894, c. 247, sec. 9; 1900, c. 367, sec. 9;

Stats. 1881, c. 169, sec. 31; Marlborough, Stats. 1890, c. 320, sec. 8; see Stats. 1896, c. 379, sec. 9; Medford, Stats. 1892, c. 324, sec. 9; 1903, c. 345, sec. 7; 1906, c. 252, sec. 1; Melrose, Stats. 1899, c. 162, sec. 8; New Bedford, Stats. 1847, c. 60, sec. 19; 1868, c. 228, sec. 25; 1875, c. 140, sec. 51; Newburyport, Stats. 1851, c. 296, sec. 20; Newton, Stats. 1897, c. 283, sec. 39; 1873, c. 326, sec. 28; North Adams, Stats. 1895, c. 148, sec. 8; Northampton, Stats. 1883, c. 250, sec. 37; see Stats. 1900, c. 427, sec. 8; Pittsfield, Stats. 1889, c. 411, sec. 8; 1895, c. 302, sec. 8; 1875, c. 166, sec. 28; 1904, c. 389, sec. 6; Quincy, Stats. 1888, c. 347, sec. 8; Roxbury, Stats. 1846, c. 95, sec. 19; Salem, Stats. 1836, c. 42, sec. 17; Somerville, Stats. 1871, c. 182, sec. 26; 1899, c. 240, sec. 8; Springfield, Stats. 1852 <sup>227</sup> c. 94, sec. 20; Taunton, Stats. 1882, c. 211, sec. 21; 1864, c. 209, sec. 18; Waltham, Stats. 1893, c. 361, sec. 9; Westfield, Stats. 1906, c. 409, sec. 11; Woburn, Stats. 1897, c. 172, sec. 8; 1888, c. 374, sec. 8; Worcester, Stats. 1848, c. 32, sec. 18; 1866, c. 199, sec. 34; 1893, c. 444, sec. 8. See Stats. 1892, c. 377, title 2, art. 9. This act, although held on general grounds unconstitutional in *Larcom v. Olin*, 160 Mass. 102, 35 N. E. 113, was a manifestation of legislative intent in this respect. Statutes of 1876, chapter 211, in section 4 (for Fall River), and Statutes of 1877, chapter 146, in section 4 (for Springfield), recognize the existence of the right in different phrase. It is believed that such express provision is in every city charter enacted save one for Chelsea (Stats. 1881, c. 200), one for Newton (Stats. 1882, c. 210), and one for Waltham (Stats. 1884, c. 309), all three now repealed, and two for Lowell, which were rejected by popular vote (Stats. 1892, c. 323, and Stats. 1893, c. 429). It is possible that sections 4, 9, 4, 3 and 3, respectively, of these several acts might have been held to cover the subject by implication.

It is hard to overestimate the historic significance and patriotic influence of the public meetings held in all the towns of Massachusetts before and during the Revolution. No small part of the capacity for honest and efficient local government manifested by the people of this commonwealth has been due to the training of citizens in the forum of the town meeting. The jealous care to preserve the means for exercising the right of assembling for discussion of public topics manifested in city charters by the representatives of the people, whenever providing for the transition from the town meeting to the city form of local government, demonstrates that a vital appreciation of the importance of the opportunity

to exercise the right still survives. The practical institution of the citizen in affairs of government through instrumentality of public meetings and face to face discussion may be regarded quite as important as their amusement, recreation or assumed temporal advancement in ways here expressly authorized by statute and held constitutional in *Hard v. Taunton*, 140 Mass. 467, 5 N. E. 157; *Morrison v. Lawrence*, 98 Mass. 219; *Kittredge v. North Brookfield*, 101 Mass. 286; *Commonwealth v. Williamstown*, 156 Mass. 286, 19 N. E. 472; *Kingman v. Brockton*, 153 Mass. 255, 26 N. E. 998, 11 L. R. A. 123; *Attorney General v. Williams*, 170 Mass. 476, 55 N. E. 77.

It is only by a continuance of intelligent, persistent and honest <sup>228</sup> interest in the cause of good government on the part of the great majority of citizens that the permanency of our institutions can be secured. Only by the abiding constancy of such interest will intelligence triumph over ignorance and indifference in public affairs. In no other way can self-government by free men continue, which shall in fact secure the blessings of liberty. The less frequent exercise of the right of public assembly for discussion now than formerly is not to be regarded as an abandonment.

A commodious and convenient hall in which the people are to exercise their right of assembling and of consulting and discussing public affairs is, therefore, an object for which the defendant city may legally expend money: See *Bates v. Bassett*, 60 Vt. 530, 15 Atl. 200, 1 L. R. A. 107; *Greely v. People*, 60 Ill. 19; *Bell v. Platteville*, 71 Wis. 36 N. W. 831; *Eastman v. Meredith*, 36 N. H. 284, 10 Me. Dec. 302; *Jones v. Sanford*, 66 Me. 585; *Clark v. Brockton*, 81 Mo. 503, 51 Am. Rep. 243; 1 Dillon on Municipal Corporations, sec. 30. It has not been argued that there is anything in the acts of the defendant city thus far which shows an unreasonable or wanton exercise of the power, provided the subject matter is within its scope.

2. The second point raised is, that the ordinance, by which the commission charged with the construction of the hall created, is in violation of Revised Laws, chapter 26, section 7, and therefore is illegal. This contention is not sustained. The members of the commission do not belong to that class of city officers whose election is required by any general or special law. The commission was itself the creature of the ordinance. It was necessary that some agent of the city should be selected to perform the service required. No duty does not appear to have been imposed by law upon

particular city officer, and could not be performed by the city council itself: Stats. 1896, c. 415, sec. 7. By section 6 of the same act the city council was empowered to create commissions or boards and transfer duties to them, with an exception not here material. Having the power to create the commission by ordinance, the city council necessarily possessed the incidental power to determine how its members should be chosen, whether, by appointment by the mayor with or without confirmation by either or both branches of the city council, or in any other reasonable and legal way. The city council of Lowell has the same power, as to matters <sup>229</sup> not specially covered by statute, to create committees or commissions of citizens for the performance of municipal functions, possessed by towns in town meeting: Charter of Lowell, Stats. 1875, c. 173, sec. 23. See *Boston Electric Co. v. Cambridge*, 163 Mass. 64, 39 N. E. 787. A broad power in this respect has always been exercised by towns: *Haven v. Lowell*, 5 Met. 35; *Shea v. Milford*, 145 Mass. 528, 14 N. E. 764; *Sylvester v. Webb*, 179 Mass. 236, 60 N. E. 495, 52 L. R. A. 518. The ordinance provision in effect was that whoever might hold the office of mayor for the time being should be a member of the commission by virtue of his office as mayor, and that nominations for the other four members should be made by the chairman of the board of aldermen and president of the common council, and election by the city council from such nominees, with a provision for new nominations in case of failure to elect those first nominated, until the membership of the commission should be completed. The substance of this is that nominations should be made by the designated officers with power in the city council to approve or reject the persons so nominated. What the city council undertook to do was to restrict its own field of selection to those nominated by the heads of its respective branches. This was not unreasonable or illegal, the whole subject matter being within its jurisdiction. The provisions of Revised Laws, chapter 26, section 7, were followed in the election of the four citizen members of the commission to the extent that the voting upon the nominations was *viva voce*. There is, perhaps, ground for argument that such a commission is not a board of public officers, but only municipal agents: *Shea v. Milford*; 145 Mass. 528, 14 N. E. 764. It is not necessary to decide this question, but if the argument be sound, the statute has no application.

3. The final contention of the petitioners is that in making the appropriation of three hundred dollars for the use of

the commission to be expended in the exercise of its power. The city council proceeded not by ordinance, bill or resolution, but by a mere order, in violation of its regulatory by-laws. No ordinance or rule of the city of Lowell has been called to our attention requiring such an appropriation to be made otherwise than by order, and there is no general law making void an appropriation in that form: *Johnson v. Somerville*, 195 Mass. 370, 81 N. E. 268, 10 L. R. A. 715. It is said, also, that the appropriation was in violation of parliamentary law as expounded in *Erving's Manual* and his *Law and Practice of Legislative Bodies*. If it be assumed that these had been adopted as rules of the city council, it is enough to say, without argument, upon the question whether they were violated, that they are within the "power of all deliberative bodies to abolish, modify or waive their own rules intended as security against arbitrary action": *Holt v. Somerville*, 127 Mass. 408; *Chandler v. Town of Somerville*, 128 Mass. 213. The method of financing the construction of the hall is not before us.

Bill dismissed with costs.

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*As to What Objects will Warrant the Imposition of Taxes.*—See note to *Zigler v. Menges*, 16 Am. St. Rep. 365. The general rule is that taxes must be levied for public purposes only, never for private objects or purposes: *State v. Froehlich*, 118 Wis. 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

## BRYANT v. ABINGTON SAVINGS BANK

[196 Mass. 254, 81 N. E. 997.]

**PLEADING—Statute Requiring the Denial of the Genuineness of a Signature, Construction of.**—A statute providing that a signature to a written instrument which is declared on as a cause of action shall be taken as admitted, unless the party sought to be defended thereby files a specific denial of the genuineness thereof, and demands that it shall be proved at the trial, does not apply to a signature on the passbook of a savings bank claimed to have been transferred to the plaintiff, because no signature is necessary to sue on the passbook where it is accompanied by the delivery of the passbook. (554.)

**SAVINGS BANK—Transfer of Passbook by Delivery.**—The transfer of a deposit in a savings bank may be accomplished by the delivery of the bankbook without any written assignment. (554.)

**PLEADINGS—Averment of Transfer, When not Admitted.—**

An averment that the transfer alleged in the complaint, if it should appear to have been signed by the transferrer, was made when he had not sufficient capacity to render it valid, does not admit that such transfer was made, and does not preclude contesting the genuineness of the signature if it should be offered in evidence. (p. 554.)

W. J. Coughlan and D. R. Coughlan, for the defendants.

F. M. Bixby and D. E. Damon, for the plaintiff.

**255** MORTON, J. On the pleadings as amended the controversy became one between Sadie W. Bryant, for whose benefit the action originally was brought in the name of the administrator, and the administrator; the writ and declaration being amended by making her the plaintiff, and the administrator appearing as claimant. The savings banks disclaim any interest in the funds, and are ready to pay them over to whomsoever the court shall decide is entitled to them. The amended declaration alleged in each case, so far as material, "that said John Bannican (the intestate) during his lifetime assigned and delivered to her, the said Sadie W. Bryant, said book and the sums therein stated as deposited and all other sums therein stated of accumulated interest and dividends," and that the bank owed her the same. The answer of the administrator, which was the same in each case, contained a general denial except that it was alleged that a deposit was made in the bank in the name of said John Bannican, which was admitted, and that it was specifically denied that said Bannican assigned or delivered said bankbook to said Sadie W. Bryant during his lifetime, and was averred that, if it should appear that said Bannican signed any transfer or assignment of said deposit to said Sadie W. Bryant, he had not sufficient mental capacity to execute the same, and that it was procured by fraud and undue influence. The plaintiff joined issue on the answer.

At the trial the plaintiff relied on what purported to be written assignments of the deposits from Bannican to her. The administrator offered to show that the signatures were forgeries. The judge excluded the evidence under Revised Laws, chapter 173, section 86, and instructed the jury in substance that the genuineness of the signatures could not be attacked for want of a specific denial of them in the answers, and of a demand requiring the plaintiff to prove them. The jury returned a verdict for the plaintiff in each case, and the cases are here on exceptions by the administrator to the ruling thus made and the instructions thus given.

We think that the presiding judge was wrong. The referred to provides that "A signature to a written instrument which is declared on or set forth as a cause of action . . . shall be taken as admitted unless the party so charged thereby <sup>256</sup> files in court . . . a specification of the genuineness thereof and a demand that it be proved at the trial": Revised Laws, c. 173, sec. 86. This statute is a re-enactment of Statutes of 1877, chapter 410, which it was said in *Holden v. Jenkins*, 125 Mass. 411, "the design of the statute was to save the party who relies upon a written instrument the trouble and expense of proving the signature, unless the adverse party, whose signature it is, will take the responsibility of a special denial of its genuineness, this being a fact especially within his personal knowledge." But in order to dispense with proof of the signature, it must appear that the written instrument is declared on or set forth as the cause of action. It is not enough to set out what turns out to be the legal effect of the instrument when it is offered in evidence (*Higgins v. Donnell*, 16 Gray, 386), but it must appear from the pleadings that the cause of action arises out of a written instrument executed by the adverse party, who, for the reason it appears to have been executed by him and is relied on as the cause of action, may justly be required to admit its genuineness. In this case there was nothing in the pleadings which showed that the written assignments were signed by him, and the administrator was not, therefore, required to admit or deny the signatures to them. The gift or transfer of a deposit in a savings bank may be established by the delivery of the bankbook without a written assignment (*Wright v. Boston Five Cents Savings Bank*, 129 Mass. 425, 12 Rep. 371), and for aught that appeared in the pleadings that was what was relied on. The averment in the pleadings that if it should appear that Bannican signed transfers that he had not sufficient mental capacity to render them valid was not an admission that he did sign transfers, and did not exclude the administrator from contesting the genuineness of the signatures if such transfers were offered in evidence. The court have assumed, without deciding, that the statute applies to the cases before us, although the plaintiff seeks to rely not against Bannican's estate, but against the savings bank by virtue of assignments from Bannican; in other words, against the party whose signature is in question, but not against another party by virtue of assignments alleged to have been made by Bannican. The question whether the statute



plies may not arise, however, at another trial, and it is not necessary to pass upon it now, though <sup>257</sup> it may be observed, as before stated, that the controversy is in effect between the plaintiff on the one hand and the estate on the other.

Exceptions sustained.

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*The Delivery of a Savings Bank Passbook* is regarded by the weight of authority as a good delivery of the funds deposited, without a written assignment: See the note to Johnson v. Colley, 99 Am. St. Rep. 903. Where the holder of a bankbook delivers it to another with an order directing that the amount due be paid to the latter, who afterward retains the possession of the book, this constitutes a gift of such amount: Matter of Barefield, 177 N. Y. 387, 101 Am. St. Rep. 814.

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## COMMONWEALTH v. STEVENS.

[196 Mass. 280, 82 N. E. 33.]

**DIVORCE, Marriage Before Decree of is Final.**—A marriage contracted after the entry of the decree nisi and before the final decree of divorce is illegal and void. (p. 557.)

**EVIDENCE.**—The Law of Another State must be Proved like any other fact. (p. 557.)

**THE COMMON OR UNWRITTEN LAW** of Another State may be Taken to be the Same as the law of this state. (p. 557.)

**MARRIAGE, Cohabitation After Void.**—If the solemnization of a marriage is unlawful, cohabitation under it is unlawful in the beginning and can only become lawful upon a new solemnization after the impediment is removed. (p. 557.)

**EVIDENCE—Statutes of Another State, Evidence of does not Include Marginal Notes of Decisions.**—Cases mentioned in the marginal notes of statutes offered in evidence are not thereby brought before the court. The cases should be specifically put in if it is desired to prove the effect of the statutes as construed by the courts of the state in which they are in force. (p. 557.)

**MARRIAGE, Statute Validating, Extraterritorial Effect of.**—A statute providing that if a person having a living spouse enters into a marriage, the other party to which acts in good faith, and the former marriage is subsequently annulled, and the parties continue thereafter to live together as husband and wife, they shall be held to have been legally married from and after the removal of the impediment, has no extraterritorial effect, and if the impediment is removed while the parties reside in another state, it has no effect on the status of the parties, although they subsequently remove to the state where such statute is in force. (p. 558.)

**Indictment for polygamy.** The accused asked the court to rule that he was entitled to an acquittal because his marriage to Minnie C. Tourtelotte had never been legalized. The judge

refused to so rule. Thereupon the defendant consented to a verdict of guilty, and the jury having returned its verdict accordingly, the judge, at the request of the accused, reported the questions of law involved for the decision of the supreme judicial court.

J. F. Creed, for the defendant.

J. S. Richardson, assistant district attorney, for the commonwealth.

<sup>281</sup> HAMMOND, J. This is an indictment for polygamy. At the trial it appeared that the defendant was married on September 18, 1895, to Grace P. Batchelder, in whose case on September 10, 1900, a decree nisi for divorce was granted, which was made absolute on March 11, 1901. These proceedings occurred in this commonwealth. On January 26, 1901, the defendant, then having been living four months in this commonwealth, married there Minnie C. Tourtellotte (she entering the marriage in good faith and in the full belief that his first marriage had been annulled by divorce), and lived with her for six months after the marriage, at Atlanta in this commonwealth, and then separated from her. The defendant and Minnie both came to this commonwealth, but not at the same time and subsequently cohabited here as husband and wife under the Georgia marriage until March, 1904, no marriage ceremony between them having at any time been performed. On August 16, 1905, the defendant married Jennette H. Smyth in this commonwealth, and subsequently lived with her in Boston. The three women were living together at the time of the trial.

To show the law of Georgia, the defendant introduced in evidence the Third Title, chapter 1, article 1 of the constitution of the state of Georgia, "Domestic Relations," and all of the subtitle "Marriage and Divorce" relevant to the case at bar, particularly the section of "Essentials of Marriage" and the section on what <sup>282</sup> constitute "Void Marriages" under the Georgia Code; and also the following decisions of the supreme court of that state, namely: *Equitable Life Soc. v. Paterson*, 41 Ga. 338, 5 Am. Rep. 535; *Clark v. W. S. S. S.*, 62 Ga. 407; *Wrye v. State*, 95 Ga. 466, 22 S. E. 275; and *Wilson v. Allen*, 108 Ga. 275, 33 S. E. 975.

The case is before us upon a report, and the question is whether at the time of his marriage to Smyth the defendant was the lawful husband of the woman between whom and him the ceremony of marriage in Georgia took place.

It is plain that, since the time of that ceremony he had not been completely divorced from his first wife, the ceremony was illegal and void: Ga. Code, ed. 1895, secs. 2412, 2416. It is argued, however, by the commonwealth that by the cohabitation in Georgia between the parties as husband and wife subsequent to the absolute decree of divorce between the defendant and his first wife, a valid marriage was established under the law of that state. This contention makes it necessary to examine that law.

The law of another state is to be proved like any other fact. We cannot take judicial cognizance of it. In the total absence of any evidence whatever, the common or unwritten law of another state may be taken here to be the same as the law of this state. But the statute or written law must be proved, and we are confined to the proof introduced in evidence at the trial: *Hackett v. Potter*, 135 Mass. 349, and cases cited.

Inasmuch as the marriage ceremony in question was illegal and void because of the fact that the defendant had another wife, it is plain that, if the common law of Georgia is the same as that of Massachusetts, the difficulty was not cured by the cohabitation after the defendant had been fully divorced from his first wife. The solemnization of the second marriage being unlawful, the cohabitation was unlawful in the beginning, and could become lawful only upon a new solemnization after the impediment had been removed: *Thompson v. Thompson*, 114 Mass. 566. It is argued, however, by the attorney for the commonwealth that in this respect the common law of Georgia is different from that of Massachusetts, in that a new solemnization in a case like this is not necessary to validate the marriage; and he has cited upon his brief some decisions of the supreme <sup>283</sup> court of Georgia (including *Smith v. Smith*, 84 Ga. 440, 11 S. E. 496, 8 L. R. A. 362), which lead to the suspicion that upon a full investigation of its law this view would appear to be correct; but the difficulty is that in considering this matter we are confined, as before stated, to the statutes and decisions which were introduced in evidence at the trial. Cases which are mentioned in the marginal notes to statutes are not brought before us by merely putting the statutes in evidence. The cases themselves should be specifically put in. Confining ourselves to the evidence, we do not find the contention of the commonwealth sustained. So far as respects the question of cohabitation after the complete decree of divorce between the defendant and his first wife, there is nothing in the statutes and decisions introduced at

the trial which would justify a finding or ruling that cohabitation in Georgia a lawful marriage relation was created.

It is, however, urged by the commonwealth that even if a lawful marriage existed while the parties lived in Georgia when they afterward cohabited in Massachusetts they were husband and wife by virtue of Revised Laws, chapter 208, section 6, which reads as follows: "If a person, during the lifetime of a husband or wife with whom the marriage was in force, enters into a subsequent marriage contract without legal ceremony, and the parties thereto live together as husband and wife, and such subsequent marriage contract was entered into by one of the parties in good faith in the full belief that the former husband or wife was dead, that the former marriage had been annulled by divorce without knowledge of such former marriage, they shall not be held to be guilty of bigamy, if the impediment to their marriage has been removed by the death or divorce of the other party to the former marriage, if they continue to live together as husband and wife in good faith on the part of one of them, be held to have been lawfully married from and after the removal of such impediment, and the issue of such subsequent marriage shall be considered the legitimate issue of both parents."

This statute, of course, can have no extraterritorial effect. It could not have affected the status of the parties to a marriage ceremony in Georgia while they continued to live in that state. The "impediment" was removed several months before they left that state. The statute validates the marriage "from <sup>284</sup> and after the removal of such impediment." The plain inference from this is that it applies only to cases where, upon the removal of the impediment, it can instantly take effect. As stated by this court in *Turner v. Turner*, 189 Mass. 373, 109 Am. St. Rep. 643, 75 N. H. 101, the purpose of the statute "is to provide that the marriage ceremony, illegal at first by reason of the existence of the impediment, shall be regarded as taking place at the time the impediment is removed. . . . It is immaterial whether the removal of the impediment is known or unknown. Whether known or not, the marriage ceremony becomes operative from the removal, if the parties continue to live together as husband and wife in good faith on the part of one of them. In the case at bar all the conditions of the statute were fulfilled for months before the parties left Georgia. Manifestly the statute could not apply. The parties were not within the jurisdiction of the statute when by its terms the time came

it to take effect. It must take effect then, if at all. The case, therefore, is not within the statute.

According to the terms of the report, the verdict should be set aside and a new trial granted.

So ordered.

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*A Marriage Between Parties* when either has a lawful wife or husband living is void: *Potter v. Clapp*, 203 Ill. 592, 96 Am. St. Rep. 322; *Barth v. Barth*, 102 Ky. 56, 80 Am. St. Rep. 335.

*The Effect of the Removal of an Impediment to an Attempted Marriage*, followed by cohabitation of the parties, is discussed in the recent note to *Klipfel v. Klipfel*, ante, p. 96.

*As to What Marriages are Void*, see the note to *State v. Lowell*, 79 Am. St. Rep. 361; as to the effect of a void marriage, see note to *Deeds v. Strode*, 96 Am. St. Rep. 267; and as to presumptions in favor of the validity of marriages, see the note to *Pittinger v. Pittinger*, 89 Am. St. Rep. 198.

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## COMMONWEALTH v. WALSH.

[196 Mass. 369, 82 N. E. 19.]

**EVIDENCE**—*Conviction of a Crime cannot be Proved on Cross-examination of the Defendant*.—Under a prosecution for illegally selling intoxicating liquors, the accused cannot be compelled, on cross-examination, though he voluntarily offered himself as a witness, to answer whether he has ever been convicted of illegally keeping intoxicating liquors for sale. Such conviction can be proved only by the record thereof, though a statute provides that the conviction of a witness of a crime may be shown to affect his credibility. (pp. 559, 560.)

J. F. McGrath, for the defendant.

E. I. Morgan and G. S. Taft, district attorney, for the commonwealth.

<sup>369</sup> RUGG, J. The defendant was tried upon a complaint for the illegal selling of intoxicating liquors. He offered himself as a witness in his own defense, and on cross-examination was asked, "Have you ever been convicted of illegally keeping intoxicating liquor for sale?" The defendant was compelled to answer the question, and replied in the affirmative. His exception to this ruling brings the case here.

In *Commonwealth v. Quin*, 5 Gray, 478, and *Commonwealth v. Sullivan*, 161 Mass. 59, 36 N. E. 583, questions were asked of witnesses other than the defendant, which were treated as an attempt to prove a conviction of crime, on cross-examination and without the production of the record, for the purpose of affecting their credibility. It was said in the first case that the question was improperly put to the wit-

ness, for the reason that it "involved the fact of a conviction, which could only be proved by record," decision was followed in the second case. The same apparently has been assumed to apply as well to a party placing himself as a witness in his own behalf as to other parties. See *Commonwealth v. Green*, 17 Mass. 515; *Gertz v. F. R. R.* 137 Mass. 77, 50 Am. Rep. 285; *Commonwealth v. Green*, 146 Mass. 131, 15 N. E. 153; *Lamoureux v. New York*, 169 Mass. 338, 47 N. E. 1009, and *Commonwealth v. Green*, 170 Mass. 14, 48 N. E. 782. This was early the law in England: *Rex v. Castell Careinion*, 8 Q. B. 101. It has been argued in behalf of the commonwealth rule should not be applied to parties, but should be applied to witnesses not parties. No such distinction can be drawn from the language of the statute: Rev. Laws, c. 175, § 21. It is clear that the defendant in a criminal case is comprehended by the descriptive words used in both sections.

It next is urged that these decisions should be overruled and the rule established permitting proof of such conviction by a cross-examination of the witness. *State v. Knowlton*, 429 Me. 429, 57 Atl. 588, *McGovern v. Hayes*, 75 Vt. 104, 326, *McLaughlin v. Mencke*, 80 Md. 83, 30 Atl. 603, *State v. Conrad*, 19 Mich. 170, and *State v. Babcock*, 25 R. I. 55 Atl. 685, are cited as authorities in support of this position. The Massachusetts rule is supported by *Hall v. State*, 30 Conn. 551, *Kirschner v. State*, 9 Wis. 140, and *People v. Griswold*, 24 N. Y. 298. We see no sufficient reason for overruling *Commonwealth v. Quin*, 5 Gray, 478. It is an established rule of practice in this commonwealth for many years, and has its foundation in the common law of England. While the doctrine of stare decisis does not prevent innovation and correction of principles previously declared, we have no question that the practice prevailing in this commonwealth has been correctly expounded in the cases we are asked to overrule. It is the province of the court to declare the law, and not to legislate. It is generally, though not universally, true, that, wherever such cross-examination is permitted, it is by virtue of a statute: See 2 Wigmore on Evidence, sec. 1270, note 5.

Exceptions sustained.

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*The Cross-examination of the Accused in a Criminal Prosecution*—he has voluntarily offered himself as a witness, is discussed in note to *State v. Duncan*, 38 Am. St. Rep. 895; *Evans v. O'Connor*, 38 St. Rep. 318.

*Evidence of Other Crimes in Criminal Prosecutions* is discussed in note to *Sykes v. State*, 105 Am. St. Rep. 976.

## COLBURN v. MARBLE.

[196 Mass. 376, 82 N. E. 28.]

**BREACH OF PROMISE OF MARRIAGE—Evidence of Reputation for Chastity.**—In an action by a woman to recover for the breach of defendant's promise of marriage, she should not be allowed, in rebuttal, to prove her good reputation for chastity. (p. 563.)

**EVIDENCE—Reputation, When not Admissible.**—In a civil action, evidence of good character or reputation is not admissible for the purpose of meeting evidence of specific acts of misconduct. (p. 563.)

**EVIDENCE OF CHARACTER.**—Character is not to be Shown by Evidence of Specific Acts, but only by evidence of reputation. (p. 564.)

**BREACH OF PROMISE TO MARRY—Want of Chastity as a Defense.**—Actual unchastity, either before or after the making of the promise of marriage, if there has been no waiver of the condition, justifies the defendant in breaking the engagement for that reason. (p. 564.)

**BREACH OF PROMISE OF MARRIAGE.—Immodest Acts of Plaintiff.**—Immodest or indecent conduct on the part of a woman, not amounting to unchastity, is not admissible in evidence in an action by her for a breach of promise of marriage, either in defense or in mitigation of damages. (p. 565.)

**BREACH OF PROMISE OF MARRIAGE—Evidence of What was Told Defendant by a Third Person.**—In an action for a breach of promise of marriage, the defendant is not entitled to prove that he stopped going with the plaintiff because of something told him by a third person. (pp. 565, 566.)

**BREACH OF PROMISE TO MARRY.**—Want of chastity not known to defendant until after the commencement of an action for the breach of a promise to marry is nevertheless a good defense. (p. 566.)

**BREACH OF PROMISE OF MARRIAGE—Fraud in Concealing Unchastity, What is not.**—Mere silence on the part of a woman, without any inquiry on the part of the man, though resulting in the concealment of matter which would have broken the engagement if known, does not constitute fraud on her part. (p. 566.)

**BREACH OF PROMISE OF MARRIAGE for an Insufficient Reason does not Bar a Defense Founded upon Good Cause not Known When the Breach Occurred.**—If a man commits a breach of his promise of marriage on a ground other than the fornication of the woman with a third person, this does not waive such fornication nor prevent its operation as a defense to the action. (pp. 566, 567.)

**APPEAL AND ERROR—Harmless Ruling.**—Though the court gives an erroneous instruction, this does not constitute a reversible error, if the facts upon which the instruction was given were found by the jury not to exist. (p. 567.)

**BREACH OF PROMISE OF MARRIAGE—Mitigation of Damages.**—The refusal of an instruction respecting fornication by the plaintiff who sues for a breach of promise of marriage is not error when, by its terms, it includes fornication committed by the plaintiff with the defendant. (p. 567.)

Action alleging a promise by the defendant to marry the plaintiff, and that under and wholly by reason of such promise

she was seduced by the defendant, who thereafter refused to perform his promise. The answer consisted of a general denial and an averment that the defendant was justified in his refusal to perform his promise, if he ever made one.

The plaintiff had always lived with her parents, who had lodgers, including two men, one named Bragg and one named Smith. The defendant offered evidence to controvert the allegation that he had promised to marry plaintiff. He admitted having had repeated sexual intercourse with her. He then offered to show that while the men above named were lodging at her parents' house, she went into the bedroom of one of them and conducted herself in an immodest and indecent manner, and, at the same time, her mother repeated certain words of a suggestive and indelicate character, to which the plaintiff took no exception; that at another time her mother pushed a man into a bedroom where the plaintiff was naked and locked the door on them; that the mother, herself, at various times, had adulterous relations with other persons; that the defendant, during the progress of which the plaintiff was present, a guard to give warning in the event of the father's return, and also that the plaintiff had committed fornication with a man named Martin, and that the defendant had committed none of these acts until after he had a conversation with Wilson in January or February, 1906, which was nearly two years after the alleged promise of marriage, and a few months prior to the commencement of the present action.

The judge at the trial allowed the defendant to introduce evidence of the alleged misconduct of the plaintiff with Martin, but the defendant, being unable to state the facts in evidence as to any of the other matters would prove any offense by the plaintiff, the judge ruled that no other evidence amounted to an offer of proof of specific criminal conduct, and excluded the evidence offered, to which the defendant excepted.

The defendant having testified that he did not go to the plaintiff's house after his talk with Wilson, was asked by his counsel "whether or not it was because of what Wilson told him that he did not afterward go to the plaintiff's house?" But the judge said that "his reason is incompetent," and he would "exclude that question in its present form, to the defendant excepted. He was then asked by his counsel "In consequence of what did you abstain from going to that house?" and this question was excluded, but in the argument the defendant waived his exception to the exclusion.



The jury found for the plaintiff, and also, in answer to a specific question, found that the plaintiff had not been guilty of misconduct with Martin.

E. Greenhood and L. E. Fales, for the defendant.

H. T. Richardson, for the plaintiff.

<sup>379</sup> SHELTON, J. In our opinion the plaintiff ought not to have been allowed to prove in rebuttal her good reputation for chastity. The general principle is that in civil actions evidence of <sup>380</sup> character or reputation is not admissible for the purpose of meeting evidence of specific acts of misconduct: *Day v. Ross*, 154 Mass. 13, 27 N. E. 676. Cases in which the character of the plaintiff is put directly in issue, as in slander or libel, or in which evidence of general reputation may be received as bearing upon a question of notice or of probable cause, are not really exceptions to the rule. This rule is clearly stated, with a full citation of authorities, in *Geary v. Stevenson*, 169 Mass. 23, 47 N. E. 508. It was applied to an action for breach of promise of marriage by the supreme court of Pennsylvania in *Lecky v. Bloser*, 24 Pa. 410. It has been applied in England to the analogous case of an action by a parent for the seduction of a daughter: *Bamfield v. Massey*, 1 Camp. 460; *Dodd v. Norris*, 3 Camp. 519. The defendant merely had attempted to show specific acts of unchastity on the part of the plaintiff; he had not, by attacking her reputation, opened the field to her to offer evidence to support it, as in *Smith v. Hall*, 69 Conn. 651, 38 Atl. 386. So far as the decisions in some other states go beyond the doctrine here adopted, we do not regard them as sound. The defendant's exception upon this subject must be sustained.

The defendant also offered to prove several instances of immodest and indecent conduct of the plaintiff in 1902, prior to his alleged promise, together with evidence that he did not learn of these things until 1906, and that he then ceased his relations with her. This evidence, so far as it did not tend to show actual unchastity on her part, was excluded; and the defendant's exception to this ruling raises the next question to be considered.

There is much authority for saying that the defendant had the right to show, if he could do so, that the plaintiff's reputation for chastity was bad before the making of his promise: *Boynton v. Kellogg*, 3 Mass. 189, 3 Am. Dec. 122; *Woodard v. Bellamy*, 2 Root, 354; *Von Storch v. Griffin*, 77 Pa. 504;

Capehart v. Carradine, 4 Strob. 42; Morgan v. Yarbor, 5 La. Ann. 316; Burnett v. Simpkins, 24 Ill. 264; Butcher v. Eschleman, 18 Ill. 44; Denslow v. Van Horn, 16 Iowa, 321; Stewart v. Smith, 92 Wis. 76, 65 N. W. 736; Kantzler v. Grant, 2 Ill. App. 236. But the evidence offered by the defendant could not have been admitted upon that ground, as it is settled in this commonwealth that character is not to be shown by evidence of specific acts, but only by evidence of reputation: McCarty v. Coffin, 157 Mass. 478, 32 N. E. 649; Miller v. Curtis, 158 Mass. 127, 35 Am. St. Rep. 32 N. E. 1039, and cases there cited. There is nothing inconsistent with this in Sullivan v. Lowell etc. Ry., 162 N. E. 536, 39 N. E. 185, and the rule as to human beings is recognized in Palmer v. Coyle, 187 Mass. 136, 72 N. E. 844.

Actual unchastity, either before or after the making of a promise of marriage, if there has been no waiver of the objection, will justify a defendant in breaking the engagement for that reason: Young v. Murphy, 3 Bing. N. C. 54; In re Greenwood, 1 Car. & P. 350; Bench v. Merrick, 1 C. K. 463; Snowman v. Wardwell, 32 Me. 275; Foster v. Chett, 68 Vt. 319, 54 Am. St. Rep. 886, 35 Atl. 316. But these and the many other decisions which might be cited to the same effect do not help the defendant; for he was allowed to offer testimony of this kind, and none of the offers which were excluded went further than the claim that the plaintiff's actions had been immodest and indecent: Fry v. Leslie, 12 Va. 269, 12 S. E. 671; and conduct of this kind prior to the engagement never has been held to justify a breach of promise. Indeed, the mere fact that the plaintiff in a case like this has, in some respects, violated the criminal law would not be enough for this purpose: Berry v. Baker, 44 Me. 164.

The defendant, however, contends that the evidence is competent in mitigation of damages; and it has been held in some other states that indelicate, immodest or indecent conduct on the part of the plaintiff in a suit of this character, though not amounting to actual unchastity, is yet to be considered by the jury in assessing damages: Palmer v. Anderson, 7 Wend. 142; Stewart v. Smith, 92 Wis. 76, 65 N. W. 736; Stratton v. Dole, 45 Neb. 472, 63 N. W. 875. And in Boylston v. Kellogg, 3 Mass. 189, 3 Am. Dec. 122, the defendant was allowed at the trial to give in evidence any instances of bad conduct and even of indelicacy in the plaintiff; but the decision of the full court was only that the defendant could not prove in mitigation of damages the plaintiff's general

character after the promise and before the breach. The somewhat broader statements of this decision made in *Butler v. Eschleman*, 18 Ill. 44, and in the dissenting opinion of *Davies, J.*, in *Johnson v. Jenkins*, 24 N. Y. 252, are not to be supported.

The argument on which these cases were decided seems to <sup>382</sup> have been that a woman of loose conversation and immodest demeanor would suffer less from a breach of an engagement to marry than one of purer mind and more reserved bearing; a supposition which, we think, it would be difficult to justify. And it is not without significance that these decisions were made in states in which exemplary or vindictive damages are allowed in some instances to be given; and there was, perhaps, greater reason for allowing it to be shown that the plaintiff's conduct had not been morally blameless than would be the case in this commonwealth, where no greater damages can be given than a compensation for the injury actually sustained. Nor does the argument seem to go further than to leave it to the jury to say what damages should be given to a woman of the character such as they might find to be indicated by what was shown to have been her conduct. But if this is so, the evidence of her specific actions would be material only as throwing light upon her character; and we have already seen that in this commonwealth, although a different rule prevails in some other states, character can be proved only by evidence of reputation.

Accordingly, we find no error in the rulings refusing to admit the evidence which has been spoken of.

Nor has the defendant any right of exception to the ruling refusing to allow him to testify that it was because of what *Wilson* told him that he stopped going to the plaintiff's house. It may be that the question which he put was excluded by reason of its form; and the defendant at the argument before us waived his exception to the exclusion of a similar question put in a correct form. But we are of opinion that the evidence was incompetent in substance. The defendant's contention was that what *Wilson* told him included all the matters which had previously been excluded, and which we already have seen were incompetent. It may be granted that the defendant in a suit like this may show in defense that he broke off the contract to marry by reason of material misconduct in the other party: *Sheahan v. Barry*, 27 Mich. 217; *Snowman v. Wardwell*, 32 Me. 275; *Espy v. Jones*, 37 Ala. 379. But this did not entitle the defendant either to introduce incompetent evidence under the guise of showing the

reason for his acts, or to show that he had broken off relations with the plaintiff for reasons which did not justify him in so doing. As most of the matters communicated to him by Wilson were incompetent, and could not themselves be testified to, it was immaterial whether his conduct was based upon them. He was permitted to testify to all that he did after this conversation, and that, under the circumstances, was all that he was entitled to. Moreover, even if it could be supposed that what he did was based wholly on the plaintiff's misconduct by the plaintiff, the most that he could have been allowed to say upon his story would have been that he himself committed fornication with the plaintiff because Wilson told him that she had previously committed the same offense with someone else. This reason could not have fitted any claim on his so as to constitute a defense. Nor could the jury have disconnected this alleged reason from the setting in which the defendant would have used it, and attached it to a completely different set of facts, the very existence of which the defendant denied. The defendant's state of mind could only be applied to the facts only as he then understood them, and it might or might not have been his state of mind upon the particular and different facts. Accordingly, the evidence rightly excluded.

The judge ruled that if the plaintiff was guilty of unchastity before the defendant's promise to her, and did not inform him and he did not know of it until after action brought, the verdict must be for him. This was correct. The judge added, at the request of the plaintiff, that "mere silence on her part, without inquiry by him, though resulting in concealment of matters which would have broken the engagement if known, would not constitute fraud on her part, and the defendant excepted to this. But this, too, was correct: *Van Houten v. Morse*, 162 Mass. 414, 44 Am. St. Rep. 373, 38 N. E. 705, 26 L. R. A. 430. The parties have argued the case as if this amounted to a withdrawal of the ruling first made; and, if that were so, it would be erroneous for the reasons heretofore stated. But we do not so understand it. And the further ruling given, that if the defendant abandoned the plaintiff "for any reason other than her fornication with another, such fornication would now be no defense to this action, even though he would have been justified at the time of such abandonment in breaking his promise by reason of such fornication if he had then known of it," although supported by *Sheahan v. Barry*, 27 Mich. 217, was 38

roneous, so far as it applied to any act of fornication which was not then known to him, and which accordingly he could not be said to have waived. The true rule was that which had been previously stated to the jury. But the defendant has not suffered by this error; for he relied only upon the testimony concerning the plaintiff's condition in September, 1903, which the jury must have found to have been due to the defendant himself, and upon his claim relative to Martin, which the jury have expressly negatived.

The defendant also excepted to the judge's refusal to instruct the jury that evidence of fornication on the part of the plaintiff would be considered in mitigation of damages. But this request was too broad. It included fornication committed with the defendant, and so could not have been given: *Espy v. Jones*, 37 Ala. 379; *Johnson v. Smith*, 3 Pittsb. 184. Nor, for the reasons above stated, has the defendant suffered by its not having been given.

The exception to the refusal of the judge to define the word "seduced," as requested by the defendant, has not been argued, and we treat it as waived.

Exceptions sustained.

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*Defenses to Actions for Breach of Promise to Marry* are discussed in the notes to *Shackleford v. Hamilton*, 40 Am. St. Rep. 172; *Burnham v. Cornwell*, 63 Am. Dec. 532. The general reputation of a woman for unchastity is no bar to her action for breach of promise of marriage; and to constitute unchastity a defense, the defendant must not only prove her to be actually unchaste, but also that he had no knowledge of such unchastity at the time of making the promise to marry: *Foster v. Hanchett*, 68 Vt. 319, 54 Am. St. Rep. 886.

*Before Making or Accepting an Offer of Marriage* it is not the duty of a party to communicate all the previous circumstances of his or her life, and the parties are bound if they become engaged without making any investigations, and without receiving any assurances or representations which led to the engagement: *Van Houten v. Morse*, 162 Mass. 414, 44 Am. St. Rep. 373, and note. See, however, *Grover v. Zook*, 44 Wash. 489, 120 Am. St. Rep. 1012.

# NICHOLS v. BOARD OF ELECTION COMMISSIONERS.

[196 Mass. 410, 82 N. E. 50.]

**CONSTITUTIONAL LAW—Elections—Voting Machine.**—Under a constitution requiring officers to be "chosen by written ballot," a statute providing for the use of a voting machine is unconstitutional where the voter must trust everything to the perfection of the machine and cannot see whether it is properly working or not. (196 Mass. 410, 82 N. E. 50.)

J. H. Vahey, C. H. Inness and T. F. Vahey, for petitioners.

T. M. Babson, for the respondents.

<sup>410</sup> KNOWLTON, C. J. This is a petition for a writ of mandamus to compel the board of election commissioners of the city of Boston to provide the so-called Australian ballot for use at the next election in precinct 6 of ward 1 of the city, instead of the Dean ballot machine which the board voted to use. The case was reserved by a single justice for determination by the full court.

<sup>411</sup> It appears that this machine has been approved by the secretary of the commonwealth, the treasurer and receiver general, and the auditor of accounts, under the provisions of the Revised Laws, chapter 11, section 270, and regulations. The use of it have been made and instructions for voting have been prepared by the secretary of the commonwealth in accordance with the Statutes of 1905, chapter 313, section 1.

This machine is a mechanical device for registering votes. In shape it is like a box. It is about three feet in height, two and one-half feet square upon its upper surface, and is used as follows: Immediately before the opening of the election it is inspected by the election officers. There are certain dials on the machine, some registering the number of votes cast by a candidate for office, and one which records the total number of voters casting ballots. All these dials are set at zero. The election officers see that a steel top is properly placed over the machine, upon which top is pasted the list of candidates to be voted for and questions to be answered. This top is then locked by the election officers. When it is so locked, it is impossible for any voter to turn the dials which register the number of votes cast for the various candidates, and all that the voter can see is the names of the various candidates and the language of the questions.

and such other information in reference to the candidates as is required by law to be upon the ballot. As each voter gives his name when about to vote, he steps under a curtain connected with the machine, which curtain conceals the face of the machine and all of the mechanical device used for registering votes from the sight of the election officers. The voter sees upon the face of the machine only the names and information above mentioned, and a number against the name of each candidate. There is a blank space to the right of the number, and a key to the right of the blank space, about one-fourth of an inch square. The voter pushes down the key to the right of the name of each candidate for whom he desires to vote. The pushing down of the key causes a cross to be exposed in the blank space between the number and the key, but none of the dials registering votes is moved in consequence of the pressing down of the key. After he has marked a cross in this way against the name of each candidate for whom he desires to vote, he throws a lever, called the operating lever, from right <sup>412</sup> to left, before which act he may change his cross from one candidate to another. This lever is attached to the machine, and the moving of it from right to left, and this alone, causes a dial connected with the name of each candidate so crossed to move, thereby registering a vote for each candidate whose name is crossed. The movement of this dial cannot be seen by the voter or by anyone else. After the polls are closed, the election officers unlock the top on which the official list of candidates and questions is pasted, and read the dials, and make official returns of the votes cast for each of the respective candidates and questions in accordance with the figures shown upon the dial.

The petitioner contends that the use of this machine as proposed would be illegal and in violation of the provision of the constitution of the commonwealth, chapter 1, section 3, article 3, which provides that representatives to the general court shall be "chosen by written votes," and of other provisions of the constitution, which by implication require that other state officers shall be chosen in the same way: See Mass. Const., art. 3, c. 2, sec. 1; art. 2, c. 1, sec. 2; art. 10, c. 2, sec. 1; Amendments to the Constitution, arts. 16, 17. In article 3, chapter 2, section 1, cited above, it is made the duty of the town clerk, in the presence of the selectmen of towns who conduct the election, to "sort and count the votes, form a list of the persons voted for, with the number of votes for each person against his name," and to "make a fair record of the

same," and a "public declaration thereof"; and the other similar provisions.

The constitutional question thus raised was considered the different answers given to questions submitted to the House of Representatives, which appear in the Opinions of the Justices, 178 Mass. 605, 60 N. E. 129, 54 L. R. A. 430.

This question may be answered affirmatively or negatively according to the degree of strictness with which we interpret the language of the constitution. If a choice by written ballot is to be limited as to details to the particular method or methods which the framers of the constitution had in mind more than one hundred years ago, it is plain that the use of a machine is not permissible. If we look at the object of the constitutional requirement, there is ground for an argument that it may be accomplished by the use of this machine. That, in a broad and <sup>413</sup> liberal application of the provisions of the constitution to the present conditions and present methods of voting, the use of this machine at an election should be deemed a choice "by written votes." It might be argued that the making of a material record of his vote by each voter, and thereby securing for it greater certainty of permanence than would result from a show of hands or a declaration viva voce, is accomplished by the use of a machine as well as by a paper vote written by the hand of the voter and deposited in a box. The secrecy of the ballot is even more effectively secured by the machine than by the method practiced one hundred years ago. It might be contended that, when the voter has pressed down the key corresponding to the name of each of his candidates, he has before him a record upon which his choice is designated by the crosses opposite the names, and that his movement of the lever which registers the record upon the dials below does not differ in effect from a movement of his hand in throwing a piece of paper into a box, and that the numerical adjustments and uncertainties that intervene between his act and the entry of the record in the election officers are no greater in the one case than in the other. Some of the justices, including the writer of this opinion, would prefer to decide that this method of voting is within the meaning of the constitutional provision.

But the method in detail is entirely unlike the writing of a name of chosen candidates upon a piece of paper, and the deposit of the paper in a box, to be afterward taken out and counted. In the use of the machine the voter must devote everything to the perfection of the mechanism. He must see whether it is working properly or not. This cha



error, whether greater or less than the chance that a ballot deposited in a box will not be properly counted, is very different from it. It was not within the knowledge or contemplation of the framers of the constitution.

In one of the opinions already referred to, signed by three of the justices (178 Mass. 605, 60 N. E. 129, 54 L. R. A. 430), this language was used: "Interpreting the constitution in the light of the circumstances existing at the time of its adoption, as well as of the laws and customs which had theretofore prevailed, we think that the language prescribing the way in which the will of the voters shall be expressed and ascertained in the case of the election of <sup>414</sup> governor and of the other state officers, where similar language is used, necessarily implies at least that the choice of the voter shall be indicated by some kind of writing upon a paper or other material thing, that this material thing bearing this written expression of the choice of the voter shall by this act of voting pass from his possession and control into that of the officers charged with the duty of conducting the election, and that the voter shall have reasonable opportunity to see that it has so passed, that it shall be distinct from that handed in by any other voter, and that these written votes so handed in shall continue to be the same material things, capable of being handled, sorted and counted, and that the whole work of ascertaining and declaring the result shall be the personal act of these election officers, with the written votes before them, the sorting and counting as well as the declaration of the result being done by sworn officers. One reason for the requirement of a written vote is that the voter may have a reasonable opportunity of making his choice without immediate influence upon the part of others; and that the reason for the requirements applicable to the sorting and counting is that the votes may not fail of their proper force by reason of mistake or fraud in the count. The safeguard erected by the constitution is that there shall remain after the closing of the voting, in a material form, capable of being read and understood by men, a written vote cast by each voter; and that all these individual votes, each given by the voter to the election officers, shall be read, sorted and counted in accordance with the several tenor of each, by men acting under the sanction and obligation of their respective official oaths."

There is no doubt that, in reference to the only conditions and methods which they then knew or thought possible, this is a fair statement of what was in the contemplation of the framers of the constitution. To a majority of the court, the

adoption and use of a machine which employs novel methods, and whose working and whose record of is invisible to the voter, seem so great a departure from the method referred to in the language of the constitution as to be included within its broadest meaning. Even if the principal objects to be accomplished by the constitution would be accomplished as well by the use of the machine, it seems too great a <sup>415</sup> stretch of language to say that the use of it is the expression of a choice by a written ballot, the opinion from which we have already quoted in this language: "The turn of a wheel or a dial, the opening of a hole in an unseen roll of paper on which are the names of candidates, by a voter who pulls a lever or turns a handle, is not the use of a written vote within the meaning of the constitution; nor is the inspection of a dial, even if followed by an inspection of all the cogs and wheels which have moved the hands of the dial, or the counting of the holes in such a paper and the inspection of the marks which made the holes, the sorting and counting of the ballots by election officers. If it be said that these are the most efficient means to secure a free and honest election, the answer is that they are not the means prescribed by the constitution. The constitution does not require the general court to put the expression of the vote at the chance of being nullified or perverted by slipshod machinery, defective levers or other mechanical devices which exclude living intelligence, no conscience and no liability to insure their going right. It requires a careful step in the task of seeing that votes, whether given by show of hands or by paper writing, are counted rightly and intrusted to and performed, not by an inanimate machine but by sworn officers, and in open meeting, where the result of the work can be verified and mistakes corrected."

Decisions in other states that bear upon this question under constitutional provisions differing somewhat from our own, and we do not deem them conclusive: In *Machine*, 19 R. I. 729, 36 Atl. 716, 36 L. R. A. 54; *v. Comstock*, 99 Minn. 261, 109 N. W. 113, 698, 700 N. S., 621; *Lynch v. Malley*, 215 Ill. 574, 74 N. E. 1029, 69 L. R. A. 184. In the opinion of a majority of the court the statute under which the respondents are proceeding is unconstitutional.

Peremptory writ of mandamus to be issued.

**CONSTITUTIONALITY OF STATUTES AUTHORIZING THE USE OF VOTING MACHINES.**

The constitutionality of statutes authorizing the use of voting machines was, we believe, first judicially considered in February, 1897, when the justices of the supreme court of Rhode Island answered a question submitted to them for their opinion. The question has been considered and determined by the highest courts of six of the states, either in response to requests for the opinions of the judges made by the proper authorities, or in determining litigated cases presented to the courts for decision. In five of these states the answer has been unequivocally in the affirmative, though not always without a dissent on the part of some of the judges: *Lynch v. Malley*, 215 Ill. 574, 74 N. E. 723; *United States S. V. M. Co. v. Board of Supervisors*, 132 Idaho, 38, 119 Am. St. Rep. 539, 109 N. W. 458, 7 L. R. A., N. S., 512; *Detroit v. Board of Inspectors*, 139 Mich. 548, 111 Am. St. Rep. 430, 132 N. W. 1028, 69 L. R. A. 184; *Elwell v. Comstock*, 99 Minn. 261, 109 N. W. 113, 698, 7 L. R. A., N. S., 621; *In re Voting Machine*, 19 R. I. 729, 36 Atl. 716, 36 L. R. A. 547. In each of the states wherein the question arose, the constitution provided for votes by ballot, and though the phrase in the constitution of Massachusetts is not precisely in this form, we cannot perceive that there is any difference in substance. The first opinion given by the justices of the supreme judicial court of Massachusetts appeared to favor the constitutionality of statutes authorizing the use of these machines: *Opinion of Justices*, 178 Mass. 605, 60 N. E. 129, 54 L. R. A. 430; but even in that case, one of the judges concurring in the affirmative stipulated that it must appear that the machine gave the voter an opportunity to know that the vote, registered was the same as that which he sought to cast. The opinion of this judge now appears to conform to that of the majority in *Nichols v. Board of Elections Commrs.*, 196 Mass. 410, ante, p. 568, 82 N. E. 250, 12 L. R. A., N. S., 230, and probably renders impossible the use in that state of any voting machine now in existence for, as we understand them, none permit of the voter's seeing that the record made is precisely that which he intended.

We cannot but regard the decision in the principal case as a step backward, and one not necessarily commanded by the constitution of that state. It is true that it requires a written vote, but this is equivalent to requiring a vote by ballot. There has been no contention that the requirement either of a written vote or a vote by ballot can be satisfied only by a vote by a ballot made by the hand of the voter. Ballots have long been printed, and the habit of printing them probably antedated the adoption of the several constitutions providing for vote by ballot or in writing. The voting machine, as we understand it, prints or registers the vote as cast, and thereby accomplishes the purposes of a ballot in writing, and the only insuperable objection found by the supreme judicial court of Massachusetts was that the voter must depend on the perfection of the machine and could not see that it actually obeyed his wish.

The ultimate object of the ballot was to have the vote cast by the proper officers for the persons for whom the voter exercised the elective franchise, and under no system involving the secret ballot could the voter, beyond all possibility, see that his vote was properly counted. The voting machine is an attempt to substitute a proper and speedy counting of the votes, and we think it is not held to promote, rather than to subvert, the object of the constitutional provisions guaranteeing and regulating the exercise of the elective franchise. The courts affirming the validity of the statute authorizing the use of voting machines of course concede that such machines were not within the thought of the delegates who framed the constitution, nor of the voters who ratified, the different state constitutions. The object of these constitutions, as these courts concede, was to prohibit statutes authorizing viva voce votings, and to secure the secrecy of the ballot. Such object is not made more difficult of attainment by the use of voting machines, but if any particular machine is so arranged that it may not at an election at which the machine is used permit of the voter's casting his vote in secret, then the machine is to be discarded, or, in other words, the statute purporting to authorize its use must be adjudged unconstitutional: *Helme v. Board of Election*, 149 Mich. 390, 119 Am. St. Rep. 681, 113 N. W. 6. In this case it appeared that before a voter could vote for a particular candidate or of candidates, or a candidate whose name was not on the ballot, he must apply to an election inspector for a paper ballot, which, when preparing, he must fold and deliver to the inspector to be placed in a cartridge and introduced into a receptacle prepared for the machine, and through that into a box, to be counted if it was found that the persons voted for could not otherwise have been voted for by the use of the machine. It was obvious, said the court, that a voter could not ask for and vote such a ballot without indicating that he did not vote for his full party ticket, and to this extent that he was reluctant to have his want of party fealty manifested acted as a deterrent to his voting for the persons of his choice. The court was of the opinion that the requirements found in the statute under consideration were unconstitutional as applied to the case before it, because they violated the right of the elector to vote a secret ballot, and hence that as all the machines in use in the county were of this infirmity, they could not lawfully be used, and it was necessary that paper ballots be furnished for each precinct.

## MILES v. JANVRIN.

[196 Mass. 431, 82 N. E. 708.]

**LANDLORD AND TENANT—Breach of Promise to Repair—Tort.**—Though a landlord in a lease covenants to keep the premises in repair, yet the tenant cannot sustain an action of tort for personal injuries received by him because of the breach of such covenant. (p. 576.)

**LANDLORD AND TENANT—Contract to Keep Premises in Repair or to Make Specific Repairs.**—There is no difference, so far as the liability of the landlord is concerned, between a promise to keep the premises in repair generally during the time of the lease and a contract to make special repairs, but there is a difference between the landlord's agreeing to maintain the premises in a safe condition for the tenant's use and a contract to keep the premises in repair. (pp. 577, 578.)

**LANDLORD AND TENANT—Right of the Latter to Maintain Tort for a Failure to Repair.**—A tenant cannot maintain an action of tort against a landlord for injuries due to the latter's breach of a contract or covenant to keep the premises in safe condition or repair, unless the contract is such that, notwithstanding the lease, the premises, so far as their safety is concerned, must be deemed to remain in the control of the landlord, with nothing but a right in the tenant to use them. (p. 577.)

**LANDLORD AND TENANT—Notice to the Former to Repair, When Necessary.**—Where, by the force of a contract, the landlord is to maintain the premises in safe condition for the tenant's use, no notice is necessary, but where the landlord's contract is to keep the premises in repair as the premises of the tenant during the time of the lease, notice is necessary before the landlord is in default. (p. 582.)

**LANDLORD AND TENANT—Who may not Maintain an Action for Injuries Due to a Failure to Keep Premises in Safe Condition.** The wife of the tenant cannot maintain an action of tort against the landlord for personal injuries due to his breach of a contract or covenant to keep the premises in repair and in a safe condition. (p. 583.)

Tort by the plaintiff, a married woman, for personal injuries sustained by her by falling upon a defective doorstep in a dwelling-house occupied by her and her husband under a lease to him by the defendant's intestate, the allegation being that the steps were negligently permitted by such intestate to be out of repair.

The evidence offered at the trial tended to show that the defendant's intestate agreed with the plaintiff's husband to repair the steps in question and to keep "them in good condition, so that no one could get hurt."

The trial judge instructed the jury that if the defendant's intestate merely agreed to do certain specified repairs upon the premises, that would not make him liable for the accident of the kind which happened to the plaintiff, but that if de-

fendant's intestate "made an agreement to keep the premises in repair as long as the tenancy lasted, then that would be an agreement which would transfer from the tenant to the landlord the duty of keeping the premises, keep the steps in repair"; that to establish liability on the part of the defendant, the jury must find that the injury "happened through the want of repair of this lower flight of steps, and, in the next place, that the care of those steps, the duty to repair them, had been by agreement between Mr. Janvrin and Mr. Miles transferred from the place where the law put it, to wit, upon Mr. Miles, to Mr. Janvrin, and that it was transferred, and then because of the negligence of Mr. Janvrin, and in consequence of that negligence, in his failure to repair the steps after the duty was transferred to him, this accident occurred and the plaintiff was injured."

Subject to exceptions by defendant and at the request of the plaintiff, the trial judge ruled that "if the jury find that the husband of the deceased [meaning the defendant's intestate], at the time of renting of the house, promised or in any form of words agreed to repair the steps and keep them in good repair and safe condition, and that he had notice of their unsafe condition, and that the plaintiff at the time of the accident was herself in the exercise of due care, the plaintiff was entitled to recover."

Verdict and judgment for the plaintiff. Defendant excepted.

H. E. Perkins and W. M. Robinson, for the defendant.

J. A. McGeough, for the plaintiff.

<sup>432</sup> LORING, J. It was held by this court in *Tuttle v. Gilbert Mfg. Co.*, 145 Mass. 169, 13 N. E. 465, that a landlord was not liable for personal injuries suffered by a tenant by reason of the omission <sup>433</sup> on the part of the landlord to repair the floor of a barn which he had agreed to repair as part of the contract of a lease of the barn. And the general doctrine was laid down there that a negligent omission to repair the premises of another is not the ground of an action of tort. The same conclusion was reached in *Cavalier v. Pope*, [1905] 2 K. B. 757; on appeal, [1906] App. Cas. 428; *Brodtman v. Finerty*, 116 La. 1103, 41 South. 329. See, also, *Collins v. Karatopsky*, 36 Ark. 316. These were all cases where the agreement made by the landlord was to make specific repairs.

The presiding judge in the case at bar instructed the jury that there was a difference between an agreement by a land-

lord to make a specific repair and an agreement by him to keep the demised premises in repair generally during the term of the lease; and that the defendant's liability in the case at bar depended upon the question whether the defendant agreed to put the steps here in question in repair or whether he agreed to keep them in repair generally during the term of the lease.

In our opinion, however, a tenant does not go far enough to charge a landlord in tort for personal injuries caused by an omission to make needed repairs, when he has made proof that the landlord agreed, as one of the terms of the demise, to keep the premises in question in repair generally during the term of the lease. To charge a landlord in tort for personal injuries caused by a negligent omission to make needed repairs, not only must the tenant prove that the landlord agreed to keep the premises in repair, but he must go one step further and prove that the landlord agreed to maintain the premises in a safe condition for his (the tenant's) use; that is to say, he must prove that during the term of the lease, so far as their safety is concerned, the premises to be kept in repair are to remain in the control of the landlord (as they would have remained had there been no lease), with nothing but a right in the tenant to use them. In short, that, so far as their safety is concerned, the landlord's relation to the premises to be kept in repair is the same as that of a landlord in case of common passageways in a tenement house, as to which see *Domenicis v. Fleisher*, 195 Mass. 281, 81 N. E. 191, and cases there collected. The only difference being that in a case like the case at bar the tenant has an exclusive use,<sup>434</sup> while in case of common passageways in a tenement house the use which the several tenants have is not exclusive.

The difference between the two cases is plain. To take the case now before us: It is one thing to agree to maintain a flight of steps for the use of a tenant in going to and from the house of which he has a lease, even where the steps are a part of the premises let; it is another thing to demise and let to him the steps as part of the premises of which the house is the main thing, and agree to keep the steps in repair.

In the first of these two cases, it is within the contemplation of the parties to the contract that the tenant of the house is to have a right to use the steps on the footing that they are safe at all times during the period covered by the agreement. In the second, if the landlord omits to make needed repairs when he ought to make them, the tenant has no right to use the premises which ought to have been repaired on the footing

that they are in a safe condition; his right against the landlord in such a case goes no further than to have the repairs made at his landlord's expense. In respect to what is within the contemplation of the parties, there is no difference between a contract by the landlord to keep the premises of his tenant in repair generally during the term of the lease and a contract by a landlord to make specific repairs on the premises of the tenant. We repeat: There is a difference between a landlord's agreeing to maintain premises in a safe condition for the tenant's use and a contract to keep the tenant's premises in repair.

We have said that the landlord is liable if he has agreed to maintain a flight of steps for the use of a tenant in going to and from the house of which he has a lease, even when the steps are a part of the premises let. That requires a word of explanation. Where the arrangement between the landlord and the tenant is that during the term of the lease the landlord is to be responsible for the safety of a flight of steps which leads from the highway to the demised house, the direct way of carrying that arrangement into effect would be to give the tenant nothing but a right to use the steps. This would leave the steps in the control of the landlord, and, being in his control with an agreement to keep them in repair, the case would come within the principle of *Domenicis v. Fleisher*, 195 Mass. 281, 81 N. E. 191, and within <sup>435</sup> the decision in *Miller v. Hancock*, [1893] 2 Q. B. 177. But in such a case it is possible for the parties to carry out that arrangement by including the flight of steps in the premises demised with an agreement by the landlord to become absolutely liable for the maintenance of them in a safe condition during the term of the lease. If such a contract were made by a stranger (for example, by a carpenter), the contract would put the flight of steps in the control of the carpenter during the term of the lease, so far as necessary to insure their being in safe condition, on the principle applied in *Quinn v. Crimings*, 171 Mass. 255, 68 Am. St. Rep. 420, 50 N. E. 624, 42 L. R. A. 101, and *Wixon v. Bruce*, 187 Mass. 232, 72 N. E. 978, 68 L. R. A. 248. There is nothing to prevent the same contract being made to carry out the arrangement between a landlord and tenant stated above, although, as we have said, the direct way of carrying out such an arrangement would be to give the tenant a right to use the steps only.

In the following cases the rule of *Tuttle v. Gilbert Mfg. Co.*, 145 Mass. 169, 13 N. E. 465, was applied to agreements to keep the tenant's premises in repair generally throughout



the term of the tenant's lease: *Davis v. Smith*, 26 R. I. 129, 106 Am. St. Rep. 691, 58 Atl. 630, 66 L. R. A. 478; *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767; *Brown v. Toronto General Hospital*, 23 Ont. 599.

The law in New York seems to be in accordance with these cases: *Frank v. Mandel*, 76 App. Div. (N. Y.) 413, 78 N. Y. Supp. 855; *May v. Ennis*, 78 App. Div. (N. Y.) 552, 79 N. Y. Supp. 896; *Stelz v. Van Dusen*, 93 App. Div. (N. Y.) 358, 87 N. Y. Supp. 716; *Sherlock v. Rushmore*, 99 App. Div. (N. Y.) 598, 91 N. Y. Supp. 152; *Boden v. Scholts*, 101 App. Div. (N. Y.) 1, 91 N. Y. Supp. 437; *Hagin v. Cayuga Lake Cement Co.*, 105 App. Div. (N. Y.) 269, 93 N. Y. Supp. 428; *Dancy v. Walz*, 112 App. Div. (N. Y.) 355, 98 N. Y. Supp. 407. See, also, in this connection, *San Filippo v. American Bill Posting Co.*, 188 N. Y. 514, 81 N. E. 463, and *Reynolds v. Van Beuren*, 155 N. Y. 120, 49 N. E. 763, 42 L. R. A. 129, and cases there collected.

Before the case of *Cavalier v. Pope*, [1905], 2 K. B. 757, [1906], App. Cas. 428, there was authority in England to the contrary. It was stated by Lopes, J. (as he then was), in *Nelson v. Liverpool Brewery Co.*, 2 C. P. D. 311, that, if the landlord was under an obligation to make exterior repairs, an employé of the tenant could recover for injuries caused by his failure to make needed repairs on a chimney-top which fell and caused the injuries to the tenant's employé there complained of. The plaintiff in that case undertook <sup>436</sup> to make out an obligation on the landlord to make exterior repairs by showing a custom by which exterior repairs were made by landlords. The case went off on the ground that all that was proved there was a practice among landlords to make external repairs for their own interest, and that a custom making it obligatory on a landlord to make such repairs was not proved. On the authority of this statement of Lopes, J., however, it was ruled by Phillimore, J., in *Cavalier v. Pope* [1905], 2 K. B. 757; [1906] App. Cas. 428, that a landlord, who had agreed to repair the floor of the kitchen let to the plaintiff's husband in consideration of the husband's agreeing to continue his lease of the premises, was liable for injuries suffered by the tenant's wife in falling through the floor which had not been repaired by the landlord in accordance with this agreement. That the original ruling made by Phillimore, J., in *Cavalier v. Pope*, [1905] 2 K. B. 757; [1906] App. Cas. 428, was made on the authority of this statement of Lopes, J., in *Nelson v. Liverpool Brewery Co.*, see *Collins, M. R.*, [1905] 2 K. B., at p. 762, and *Lord Atkinson*, [1906]

'App. Cas., at p. 431. This ruling was reversed in the court of appeals, *Cavalier v. Pope*, [1905] 2 K. B. 757, and in the house of lords, [1906] App. Cas. 428; and the doctrine laid down by Lopes, J., was thereby overruled.

There is a case in the circuit court of the United States for the southern district of New York—*Moore v. Steljes*, 69 Fed. 518—in which it was held that a landlord who had agreed to keep the leased premises in repair was liable for injuries suffered by one entering under the tenant, because the cause of the injury in that case antedated the lease; that is to say, because the premises let were a nuisance when let. In the opinion of Wheeler, J., in that case, the liability of the landlord in such a case to a third person was discussed. But there is no discussion there as to the proposition that one entering under the tenant stands on the same footing as a third person in that connection. That is assumed in that opinion without discussion.

If *Moore v. Steljes*, 69 Fed. 518, were law in this commonwealth, it would not help the plaintiff in her contention that the instructions given in the case at bar were correct. The presiding judge in the case at bar did not tell the jury that the defendant was liable if they found that the steps here in question were in a dangerous condition at the date of the lease. He told them that the <sup>437</sup> defendant was liable here in case he agreed to keep the steps in repair. But although for this reason the decision in *Moore v. Steljes*, 67 Fed. 518, is not authority for the instructions given, the doctrine in that case, if it is law, will be of importance in the ultimate disposition of the case at bar. For that reason we stop to consider it.

*Moore v. Steljes*, 69 Fed. 518, is not law in this commonwealth. The ground on which it is held that a landlord is liable to a third person for letting premises in a ruinous condition is that maintaining premises in a ruinous condition is a tort as against a third person who is injured by reason of their condition, and that letting premises in that condition is authorizing the continuance of the nuisance: See *Dalay v. Savage*, 145 Mass. 38, 1 Am. St. Rep. 429, 12 N. E. 841. But it is not a tort as against the tenant for a landlord to demise to him premises in such a condition that they are a nuisance: See, for example, *Bowe v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471, and *Phelan v. Fitzpatrick*, 188 Mass. 237, and cases cited. And it is no more a tort as against the tenant and those entering under him to authorize him to continue the premises in that condition than it is to let such premises to him.

It is also settled here that one entering under the tenant has no greater rights than the tenant: See, for example, *Dalton v. Gibson*, 192 Mass. 1, 116 Am. St. Rep. 218, 77 N. E. 1035. One of the grounds of decision in *May v. Ennis*, 78 App. Div. (N. Y.) 552, 79 N. Y. Supp. 896, was that on which *Moore v. Steljes*, 69 Fed. 518, was decided.

There is a case in the court of appeals of Kentucky—*Stillwell v. South Louisville Land Co.*, 22 Ky. Law Rep. 785, 58 S. W. 696, 52 L. R. A. 325—not reported in the regular series of its reports, in which it was assumed without discussion that a landlord who had agreed to make repairs on leased premises is liable to make compensation for injuries caused by his failure to make needed repairs. The only point discussed in the opinion in that case is whether the plaintiff there was barred by his contributory negligence. That decision does not help the contention made in support of the charge of the presiding judge in the case at bar, because the agreement in *Stillwell v. South Louisville Land Co.*, 22 Ky. Law Rep. 785, 58 S. W. 696, 52 L. R. A. 325, was an agreement to make specific repairs, and therefore, if it is an authority at all, it is an authority that *Tuttle v. Gilbert Mfg. Co.*, 145 Mass. 169, 13 N. E. 465, was wrongly decided. It was admitted by the presiding judge in his charge <sup>438</sup> in the case at bar, and it was admitted at the argument here, that *Tuttle v. Gilbert Mfg. Co.*, 145 Mass. 169, 13 N. E. 465, was rightly decided. This decision, therefore, does not help the plaintiff in his present contention.

The only other case to the contrary is a case in an inferior court in the state of Illinois: *Sontag v. O'Hare*, 73 Ill. App. 432. It would seem from the two cases on the authority of which *Sontag v. O'Hare*, 73 Ill. App. 432, was decided (*Mendel v. Fink*, 8 Ill. App. 378, and *Platt v. Farney*, 16 Ill. App. 216), that the porch there in question was a common porch not let to the tenant but which the tenant had a right to use; that is to say, it would seem that that case belongs to the same class of cases as those relating to the common passageways of a tenement house. Whether that is or is not the true explanation of *Sontag v. O'Hare*, 73 Ill. App. 432, is not material here; for, if that is not the true explanation of that case, all that it amounts to is a decision for which no reasons are given, but two decisions which do not support the conclusion to which the court came.

In addition there is a general statement at the conclusion of the opinion in *Thompson v. Clemens*, 96 Md. 196, 53 Atl. 919, 60 L. R. A. 580, "that a landlord under contract to re-

pair may, under some circumstances, be liable for damages for personal injuries by reason of a negligent failure to make repairs." There is a headnote substantially to that effect where no opinion is reported in *Veal v. Hanlon*, 123 Ga. 642, 51 S. E. 579, and another in *Perez v. Rabaud*, 76 Tex. 191, 13 S. W. 177, 7 L. R. A. 620, where there is an opinion but nothing in the opinion which gives countenance to the headnote. In all these cases the plaintiff was held not entitled to recover.

In determining whether an agreement by a landlord with a tenant to keep in repair generally a portion of the premises during the term of the lease is a contract to maintain those premises in a safe condition for the tenant's use, or is a contract to keep them in repair as the premises of the tenant, the necessity of a notice from the tenant to the landlord that repairs are needed before the landlord can be taken to be in default under his contract is important. Where by force of the contract the landlord is to maintain the premises in a safe condition for the tenant's use, no notice is necessary. But where the landlord's contract is to keep the premises in repair as the premises of the tenant during <sup>439</sup> the term of the lease, as matter of implication notice is necessary before the landlord is in default. For cases where it was held that notice was necessary, see *Hutchinson v. Cummings*, 156 Mass. 329, 31 N. E. 127; *McLean v. Fiske Wharf & Warehouse Co.*, 158 Mass. 472, 33 N. E. 499; *Marley v. Wheelwright*, 172 Mass. 530, 52 N. E. 1066; *Cummings v. Ayer*, 188 Mass. 292, 74 N. E. 336.

It was of cases where the landlord's agreement is to keep the tenant's premises in repair, as distinguished from an agreement to keep them in a safe condition, that *Lathrop, J.*, said in *Galvin v. Beals*, 187 Mass. 250, 72 N. E. 969: "The general rule in this commonwealth must be considered as settled that a tenant cannot recover against his landlord for personal injuries occasioned by the defective condition of the premises let, unless the landlord agrees to repair, makes the repairs, and is negligent in making them: *Bowe v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471; *Tuttle v. Gilbert Mfg. Co.*, 145 Mass. 169, 13 N. E. 465; *McKeon v. Cutter*, 156 Mass. 296; *McLean v. Fiske Wharf etc. Co.*, 158 Mass. 472, 33 N. E. 499; *Marley v. Wheelwright*, 172 Mass. 530, 52 N. E. 1066." This was repeated by *Sheldon, J.*, in *Shute v. Bills*, 191 Mass. 433, 114 Am. St. Rep. 631, 78 N. E. 96, 7 L. R. A., N. S., 965.

In the class of cases with which we are dealing here, even when the premises are included in the lease, the question for the jury is whether the defendant's agreement was to make the repairs then needed upon the steps, and such other repairs as might be needed from time to time during the term, with an implied understanding that the tenant should look out for the condition of the premises and inform him when anything should be done, or whether it was an absolute agreement to maintain the steps in a safe condition for the tenant and those claiming under him, and to relieve the tenant from any duty to provide for their safety. If a part of a landlord's undertaking is an agreement in terms to make repairs, and if the circumstances are such as to leave the meaning doubtful, it is to be determined from all the language used, and from all the circumstances, whether his meaning is to make repairs merely as a mechanic might contract to make them, only upon notice that they are needed, or whether his undertaking is intended to be broader, including a duty to observe for himself the condition of the premises and provide for their safety.

It is not necessary in this case to consider under what circumstances <sup>440</sup> an action can be maintained directly against the landlord who has agreed to keep in repair premises demised to a tenant, to avoid circuity of action: See *Payne v. Rogers*, 2 H. Black. 349; *Lowell v. Spaulding*, 4 Cush. 277, 50 Am. Dec. 775; *Milford v. Holbrook*, 9 Allen, 17, 85 Am. Dec. 735. It is enough in the case at bar to point out that the plaintiff was the wife of the tenant, and for that reason could not have sued him; and that, not being able to sue the tenant at all, she could not sue the landlord to avoid circuity of action.

Exceptions sustained.

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*The Rule that an Action in Tort does not lie against a landlord by his tenant who receives personal injuries through the landlord's failure to fulfill his covenant to repair, which is announced in the principal case, is recognized in* *Hamilton v. Feary*, 8 Ind. App. 615, 52 Am. St. Rep. 485; *Dustin v. Curtis*, 74 N. H. 266, 67 Atl. 220. But see *Olson v. Schultz*, 67 Minn. 494, 64 Am. St. Rep. 437. It has been affirmed that a landlord who has agreed with his tenant to make repairs is not liable in tort to a member of the tenant's family who receives personal injuries from the landlord's neglect to repair: *Davis v. Smith*, 26 E. I. 129, 106 Am. St. Rep. 691. But a landlord is answerable for damages due to negligence in making repairs where, being notified of a leak in a gutter, he undertakes to repair it, but does the work in so negligent a manner that the leak continues, and the water therefrom, falling on the steps, freezes, causing a daughter of the tenant, who is a member of his household, while in the exercise of due care, to slip and fall and be thereby injured: *Shute v. Bills*, 191 Mass. 433, 114 Am. St. Rep. 631; and see *Peerless Mfg. Co. v. Bagley*, 126 Mich. 225, 86 Am. St. Rep. 537.

**CITIZENS' LOAN ASSOCIATION v. BOSTON & MAINE RAILROAD.**

[196 Mass. 528, 82 N. E. 696.]

**BANKRUPTCY, Effect of a Discharge in.**—A debt is not extinguished by the discharge of the debtor in bankruptcy. (p. 585.)

**AN ASSIGNMENT of Future Earnings Which may Accrue** under an existing employment is a valid contract, and creates rights which may be enforced both at law and in equity. (p. 585.)

**BANKRUPTCY, Right to Future Wages, When does not Pass by.**—The right to future wages to be earned under a contract in existence prior to the adjudication does not pass to the assignee in bankruptcy. (p. 586.)

**BANKRUPTCY, Effect of upon Assignment of Wages to be Earned in the Future.**—An assignment of future earnings which may accrue under an existing contract of service, although the employment is indefinite and the term and compensation are terminable at will, made to secure the payment of an existing debt, is valid, and is not affected by a subsequent adjudication in bankruptcy against the assignor, and the rights of the assignee may be enforced notwithstanding the discharge in bankruptcy of the assignor. (p. 587.)

Action of contract by the Citizens' Loan Association against the Boston and Maine Railroad based on an assignment made February 27, 1905, whereby Stephen J. Westcott assigned to the plaintiff all wages thereafter to become due him from such company for services to be performed by him as a conductor within two years after the assignment.

The defendant relied upon the adjudication of Westcott as a bankrupt on December 13, 1905, and his discharge in bankruptcy entered in March following.

The case was submitted upon an agreed statement of facts, in which it was specified that "the only question intended to be raised by these facts is whether this assignment of wages can be enforced after said bankruptcy proceedings and the discharge therein." The trial court found in favor of the plaintiff, entered judgment accordingly, and the defendant appealed.

C. M. Thayer and A. H. Bullock, for the defendant.

W. Thayer, H. W. Cobb and F. A. Walker, for the plaintiff.

530 RUGG, J. The single question presented by this appeal is whether an assignment of wages to be earned in an existing employment, given before bankruptcy, without fraud, and upon sufficient consideration, to secure a valid subsisting debt, and duly recorded, can be enforced, after the discharge

in bankruptcy of the assignor, as to wages earned in the course of the original employment, by the creditor, who has not proved his debt in bankruptcy. A debt is not extinguished by a discharge in bankruptcy. The remedy upon the debt, and the legal, but not the moral, obligation to pay, is at an end. The obligation itself is not canceled: *Champion v. Buckingham*, 165 Mass. 76, 42 N. E. 498; *Heather v. Webb*, 2 C. P. D. 1.

An assignment of future earnings, which may accrue under an existing employment, is a valid contract, and creates rights which may be enforced both at law and in equity, whichever may in a particular case be the appropriate forum: *Tripp v. Brownell*, 12 Cush. 376; *Weed v. Jewett*, 2 Met. 608, 37 Am. Dec. 115; *Brackett v. Blake*, 7 Met. 335, 41 Am. Dec. 442; *Hartey v. Tapley*, 2 Gray, 565; *Gardner v. Hoeg*, 18 Pick. 168; *Taylor v. Lynch*, 5 Gray, 49; *Lannan v. Smith*, 7 Gray, 150; *St. Johns v. Charles*, 105 Mass. 262; *Lazarus v. Swan*, 147 Mass. 330, 17 N. E. 655; *James v. Newton*, 142 Mass. 366, 56 Am. Rep. 692, 8 N. E. 122. These cases proceed upon the theory that the worker under contract for service, though indefinite as to time and compensation and terminable at will, has an actual and real interest in wages to be earned in the future by virtue of his contract. He may recover for an unjustifiable interference with such an employment as for an injury to any other vested property right: *Moran v. Dunphy*, 177 Mass. 485, 83 Am. St. Rep. 289, 59 N. E. 125, 52 L. R. A. 115; *Berry v. Donovan*, 188 Mass. 353, 108 Am. St. Rep. 471, 74 N. E. 318. It is plain that one may sell wool to <sup>531</sup> be grown upon his own sheep, or a crop to be produced upon his own land, but not that to be grown or produced upon the sheep or land of another. No more can one assign wages where there is no contract for service: *Jones v. Richardson*, 10 Met. 481; *Low v. Pew*, 108 Mass. 347, 11 Am. Rep. 357; *Eagan v. Luby*, 133 Mass. 543. But profitable employment is a reality. Wages to be earned by virtue of an existing employment are no more shadowy or insubstantial than the fleece of next spring or the crop of the following autumn. Money to accrue from such service is not a bare expectancy or mere possibility, but a substance capable of grasp and delivery. It constitutes a present, existing right of property, which may be sold or assigned as any other property. Although not in the manual possession of the assignor, it is in his potential possession. The transfer of this potential possession creates the assignee a lienor upon the property right. The holder of such an assignment stands upon a firmer plane than the mort-

gagee of future acquired property, who has only the right by contract to act betimes in the future for his protection: *Wasserman v. McDonnell*, 190 Mass. 326, 76 N. E. 959. The assignee of wages to be earned under an existing contract gets a present right, perfect in itself, requiring no future action on his part. Contracts for personal service are of such a character that their breach is in appropriate cases, enjoined: *Lumbly v. Wagner*, 1 DeGex, M. & G. 604; *Duff v. Russell*, 133 N. Y. 678, 31 N. E. 622; *Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. 416. See *Philadelphia Baseball Club v. Lajoie*, 202 Pa. 210, 90 Am. St. Rep. 627, 51 Atl. 973, 58 L. R. A. 227. It may be taken for granted that the right to future wages to be earned under such a contract does not pass to the trustee in bankruptcy. Nor are we dealing here with a contract as to labor in terms or spirit contrary to public policy, as in *Parsons v. Trask*, 7 Gray, 473, 66 Am. Dec. 502. But, on the contrary, assignments of wages are recognized as valid by statute: Rev. Laws, c. 189, secs. 32, 34; c. 102, secs. 51, 57-67, both inclusive; c. 106, sec. 63. The present case is not affected by Statutes of 1905, chapter 308, or Statutes of 1906, chapter 390. Specific performance of contracts to labor like that in question will not be enforced: *Arthur v. Oakes*, 63 Fed. 310, 318; *Robertson v. Baldwin*, 165 U. S. 275. It is only where labor has been voluntarily performed that the question now presented can arise. It is possible that an agreement <sup>532</sup> to execute an assignment, falling short of the creation of a lien, is, when the wages have been actually earned, enforceable in equity, even after a subsequent bankruptcy or insolvency. We do not decide this, however: *Edwards v. Peterson*, 80 Me. 367, 6 Am. St. Rep. 207, 14 Atl. 936; *Stott v. Franey*, 20 Or. 410, 23 Am. St. Rep. 132, 26 Pac. 271. At lowest the assignment in question became "a specific equitable lien on the fund" (*Trist v. Child*, 21 Wall. 441, 22 L. ed. 623), or was "an independent collateral agreement given by way of guaranty or other security" for the main debt, and there is no reason why such an agreement should not outlive the remedy upon the debt, to secure which it was given: *Shaw v. Silloway*, 145 Mass. 503, 14 N. E. 783. In either event, it was not dissolved by the bankruptcy. We have considered the contrary authorities of *In re West*, 128 Fed. 205, *In re Home Discount Co.*, 147 Fed. 538, and *Leitch v. Northern Pacific Ry.*, 95 Minn. 35, 103 N. W. 704, with the deference to which they are entitled. They proceed upon considerations as to the effect of an assignment of wages and the rights vesting thereunder in the assignee, as well



as public policy pointed out in the latter case, which are inconsistent with what we conceive to be sound reasoning, and opposed to the numerous decisions of this court above cited concerning rights acquired under assignments of wages. In the absence of a decision to the same effect by the supreme court of the United States, we cannot accede to them as authoritative. Nor do we perceive anything inconsistent with the conclusion we have reached in *Clark v. Clark*, 17 How. 315, 15 L. ed. 77; *East Lewisburg Lumber etc. Co. v. Marsh*, 91 Pa. 96; *Christian & Craft Grocery Co. v. Michael & Lyons*, 121 Ala. 84, 77 Am. St. Rep. 30, 25 South. 571; *Williams v. Chambers*, 10 Q. B. 337; and *Hanover National Bank v. Moyses*, 186 U. S. 181, 22 Sup. Ct. Rep. 857, 46 L. ed. 1113; which are cited as generally supporting authorities in *In re Home Discount Co.*, 147 Fed. 538.

The assignment to the plaintiff is a lien which was preserved by section 67d of the bankruptcy act of July 1, 1898, chapter 541, and was not affected by the discharge in bankruptcy of the assignor. This conclusion is supported by *Mallin v. Wenham*, 209 Ill. 252, 101 Am. St. Rep. 233, 70 N. E. 564, 65 L. R. A. 602.

Judgment affirmed.

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*A Discharge in Bankruptcy* does not, according to *Mallin v. Wenham*, 209 Ill. 252, 101 Am. St. Rep. 233, release a prior assignment of wages to be earned in the future, nor destroy the lien created by such assignment.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**MINNESOTA.**

**FELT v. ELMQUIST.**

[104 Minn. 33, 115 N. W. 746.]

**PUBLIC NUISANCE—The Right of an Individual to Abate.**—An individual suffering peculiar injuries has a right to remove an obstruction in a ditch under some circumstances, but this extra-judicial remedy does not exist as a matter of absolute right; and where he attempts to exercise it when a number of legal questions are involved, and at such a time and under such circumstances that the property of others will be jeopardized, they may have him enjoined. (p. 590.)

Geo. H. Otterness and C. A. Fosnes, for the appellants.

Samuel Porter, for the respondents.

<sup>33</sup> JAGGARD, J. This is an appeal from the order refusing a new trial in a proceeding in which the trial court granted an injunction enjoining the defendants from opening an artificial outlet through a bank to Lake Waconda.

The facts, as found by the court, construed in the light of the testimony, were briefly these: Lake Waconda was a large, deep lake meandered by the United States government. Its natural outlet carried water easterly and northeasterly into Little Kandiyohi lake; thence <sup>34</sup> in a southwesterly direction into Lake Fanny; thence southerly into Big Kandiyohi; then southeasterly into the South Fork of Crow river. The lands of the defendants adjoined Little Kandiyohi lake and the outlet from Little Kandiyohi lake into Lake Fanny. The lands of plaintiffs lay to the south of Lake Waconda. The ditch in issue purported to have been constructed pursuant to the provisions of chapter 394, page 800, Laws of 1895. The third division of it, involved here, left Lake Waconda on

the north and via Lake Fanny entered Big Kandiyohi on the south. It was not, however, constructed as surveyed, nor as contemplated by the legislature, especially in this: That that part of the ditch from the starting point to what is known as "Stephen's place," a distance of over four miles, was not constructed at all. From Lake Waconda to Stephen's place little, if any, work was done toward the construction of a ditch. Over that course there had been previously built a county ditch, which had caved in and become obstructed. As a drain it was of no practical value. For two years after its construction this division of the ditch answered its purpose as a drain; but thereafter it was allowed to fill up, so that the flow of water was obstructed. In addition to this southerly obstruction, another obstruction to the north formed at the artificial outlet from Lake Waconda itself. The bottom of the cut or opening through the bank of that lake was on a level with the bottom of the natural outlet of the lake. A concrete bed was put into the bottom of the cut. The ditch had a fall of about three feet in a distance of about ten rods after leaving the lake. In course of time this artificial outlet became obstructed by natural agencies. No water ran out of the lake through the artificial outlet over the concrete bed since the year 1898 until in May, 1906. Defendants then removed that obstruction to relieve their own lands of waters discharged through the natural outlet of Lake Waconda. The result was that the lake at that time had reached a height of fully three feet above the level of plaintiffs' lands, and backed up near the south bank of Lake Waconda, so that the land lying between that bank and Lake Fanny was covered with water to an average width of eighty rods and to a depth in places of three to four feet. Plaintiffs closed the opening made by defendants of the artificial outlet, and brought this action to restrain defendants from threatened removal of the obstruction.

<sup>35</sup> The record suggests many questions of law, as these: Was the statute under which the ditch was attempted to be constructed constitutional? If not, was the ditch constructed in accordance with the statute? Were plaintiffs estopped by deeds which they had executed, or damages which they had received, from questioning the validity of that ditch? Generally, and more particularly as to these defendants, did the obstruction of the natural outlet constitute a nuisance which the defendants had a right to abate? Did the defendants show such a particular interest by way of damages peculiar to themselves as to justify their resort to self-help? What

effect did the practical abandonment of the ditch for many years have upon the rights of the parties? It would be obviously improper at this time to consider or to determine these questions. The immediate question is whether the court abused its discretion by granting the injunction.

The right of the individual suffering peculiar injury to abate a public nuisance under some circumstances is unquestioned: See, for example, *Reed v. Board of Park Commrs. of City of Winona*, 100 Minn. 167, 110 N. W. 1119. But it by no means follows that this extrajudicial remedy exists as a matter of absolute right. The nuisance must be sufficiently urgent to justify private individuals in redressing the wrong by their own power, without the more commendable resort to judicial authority. This summary method of redressing a grievance is regarded with jealousy, and is authorized only in cases of particular emergency requiring more speedy remedy than can be had by the ordinary proceedings at law: *Joyce on Nuisance*, sec. 370. And see *Moffett v. Brewer*, 1 G. Greene (Iowa), 348, per Greene, J. That under certain circumstances a property owner suffering special injury may abate a nuisance in a ditch by no means sustains the position that he will be legally justified in so doing under all circumstances. For example, would he be justified in destroying an embankment which held back enormous quantities of water, and in releasing such a dangerous instrumentality into a ditch, whereby not only property, but lives, of an entire community would be certainly endangered? It would be very easy to suggest an extreme in which such an act might even be criminal. The present is not such a case.

But the trial court found, and was justified in finding, that there was no reasonable necessity for the opening of the artificial outlet until <sup>36</sup> the ditch and watercourse into Big Kandiyohi lake was first cleared of obstructions, so as to admit of a fair drain in that direction. It also appeared that the waters discharged through the outlet came through with such velocity and in such destructive quantities that, unless prevented, they would have flooded great portions of the cultivated fields of the plaintiffs, and have entirely destroyed crops of grain growing there, beside doing other damage. Lake Waconda covered about three sections of land and was from seven to fifteen feet deep, and was about three feet higher than the surface of the waters of Lake Fanny. A large part of this entire body of water would have been drained off if defendants' act had not been restrained. Under these circumstances, we are of opinion that the trial court

was not in error in denying the existence of defendant's absolute and unqualified right to the abatement of a nuisance, and in leaving him to resort to the traditional or any other legal remedies which the law provides.

**Affirmed.**

On May 28, 1908, the following opinion was filed:

Per CURIAM. In defendants' motion for reargument it is urged that it was not "a discretionary matter with the court below in granting a permanent injunction, because in the matter of granting an injunction the court must not exercise its discretion the same as when a temporary injunction is sought." The injunction was, however, permanent only as to summary abatement by defendants' personal acts, i. e., as to the extra-judicial remedy of self-help. In the last analysis it was temporary because the legal questions involved were left open for future determination. It did not purport to determine all the rights or to terminate all the remedies of the parties. The judgment was affirmed on the merits and on the ground stated in the opinion that defendants had no legal right under the facts disclosed to abate the construction of the ditch.

**Motion for reargument denied.**

#### **ABATEMENT OF PUBLIC NUISANCE BY A PRIVATE PERSON WITHOUT SUIT.**

##### **I. Definitions and Classifications of Nuisances.**

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##### **I. Definitions and Classifications of Nuisances.**

a. Nuisance in General Defined.—It was said in *Norcross v. Thoms*, 51 Me. 503, 81 Am. Dec. 588, that "It is not practicable to give a precise, technical definition of what constitutes a nuisance at common law. Blackstone, in his Commentaries, volume 3, page 215, defines a nuisance to signify 'anything that worketh hurt, inconvenience or damage.' 'All the acts,' says Bishop (3 Bishop's Criminal Law, sec.

848): 'put forth by man, which tend directly to create evil consequence to the community at large, may be deemed nuisances, where they are of such magnitude as to require the interposition of courts.' The only accurate method of ascertaining the meaning of the term 'nuisance' at common law is to examine decided cases, adjudged to be or not to be nuisances." Whether the difficulty be so insuperable as supposed, or not, the fact remains that definitions and general rules, based upon an examination of the decided cases, have been formulated and are referred to by the courts for their guidance in the conduct and determination of cases of this sort: *Barnes v. Hathorn*, 54 Me. 124.

As a general rule, every person may exercise exclusive dominion over his own property, and subject it to such uses as will best subserve his private interests. Generally, no other person can say how he shall use or what he shall do with his property. But this general right has its exceptions and qualifications. "*Sic utere tuo ut alienum non laedas*" is a salutary and active principle of the law, wide in its application; and it is the basic and pervading principle of the law of nuisances. It does not mean, however, that one must never use his own so as to do any injury to his neighbor or his property or right. Such a rule could not be enforced in civilized society. Persons living in organized communities must suffer some damage, annoyance and inconvenience from each other. For these they are compensated by all the advantages of civilized society. But every person is bound to make a reasonable use of his property so as to occasion no unnecessary damage or annoyance to his neighbor. If he makes an unreasonable, unwarrantable or unlawful use of it, so as to produce material annoyance, inconvenience, discomfort or hurt to his neighbor or to the public, he will be guilty of a nuisance, and the law will hold him responsible either civilly or criminally, or both civilly and criminally, as the case may be. What is a reasonable use of one's property cannot be defined by any certain general rules, but must depend upon the circumstances of each case. A use of property in one locality and under some circumstances may be lawful and reasonable, which, under other circumstances, or in another locality, would be unlawful, unreasonable and a nuisance. To constitute a nuisance, the use must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment specially uncomfortable or inconvenient: *Barnes v. Hathorn*, 54 Me. 124; *Lane v. Concord*, 70 N. H. 485, 85 Am. St. Rep. 643, 49 Atl. 687; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567; *Columbus etc. Coke Co. v. Freeland*, 12 Ohio St. 392.

The important question of the amount or extent of the injury, inconvenience, discomfort, or offensiveness necessary to constitute a nuisance is necessarily frequently close and difficult. It is said in *Price v. Grantz*, 118 Pa. 402, 4 Am. St. Rep. 601, 11 Atl. 794, that "It must be a real, substantial injury." In *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 276, 25 Am. St. Rep. 595, 20 Atl. 900, 9 L. R. A. 737, the court said that "No principle is better settled than that

where a trade or business is carried on in such a manner as to interfere with the reasonable and comfortable enjoyment by another of his property, or which occasions material injury to the property itself, a wrong is done to the neighboring owner, for which an action will lie." This language is quoted in the subsequent case of *Euler v. Sullivan*, 75 Md. 616, 32 Am. St. Rep. 420, 23 Atl. 845, with the following further qualification or restriction: "But all of the authorities hold that the injury must be of a character to diminish materially the value of the property or seriously interfere with the ordinary comfort and enjoyment of it, such as would entitle the party injured to substantial damages: *Adams v. Michael*, 38 Md. 123, 17 Am. Rep. 516. And in the case of *Dittman v. Repp*, 50 Md. 522, 33 Am. Rep. 325, this court held that in determining the question of nuisance from smoke or noxious vapor, reference must always be had to the locality, the nature of the trade, the character of the machinery, and the manner of using the property producing the annoyance and injury complained of. A party dwelling in the midst of a crowded commercial and manufacturing city cannot claim to have the same quiet and freedom from annoyance that he might rightfully claim if he were dwelling in the country. Everyone taking up his abode in the city must expect to encounter the inconveniences and annoyances incident to such community, and he must be taken to have consented to endure such annoyances to a certain extent."

It is said in *Coker v. Birge*, 9 Ga. 425, 54 Am. Dec. 347, that "The maxim of the law is, 'Sic utere tuo ut alienum non laedas.' The legal proposition, then, is, that if one do an act of itself lawful, which being done in a particular place necessarily tends to the damage of another's property, it is a nuisance; for it is incumbent on him to find some other place to do that act where it will not be injurious or offensive. This statement, if intended as a definition of nuisances in general, is incomplete because, in the first place, it makes the place in which the act is done the only test of its character as a nuisance, whereas the place may be perfectly lawful and appropriate, and the nuisance consists entirely in the manner of the doing or maintaining: *Kinney v. Koopman*, 116 Ala. 310, 67 Am. St. Rep. 119, 22 South. 593, 37 L. R. A. 497; *Dittman v. Repp*, 50 Md. 522, 33 Am. Rep. 325; *Windfall Mfg. Co. v. Patterson*, 148 Ind. 414, 62 Am. St. Rep. 532, 47 N. E. 2, 37 L. R. A. 381; *Burdett v. Swenson*, 17 Tex. 489, 67 Am. Dec. 665; *Miller v. Burch*, 32 Tex. 208, 5 Am. Rep. 242.

And in the second place, it confines the injury to the property of another, while as appears by the authorities it may consist in an injury to the property, or other right, or interest, or to the health, or even the comfort or convenience, of such other person: *Cleveland v. Citizen's Gas Light Co.*, 20 N. J. Eq. 205; *Wahle v. Reinbach*, 76 Ill. 322; *Norcross v. Thoms*, 51 Me. 503, 81 Am. Dec. 588.

And in the third place, it fails to indicate any general rule by which it may be determined whether or not the injury, inconvenience, discomfort, or offensiveness complained of is sufficient, in amount or

extent, to constitute a nuisance. Taken literally, the slightest inconvenience or discomfort would answer the requirements of the statement. It was held in *Wahle v. Reinbach*, 76 Ill. 322, that any business, however lawful, which causes annoyances that materially interfere with the ordinary comfort, physically, of human existence, is a nuisance that should be restrained; and smoke, noise and bad odors, even when not injurious to health, may render a dwelling so uncomfortable as to drive from it anyone not compelled by poverty to remain; that unpleasant odors, from the very constitution of our nature, render us uncomfortable, and, when continued or repeated, make life uncomfortable; that to live comfortably is the chief and most reasonable object of men in acquiring property, as the means of attaining it; and that any interference with our neighbor in the comfortable enjoyment of life is a wrong which the law will redress. "The only question is," say the court, "What amounts to that discomfort from which the law will protect? The discomforts must be physical—not such as depend upon taste or imagination. But whatever is offensive physically to the senses, and by such offensiveness makes life uncomfortable, is a nuisance."

It is sometimes said that "the question whether a particular use of property amounts to a nuisance to one's neighbor is a question of fact to be determined in each particular case": *Catlin v. Patterson*, 10 N. Y. St. Rep. 724. But this remark is to be taken and understood with the qualifications indicated in *Barnes v. Hathorn*, 54 Me. 124, where the appropriate manner of dealing with the question is stated as follows: "The definitions and rules applicable to cases as they arise must be general, and each case must be brought to the test of the principles laid down. Usually, therefore, it becomes a mixed question of law and fact whether, on the case proved, the existence of a nuisance is established or not. If, however, it is clear upon the facts, that a jury would not be authorized to find that a nuisance did exist, the judge would be justified in ordering a nonsuit."

A nuisance is defined in a late case as being "Whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property": *Acme Fertilizer Co. v. State*, 34 Ind. App. 346, 107 Am. St. Rep. 190, with extended note, 72 N. E. 1037.

b. **Nuisance Per Se Defined.**—A nuisance per se, as the term implies, is that which is a nuisance in itself, and which, therefore, cannot be so conducted or maintained as to be lawfully carried on or permitted to exist. Such a nuisance is a disorderly house, or an obstruction to a highway, or to a navigable stream. But a business lawful in itself cannot be a nuisance per se, although, because of surrounding places or circumstances, or because of the manner in which it is conducted, it may become a nuisance. Of course, all persons have the right to insist that a business in any degree offensive or dangerous to them shall be carried on with such improved means



and appliances as experience and science may suggest or supply, and with such reasonable care as may prevent unnecessary inconvenience to them. By such care and improved methods and appliances many occupations formerly regarded as nuisances may now be carried on, even in populous neighborhoods, without annoyance to anyone: *Kinney v. Koopman*, 116 Ala. 310, 67 Am. St. Rep. 119, 22 South. 593, 37 L. R. A. 497; *Hundley v. Harrison*, 123 Ala. 292, 26 South. 294; *Windfall Mfg. Co. v. Patterson*, 148 Ind. 414, 62 Am. St. Rep. 532, 47 N. E. 2, 37 L. R. A. 381.

c. **Classification of Various Kinds of Nuisances.**—Nuisances are of three kinds—public, private and mixed. They are public when they violate public rights, and produce a common injury; when they injure or annoy that portion of the public which necessarily comes in contact with them. They are private when the injury resulting from them violates only private rights, and produces damage to a few persons only; or even to one person only. Mixed nuisances are those which are both public and private, in their effects—public, because they violate public rights, and injure many persons, or all the community; and private, in that they also produce special injury to private rights: *Acme Fertilizer Co. v. State*, 34 Ind. App. 346, 107 Am. St. Rep. 190, with extended note, 72 N. E. 1037; *Kelley v. City of New York*, 6 Misc. Rep. 516, 27 N. Y. Supp. 164; *Emory v. Hazard Powder Co.*, 22 S. C. 476, 53 Am. Rep. 730. The proposition that a nuisance may be both public and private—that is to say, that a public nuisance becomes also a private nuisance as to any person who is specially injured by it—is well supported by authority: *Yolo County v. City of Sacramento*, 36 Cal. 193; *Wylie v. Elwood*, 134 Ill. 281, 23 Am. St. Rep. 673, 25 N. E. 510, 9 L. R. A. 726; *Kuhn v. Illinois Cent. R. Co.*, 111 Ill. App. 323; *Kissell v. Lewis*, 156 Ind. 233, 59 N. E. 478. The difference between a public nuisance and a private nuisance does not consist in any difference in the nature or character of the thing itself. The nuisance is public because of the danger or injury to the public. It is private only because the individual, as distinguished from the public, has been or may be injured: *Kinney v. Koopman*, 116 Ala. 310, 67 Am. St. Rep. 119, 22 South. 593, 37 L. R. A. 497. A nuisance is distinguished from a trespass, in that it consists in a use of one's own property in such manner as to cause injury to the property, or other right, or interest of another: *Norcross v. Thoms*, 51 Me. 503, 81 Am. Dec. 588. The expressions, "public nuisance," and "common nuisance" are used interchangeably, and are identical in meaning: *Bouvier's Law Dictionary*, tit. "Nuisance."

## II. Right of Abatement Without Suit in General.

a. **Common-law Right of Abatement.**—It was said in *Gates v. Blincoe*, 32 Ky. (2 Dana) 158, 26 Am. Dec. 440, decided in 1833, that "Any person who is injured by a private nuisance may abate it; and a public nuisance may be abated by anyone, even though it may not have occasioned any special damage or inconvenience to him

individually"; and it is not uncommon, especially in the earlier cases, to find unqualified statements, as in *Hart v. Mayor of Albany* (1832), 9 Wend. 571, 24 Am. Dec. 165, and in *Harvey v. Dewoody* (1856), 18 Ark. 252, to the effect that "any person may abate a public or common nuisance"; and in *Gunter v. Geary* (1851), 1 Cal. 462, where it is said that "It is stated, in general terms, in all the authorities, that anyone has a right to abate a common nuisance . . . without regard to the question whether it is an immediate obstruction or injury to him"; and in *Manhattan Mfg. etc. Co. v. Van Keuren* (1872), 23 N. J. Eq. (8 C. E. Green) 251, where it was held that "At common law, it was always the right of a citizen, without official authority, to abate a public nuisance, and without waiting to have it adjudged such by a legal tribunal. His right to do so depended upon the fact of its being a nuisance. . . . This common-law right still exists in full force. Any citizen, acting either as an individual or as a public official under the orders of local or municipal authorities, whether such orders be or be not in pursuance of special legislation or chartered provisions, may abate what the common law deemed a public nuisance. In abating it property may be destroyed and the owner deprived of it without trial, without notice, and without compensation."

The authorities, however, during these times were in conflict in this respect; and as early as 1838 the Kentucky court of appeals registered its disapproval of these unqualified expressions in the case of *Gray v. Ayres*, 37 Ky. (7 Dana) 375, 32 Am. Dec. 107, and in 1858 the supreme court of Massachusetts, in *Brown v. Perkins*, 78 Mass. (12 Gray) 89, declared the law substantially as it is held by the preponderance of authority at the present time. In that case the court say: "The true theory of abatement of nuisance is that an individual citizen may abate a private nuisance injurious to him, when he could also bring an action; and also, when a common nuisance obstructs his individual right, he may remove it to enable him to enjoy that right, and he cannot be called in question for so doing. As in the case of the obstruction across a highway, and an unauthorized bridge over a navigable watercourse, if he has occasion to use it, he may remove it by way of abatement. But this would not justify strangers, being inhabitants of other parts of the Commonwealth, having no such occasion to use it, to do the same. Some of the earlier cases, perhaps, in laying down the general proposition that private subjects may abate a common nuisance, did not expressly mark this distinction; but we think, upon the authority of modern cases, where the distinctions are more accurately made, and upon principle, this is the true rule of law."

**b. Common-law Right not Abrogated by Statutes.**—The common-law right of abating nuisances without suit is not abrogated by statutes conferring cumulative remedies. Where a statute creates a new offense, by making unlawful what was before lawful, and prescribes a particular penalty and mode of enforcing it, the statute, of course, must be followed; but if the offense was before punishable at com-

mon law, though the statute may prescribe a new remedy, unless there are negative words excluding all others, the common law still remains: *Crittenden v. Wilson*, 5 Cow. 165, 15 Am. Dec. 462; *Wetmore v. Tracy*, 14 Wend. 250, 28 Am. Dec. 525; *Renwick v. Morris*, 3 Hill (N. Y.), 621; *Tucker v. Rankin*, 15 Barb. 471; *Harrower v. Ritson*, 37 Barb. 308; nor does a statute conferring jurisdiction in equity extinguish the common-law right: *Great Falls Co. v. Worster*, 15 N. H. 412.

c. **Nuisances Other than Nuisances per se.**—It was held in *Gray v. Ayres*, 37 Ky. (7 Dana) 375, that "although, it may be, in general, true that individuals may abate a physical public nuisance by force, it is not, in general, true that they may use force in abating a public nuisance which is not of a physical or substantial nature"; and in *Denver v. Mullen*, 7 Colo. 345, 3 Pac. 693, that "it is only certain kinds of nuisances that may be removed or abated summarily by the acts of individuals or by the public, such as those which affect the health, or interfere with the safety of property or person, or are tangible obstructions to streets and highways under circumstances presenting an emergency. Such clear cases of nuisances per se are well understood, and need not be further noticed here, to distinguish them from the case before us"; and this remark taken in connection with the context has been summarized by the reporter of that court in the syllabus of that case, as follows: "Only nuisances per se may be removed or abated summarily by the acts of individuals or by the public"; and in that shape it has been carried into the digests. The text of the opinion does not, nor do the decisions support the proposition in this unqualified form."

### III. Abatement of Public Nuisances.

a. **Early Rule that One may Abate Though not Specially Injured.** It was said as late as 1894, by President Brannon of the supreme court of appeals of West Virginia in the opinion of the court delivered by him in the case of *Watts v. Norfolk & Western Ry. Co.*, 39 W. Va. 196, 45 Am. St. Rep. 894, 19 S. E. 521, 23 L. R. A. 674, that "There is a grave difference of opinion as to abatement of a purely public nuisance by mere act of the party. Some contend that no one, not interested personally and peculiarly otherwise than other persons can do so, while others hold that any one may do so." It will be desirable, therefore, under this head to classify and examine the authorities with a view of ascertaining when, and in what class or classes of cases, and under what circumstances, if at all, it may properly be said at the present time that "any one may abate a public nuisance."

*Hart v. Mayor etc. of Albany* (1832), 9 Wend. 571, 24 Am. Dec. 165, is one of the first, if not the first, American case in which this question was discussed, and in that case Justice Sutherland, speaking of the floating warehouse there in question, said: "This float, if permanently moored and continued in the open part of the river, thereby rendering the navigation less safe and convenient, would, I

apprehend, most clearly be a public nuisance, liable to be indicted as such, or to be abated without indictment by any individual who might be injured or aggrieved by it"; while Senator Edmonds, who was by virtue of his office a member of the court for the correction of errors, in which the case was pending, after some discussion of the question of the limitation of the power of abating nuisances to those prejudiced by them, remarked, in the opinion delivered by him, that "In the case of a private nuisance it is undoubtedly true that its removal can only be lawfully effected by the party aggrieved, and if the rule were the same in regard to a public nuisance, I do not well see how that changes the power of dejection, or how the case of the appellants (the maintainers of the alleged nuisance) could be aided by it; for a common nuisance is an unlawful act, whereby the whole community is injured; all, therefore, are aggrieved, and all have a right to abate it"; and on page 588, Justice Sutherland apparently wholly rejects the theory or doctrine of a limited or circumscribed right of abatement, and declares in unqualified terms (*italics his*) that "the books lay down the rule in very broad terms *that any person* may abate a common nuisance. . . . For if one whose estate is prejudiced by a private nuisance, may justify the entering into another's grounds, and pulling down and destroying it, it cannot but follow a fortiori that anyone may lawfully destroy a common nuisance." The sayings, emanating from such a source and in a case of some prominence, have doubtless exerted for a long time a powerful influence in support of the unqualified assertion that in all cases of public nuisances anyone, whether directly affected or not, may abate the same personally and without suit.

But it will be noticed that it is not clear that the case turned upon the point or proposition above quoted from the opinions of Justice Sutherland and Senator Edmonds—Justice Sutherland, who wrote the leading opinion, finally, on page 590, puts the case thus: "But if the true doctrine be that asserted by the complainant's counsel, that no one but a person aggrieved can remove a public nuisance, the corporation (city of Albany), whose duty it is to preserve the public streets, the docks and slips, and the river opposite thereto, from being in any manner obstructed, may well be considered a party aggrieved by any such illegal obstruction"; and the supreme court of California, in one of its earliest cases, while holding to the doctrine contended for by Judge Sutherland and Senator Edmonds, yet takes occasion to admit that the point, though fully discussed by those judges, was "not decided": *Gunter v. Geary*, 1 Cal. 462. Furthermore, it will be borne in mind that the floating warehouse in question in the New York case was claimed by the city to constitute an obstruction to the navigation of a navigable river. There may be some reasons to justify an abatement by any person in such cases which do not operate or exist in other cases; and the language of the court must always be considered with some reference to such differences, when they exist.

*Gates v. Blincoe*, 2 Dana, 158, 26 Am. Dec. 440, decided in May, 1833, is another early case in which it is asserted in unqualified terms that "a public nuisance may be abated by anyone, even though it may not have occasioned any special damage or inconvenience to him individually." That was an action in which the plaintiff sued the defendants in case, for diverting the water from his mill, by cutting a ditch, and they justified on the ground that plaintiff's mill dam was a nuisance, which they had a legal right to abate. The judgment, which was for the defendants, was reversed for an erroneous instruction, and it was not decided and does not appear whether the nuisance (if there was one) was public or private. The ground of decision was that the instruction was wrong in either event. The case of *Hart v. Mayor etc.*, 9 Wend. 571, 24 Am. Dec. 165, is not referred to in this case. The decision in *Wetmore v. Tracy* (1835), 14 Wend. 250, 28 Am. Dec. 525, begins with the statement that "The only question in the case is, whether the common-law remedy for an encroachment upon a public highway has been taken away by the statute" (affording a cumulative remedy). The remark of the court thereafter made to the effect "That any citizen has a right to abate a nuisance of this kind, was a question considerably discussed in the case of *Hart v. Mayor of Albany*, 9 Wend. 571, 24 Am. Dec. 165, and no doubt was entertained upon it. The authorities referred to by 'Mr. Justice Sutherland and Senator Edmonds appear to be uniform'; appears, therefore, to be no more than dictum.

*Meeker v. Van Rensselaer* (1836), 15 Wend. 397, is another early case sometimes quoted as a leading authority in support of the unqualified right of abatement of a public nuisance. It was held in that case that a dwelling-house, cut up into small apartments, inhabited by a crowd of poor people, in a filthy condition, and calculated to breed disease, is a public nuisance, and may be abated by individuals residing in the neighborhood, by tearing it down (it being proven upon the trial "that there was no other way to correct the evil but by pulling down the building"), especially during the prevalence of a disease like the Asiatic cholera. It is nowhere said in the decision in this case, however, that any person, whether directly affected or not, may by his own act abate any and all kinds of public nuisances.

In *Stump v. McNairy* (1844), 5 Humph. 363, 42 Am. Dec. 437, the trial court charged the jury in effect that an obstruction in a navigable inlet dedicated to public use for purposes of navigation constituted a public nuisance "which anyone might abate"; and the appellate court without discussion or citation of authorities decided that "This charge, upon reason and authority, is perfectly correct"; and likewise in *Benwick v. Morris*, 7 Hill, 575, the court, without discussion or citation of authorities, say that a dam unlawfully obstructing the navigation of a navigable stream is a thing which any individual may abate as a public nuisance; and also in *Burnham v.*

*Hotchkiss* 14 Conn. 311, it was said that a common nuisance may be abated by any individual.

In *Gunter v. Geary* (1851), 1 Cal. 462, the alleged public nuisance consisted of a house set upon piles below low-water mark in the bay of San Francisco. Justices Bennett and Hastings differed in opinion upon the question whether or not it was a public nuisance; but, citing and following *Hart v. Mayor etc. of Albany*, 9 Wend. 571, 24 Am. Dec. 165, they agreed that "anyone has a right to abate a common nuisance." In *Harvey v. Dewoody* (1856), 18 Ark. 252, which was an action for damages for pulling down the plaintiff's house upon the ground that it was a public nuisance, the court held that "it is generally conceded that any person may abate a public nuisance" (without referring to the case of *Hart v. Mayor etc. of Albany*, 9 Wend. 571, 24 Am. Dec. 165).

In *Manhattan Mfg. Co. v. Van Keuren*, 23 N. J. Eq. 251, the defendant, as street commissioner of Jersey City, who had as such commissioner already partially abated, the alleged nuisance which consisted of the manufacture of a certain fertilizer material within the city limits, was directed to show cause why an injunction should not issue forbidding any further such forcible abatement until the question of nuisance or no nuisance should be determined at law. The vice-chancellor in denying the application for the injunction stated that at common law, it was always the right of a citizen, without official authority, to abate a public nuisance, and without waiting to have it adjudged such by a legal tribunal—even though in abating it property may be destroyed and the owner deprived of it without trial, without notice, and without compensation.

*Lancaster Turnpike Co. v. Rogers* (1846), 2 Pa. 114, 44 Am. Dec. 179, was trespass for the removal by defendant of a toll-house partly on the road and partly on the defendant's land. The court, after referring to the rule that any party injuriously affected by a private nuisance may abate the same, remarked that "Surely, it cannot but follow, a fortiori, that any one may lawfully destroy a common nuisance." In *United States Illuminating Co. v. Grant* (1889), 55 Hun, 222, 7 N. Y. Supp. 788, it was held that the commissioner of public works of the city of New York had a right, both by virtue of his office and as a private citizen, to take down the noninsulated and imperfectly insulated overhead electric wires of the complainant in the city of New York. *Burnham v. Hotchkiss* (1841), 14 Conn. 311, was an action of trespass for pulling down a stone wall which was an encroachment, but not an obstruction to travel, upon a public highway. It was held that such encroachments are not in all cases necessarily public nuisances, and that the verdict and judgment of the jury against the abaters would not be disturbed; the court remarking, apparently by way of dictum, that "We consider it also settled, as is claimed by the defendants, that a common nuisance may be removed, or, in legal language, abated, by any individual." *State v. Dibble* (1856), 49 N. C. (4 Jones) 1071, is to the effect that a bridge across a navigable stream obstructing the navi-

gation thereof was a nuisance "which the defendants, or any other person, had a right to abate."

The foregoing are the American authorities cited, quoted and relied upon in support of the unlimited and unqualified right of any person to abate, by his own act and without suit, a public nuisance, whether or not he is in any manner directly injuriously affected thereby. It is worthy of note in this connection, however, that in no one of these cases was the abatement in fact done by any such mere volunteer. Each of the cases referred to the abater was in point of fact either an individual claiming to be in some manner or degree, either directly or consequentially, injured or imperiled, or seriously annoyed, by the thing abated, or else he was an officer of some municipal or other public or quasi-public corporation making the same claim on behalf of its people; and it will be noticed also that in none of these cases was the well-known distinction between the injuries, perils or annoyances, common to the public generally, and those special to the abater, and different in kind from those of the general public, raised or discussed, or even referred to; and again, it will be observed, upon reading, that in many of these cases Blackstone's Commentaries (volume 3, page 5) are cited in support of the universal and indiscriminate right of abatement of any and all public nuisances without suit. Justice Marvin, in *Griffith v. McCullum* (1866), 46 Barb. 561, maintains that Blackstone, rightly understood, inculcates no such doctrine; and he undertakes therein to demonstrate that proposition. He refers to the passage most frequently cited and quoted, to wit: "Whatsoever unlawfully annoys or doth damage to another is a nuisance; and such nuisance may be abated, that is, taken away or removed by the party aggrieved thereby, so as he commits no riot in the doing of it"; and he remarks in reference thereto: "It is, I think, from this general language that an impression has been produced that individuals may, upon their own volition, abate any and all nuisances, and that judges have sometimes so said or intimated, in a general way." It was said without any except possibly an implied qualification, in *Marcy v. Taylor*, 19 Ill. (9 Peck) 634, and in *Brooke v. O'Boyle*, 27 Ill. App. 384, that any person may remove a fence erected across a highway, without being guilty of a trespass. But in the later case of *Earp v. Lee*, 71 Ill. 193, the supreme court of the same state states the rule in such cases more guardedly, as follows: "It was held, at the common law, that nuisances which obstruct travel in public highways, in navigable streams, etc., might be removed and abated by any of the king's subjects who were thereby incommoded, but it is believed that the right of the citizen to abate (public) nuisances is confined alone to that class of cases."

It is not to be supposed, however, by reason of any criticisms that may be found in the books regarding the cases above-mentioned, that there may not be instances in which, on account of extreme urgency and public peril, any person may abate certain public nuisances; and there is at least one kind of nuisance *sui generis* in this respect.

That is the case of a mad or vicious and dangerous dog, running at large; in which case it is very generally held that the dog may be killed by any person, whether at the time directly and immediately injured or imperiled thereby, or not: *Woolf v. Chalker*, 31 Conn. 121, 81 Am. Dec. 175; *Hinckley v. Emerson*, 4 Cow. 351, 15 Am. Dec. 383; *Maxwell v. Palmerton*, 21 Wend. 407; *Dunlap v. Snyder*, 17 Barb. 561; *Brown v. Carpenter*, 26 Vt. 638, 62 Am. Dec. 603.

It was said in *North American D. & I. Co. v. The River Mersey* (D. C.), 48 Fed. 686, that a scow (of no proven value), broken adrift and drifting in the track of steamers going up and down the coast for over three weeks is a public nuisance, and may be burned, and thereby abated, by any passing vessel. But in *Gumbert v. Wood*, 146 Pa. 370, 23 Atl. 404, it was held that the owner of a towboat had no right to destroy, in the general interest of navigation, a coal boat sunk in the channel of a river, although if its location was such as to so obstruct navigation that he could not pass it without endangering his own property, then he had a right to remove the obstruction.

b. **Later Modification of this Rule.**—The unqualified and unlimited right of abatement, without suit, of any and all public nuisances, contended for in the earlier American cases, is not, however, the doctrine of the courts at the present time. The rules as at present established are as follows: (1) A mad dog, or any vicious and dangerous dog or other vicious and dangerous animal, and especially if of known and established reputation as such, may be killed by any person, whether at the time directly and immediately imperiled or not; (2) Any traveler or voyager may remove (without a breach of the peace) an unlawful obstruction in the public highway or navigable stream upon which he may be traveling or voyaging; and (3) Any other public nuisance may be abated by any person who is thereby damnified in a manner special to himself and different in kind from the injury inflicted upon the public at large. The authorities supporting these rules will be cited in the order stated.

c. **Destruction of Dangerous Animals.**—Any person may kill a mad dog or any other ferocious and dangerous dog, and especially when the vicious character of the animal is known to the owner as well as others: *Woolf v. Chalker*, 31 Conn. 121, 81 Am. Dec. 175; *Hinckley v. Emerson*, 4 Cow. 351, 15 Am. Dec. 383; *Maxwell v. Palmerton*, 21 Wend. 407; and so may any other vicious and dangerous animal permitted by its owner to run at large be killed by any person in the interest of public safety. Some animals are common nuisances if suffered to go at large, from their known and uniform instincts and propensities, such as lions and bears, and the owner who persists in keeping such an animal, without effectually and physically restraining him so that he can do no harm, ought not to complain of his destruction: *Brown v. Carpenter*, 26 Vt. 638, 62 Am. Dec. 603; and it will be presumed that the owner of a vicious animal knows of its dangerous character: *Moss v. Partridge*,



9 Ill. App. 490; Decker v. Gammon, 44 Me. 322, 69 Am. Dec. 99; Besozzi v. Harris, 1 Fost. & F. 92.

d. **Removal of Obstructions in Highways and Streams.**—The law relative to unlawful obstructions in the public highway or in navigable streams is stated in the cases affirmatively to the effect that any traveler or voyager upon the highway or the stream may remove, without a breach of the peace, any unlawful obstruction which prevents or seriously impedes his progress; a boat obstructing a navigable stream may be lawfully removed by the party obstructed, by any means necessary: King v. Sanders (1806), 2 Brev. (S. C.) 111; a building unlawfully erected on a public square is a public nuisance and may be abated by anyone aggrieved thereby: Rung v. Shoneberger, 2 Watts, 23, 26 Am. Dec. 95; a floating warehouse moored permanently in the river opposite the owner's lot is a public nuisance, and may be abated without indictment by any individual aggrieved by it: Hart v. Mayor etc. of Albany, 9 Wend. 571, 24 Am. Dec. 165; a coal barge lodged against the false work of a railroad bridge and endangering the safety thereof may be abated by the owners of the bridge: McKeesport Sawmill Co. v. Penn. Co., 122 Fed. 184; a fence across a public street may be removed so far as necessary by anyone whose progress is obstructed or impeded thereby: State v. Godwin, 145 N. C. 461, 122 Am. St. Rep. 467, 59 S. E. 132; a lodged raft endangering the safety of other closely following rafts may be removed in the most speedy manner when the exigencies of the occasion demand it: Beach v. Schoff, 28 Pa. 195, 70 Am. Dec. 122; where a raft is caught on a dam, the owner of a following raft may cast away enough of the obstructed raft to allow him free passage: Philiber v. Matson, 14 Pa. 306; where a railroad bridge across the Neuse river obstructed the navigation thereof, it was not an offense for the parties obstructed to tear down a portion thereof, notwithstanding it was erected under authority of the state law: State v. Parrott, 71 N. C. 311, 17 Am. Rep. 5; where the defendant removed a sloop's anchor to enable him to pass with his vessel through a narrow channel and the sloop went ashore and was injured, he was held nevertheless justifiable: Bedell v. Kirk, 63 Hun, 627, 17 N. Y. Supp. 638. A bridge over a navigable stream may be removed so far as necessary by anyone thereby impeded, even though the bridge was constructed by the direction of the county commissioners: State v. Anthoine, 40 Me. 435; one who finds an obstruction in a navigable river dangerous to his property has a right to remove it; but must not leave it at a place in the river where it would be likely to endanger the property of others: Porter v. Allen, 8 Ind. 1, 65 Am. Dec. 750; an old, disused, and nearly sunken boat, so fastened to a pier as to impede navigation, may rightfully be removed by the municipal authorities: McLean v. Mathews, 7 Ill. App. 599; a nuisance in a town road or public highway may be removed by anyone whose passage is obstructed: Mann v. Marston, 12 Me. 32; one passing over a road obstructed by movable bars does not become a tres-

passer ab initio by his neglect to replace the bars: *Hinks v. Hinks*, 46 Me. 423; a traveler who removes an obstruction in a highway with due care is not liable in trespass to the party who erected the same: *Corthell v. Holmes*, 88 Me. 376, 34 Atl. 173; a bridge erected by virtue of a void order of the court of sessions may be lawfully removed, so far as necessary by anyone having lawful occasion to use the river for purposes of navigation: *Arundel v. McCulloch*, 10 Mass. 70; where a bridge across a navigable river constitutes an obstruction of navigation, it may be abated by any person who is injured thereby in his rights: *State v. Dibble*, 49 N. C. 107; *Selman v. Wolfe*, 27 Tex. 68; filling up a culvert, thereby causing a highway to become impassable, and constructing a ditch so as to collect the surface water into a channel, and discharge it upon another's land, is a nuisance which the party specially injured may abate by restoring the culvert, doing no wanton or unnecessary injury: *Reed v. Cheney*, 111 Ind. 387, 12 N. E. 717; if a dock is a public nuisance and causes special damage to a private individual, he may lawfully remove it: *Larson v. Furlong*, 63 Wis. 323, 23 N. W. 584; where a stream has been used for purposes of navigation for twenty years, an obstruction thereof may be abated by anyone injured thereby: *Stump v. McNairy*, 24 Tenn. (5 Humph.) 363, 42 Am. Dec. 437. And the same rule is expressed in many of the cases negatively to the effect that no one can be justified in removing by his own act an unlawful obstruction in a public highway or navigable stream unless he has occasion to pass that way, and is thereby obstructed or impeded; where there is no inconvenience to an individual by the obstruction of a highway, he cannot right the supposed wrongs of the public *vi et armis*, but the public must proceed by its proper officers to remove the obstruction or punish the party erecting it: *Bidinger v. Bishop*, 76 Ind. 244. That a street-car company has placed a double track along a street in which it has authority to lay only a single track is no excuse for cutting the wire by which the company proposes to propel its cars: *Paterson Ry. Co. v. Grundy*, 51 N. J. Eq. 213, 26 Atl. 788.

The right of abatement without suit is in all instances limited by the necessity of the case. An encroachment upon a public highway cannot lawfully be removed except it actually interfere with the progress of the traveler upon that highway: *Harrower v. Ritson*, 37 Barb. 301; *Goldsmith v. Jones*, 43 How. Pr. 415; *Godsell v. Fleming*, 59 Wis. 52, 17 N. W. 679; and for wantonly and unnecessarily removing a temporary obstruction extending partly across the street, the abater will be held liable in trespass: *Mathews v. Kelsey*, 58 Me. 56, 4 Am. Rep. 248. The right of an individual to abate a public nuisance extends only to cases where his rights are obstructed by the nuisance: *Corthell v. Holmes*, 87 Me. 24, 32 Atl. 715; a building erected within the limits of a highway cannot be abated by individuals as a nuisance unless it actually obstructs the passage: *Hopkins v. Crombie*, 4 N. H. 520.

e. **Abatement of Other Nuisances.**—Aside from dangerous animals, and unlawful obstructions in public highways and navigable streams, no public nuisance can be rightfully abated without suit by any person except he is thereby specially, and in a manner different in kind from the public at large, injured or seriously annoyed. It is error to enjoin a person whose only mode of ingress and egress is a public road, from tearing down a fence built thereon by the owner of the adjoining land, which especially interferes with such person's use of the road and which the land owner refuses to remove: *Johnson v. Maxwell*, 2 Wash. 482, 27 Pac. 1071; a telephone pole on a private alley is a nuisance, and the lot owner was upheld in cutting it down: *Maryland T. & T. Co. v. Ruth*, 106 Md. 644, ante, p. 506, 68 Atl. 358, 14 L. R. A., N. S., 427, and it is said in *Rhodes v. Whitehead*, 27 Tex. 304, 84 Am. Dec. 631, that "every injury to a watercourse as by improperly diverting it, and every injury by means of a watercourse, by throwing the water back upon the land of another above, . . . is a species of tort denominated a nuisance, for which a party is entitled to redress by an action in which he shall recover damages, and that such nuisance shall be abated, or he may enter upon the land of the other and abate it himself." A private individual cannot maintain an action for a public nuisance, and a fortiori cannot abate it without action, except he shows special injury: *Low v. Knowlton*, 26 Me. 128, 45 Am. Dec. 100; a public nuisance can be abated only by a public officer, except in case of a person having some special interest in the abatement different from and greater than the interest of the community: *Griffith v. Holman*, 23 Wash. 347, 83 Am. St. Rep. 821, 63 Pac. 239, 54 L. R. A. 178; the remedy for a public nuisance is by indictment, unless the person instituting civil proceedings can show special damage differing in kind from that to which all others in common with him are exposed: *McMeekin v. Central Carolina Power Co.*, 80 S. C. 512, 61 S. E. 1020; it is not an available objection to an action to prevent or restrain a private nuisance that the injury complained of was a public nuisance, provided the plaintiffs are subjected by it to a special injury: *Milhau v. Sharp*, 27 N. Y. 611, 84 Am. Dec. 314. No one has a right to abate a bridge across a navigable river, as a public nuisance, unless he has himself sustained some damage not suffered by the rest of the community: *Ft. Plain Bridge Co. v. Smith*, 30 N. Y. 44; in suit by proprietors of a toll bridge to restrain the violation of their franchise, defendants not specially injured cannot maintain the defense that the bridge as maintained is a public nuisance: *Thompson v. New York & H. R. Co.*, 3 Sand. Ch. 625. Shade trees belonging to an adjoining proprietor, and standing on the edge of the street in front of his lot, cannot be destroyed on the ground that the shade renders defendant's house damp: *Bliss v. Ball*, 99 Mass. 597; the power of a municipal officer to abate a public nuisance without statutory or judicial process stands upon no better footing than that of a private citizen: *Coast Co. v. Borough of Spring Lake*, 56 N. J. Eq. 615, 36 Atl. 21; the de-

defendant may cut off overprojecting eaves, if it will do the complainant no irreparable injury: *Lawrence v. Hough*, 35 N. Y. Eq. 371; an owner will not be restrained from removing an overhanging wall: *Lyle v. Little*, 83 Hun, 532, 33 N. Y. Supp. 8; where a corporation is authorized to improve the navigation of a stream, an abatement of the works constituting the improvement, as a private nuisance, and without action, is not allowable, though such improvements obstruct, instead of improve, the navigation: *Black Riv. Imp. Co. v. La Crosse Booming & Transportation Co.*, 54 Wis. 659, 41 Am. Rep. 66, 11 N. W. 443; where injury to plaintiff would result irrespective of the existence of an alleged nuisance, it will not be abated: *Langdon v. Chicago B. & Q. R. Co.*, 48 Iowa, 437; no action lies against a person for removing, with as little injury as possible, a fence separating a highway from a navigable creek at a place over which he has a right to pass; and it is immaterial that he does so for the purpose of filling up the creek and thus committing a nuisance: *Harvard College v. Stearns*, 81 Mass. (15 Gray) 1; a dock built in the waters of a lake upon land belonging to the state or to a third party, and in the possession of the builder thereof, cannot be lawfully abated by another, nor can the materials thereof be converted by the abater to his own use: *Larson v. Furlong*, 50 Wis. 681, 8 N. W. 1; an abater cannot justify himself in tearing down a fence on the ground that it encroached on the highway unless his progress was thereby obstructed and impeded: *Williams v. Fink*, 18 Wis. 265; an oyster-house in a tidal river opposite the defendant's villa lots cannot be lawfully torn down simply because it obscured the prospect, and even obstructed the access and injured the value of the defendant's lots, especially where it did not appear that the waterway to the lots had ever been used: *Bowden v. Lewis*, 13 R. I. 189, 43 Am. Rep. 21; trees in the streets alongside the sidewalks are the private property of the owners of the abutting lots, and may be protected against everyone, except (possibly) the city: *Graves v. Shattuck*, 35 N. H. 257, 69 Am. Dec. 536; neglect of the state to keep a public dam in good preservation did not take away its public character or authorize its destruction by individuals as a public nuisance: *Harris v. Thompson*, 9 Barb. 350; the fact that the owner of trees standing near his boundary, to the alleged injury of his neighbor, has himself cut down some of the trees, does not authorize such neighbor to cut down the rest of them: *Musch v. Burkhart*, 83 Iowa, 301, 32 Am. St. Rep. 305, 48 N. W. 1025, 12 L. R. A. 484; a private citizen may not, ordinarily, volunteer, in behalf of the public to remove that which is an invasion of the public right, and thus summarily punish the offender. It is not, usually, until the public nuisance becomes, as to him, a private one, by interfering with and causing a deprivation of the enjoyment of his private rights that he can put it aside without appealing for relief to the legal tribunals: *Brown v. De Groff*, 50 N. J. L. 409, 7 Am. St. Rep. 794, 14 Atl. 219; *Hitchner v. Richman*, 74 N. J. L. 234, 65 Atl. 856; the mayor of a city, by virtue of his

office, may demolish a wooden dwelling-house in a city, which, by reason of the combustible nature of its materials, and the disorderly character of its occupants, endangers the lives, health, and property of the neighboring residents: *Fields v. Stokley*, 99 Pa. 306, 44 Am. Rep. 109. Miners who are first in appropriation of running water for mining uses may abate a nuisance caused by a dam subsequently erected below their claims, by removing the dam in a peaceable manner: *Stiles v. Laird*, 5 Cal. 120, 63 Am. Dec. 110; if an individual's private property is imperiled or endangered by a building that is being moved, he has the right to use whatever force is necessary to protect and defend that property from injury. But a mere prospect of future injury will not justify the destruction of the building, unless it is a common nuisance. And where there is time and opportunity for the interposition of an adequate legal remedy which may be effectual, the law will not justify the summary employment of force: *Graves v. Shattuck*, 35 N. H. 257, 69 Am. Dec. 536.

1. **Abatement When no Right of Action Exists.**—It is well settled and readily admitted that wherever there is a right of action for a nuisance there is also always a concurrent right to abate that nuisance without suit: *Brown v. Perkins*, 12 Gray, 89; *Amoskeag Mfg. Co. v. Goodale*, 46 N. H. 53; *Turner v. Locy*, 37 Or. 158, 61 Pac. 342. But as to public nuisances the converse of this proposition has also been asserted—that is to say, that where there is no cause of action there can be no right of abatement without suit: *Watts v. Norfolk etc. Ry. Co.*, 39 W. Va. 196, 45 Am. St. Rep. 894, 19 S. E. 521, 23 L. R. A. 674; *Priewe v. Fitzsimmons & Connell Co.*, 94 N. W. 317, 117 N. W. 497. Concerning the latter proposition, however, there may be some question. A fence or a ditch built or dug across a public highway, or a cable stretched across a navigable stream, is a public nuisance per se, and the traveler and voyager whose progress is obstructed thereby had an undoubted right, as has been shown, to remove so much thereof as may be necessary to enable him to proceed upon his way, but according to the weight of authority he can maintain no suit (in the absence of statutory authority) to abate that nuisance, except he is thereby injured or incommoded in a manner special to himself and different in kind from the injury or inconvenience suffered by the public at large.

**FREDMAN v. CONSOLIDATED FIRE AND MARINE INSURANCE COMPANY.**

[104 Minn. 76, 116 N. W. 221.]

**INSURANCE BROKER Distinguished from Insurance Agent.—**

An insurance broker is one who acts as a middleman between the insured and the insurer, and who solicits insurance from the public under no employment from any particular company; "whosoever, not being the appointed agent or officer of the insuring company, for compensation acts for or in any manner aids another in effecting insurance or reinsurance." (p. 611.)

**INSURANCE BROKER—Whether Represents Insurer or Insured.**—Unless otherwise provided, an insurance broker represents the insured, although he may represent either the insured or the insurer, or both, for certain purposes. The question is one of fact to be determined from the evidence. He may be the agent of the insurer for the purpose of delivering the policy and collecting the premiums, for the collection of the premiums only, or not even for that purpose. (p. 611.)

**INSURANCE COMPANY—Whether Bound by Knowledge of Broker.**—An insurance company is bound by the knowledge of its agent; but it is not bound by the knowledge of a broker unless actually communicated to it. (p. 612.)

**INSURANCE BROKER—Authority as Fixed by Statute.**—The provision of the Minnesota statute that every person soliciting insurance and procuring an application therefor shall be held to be the agent of the party afterward issuing insurance thereon, or a renewal, must be construed with the other provision of the statute which declares the extent of the agency of an insurance broker; it does not increase or extend the power of such broker. (p. 614.)

**INSURANCE BROKER—When does not Bind Company.**—If an insurance broker applies to A to renew an insurance policy on his stock of liquors, which A declines to do, whereupon they agree that the broker may procure a policy in the same amount as the existing policy but on A's restaurant furniture; and the broker then notifies agents of the insurance company that the old policy is to be renewed, without informing them of the real agreement with A, and the company then issues a renewal policy on the liquor accordingly and delivers it to the broker for delivery to A, which A keeps for several months, supposing that it covers the furniture, until the furniture is destroyed by fire, A cannot maintain an action to reform the policy and recover the loss, for the broker was not the agent of the company in making the contract of insurance. (p. 613.)

Dunn & Carlson, for the appellant.

Markham & Calmenson, for the respondent.

77 ELLIOTT, J. This was an action to reform a policy of fire insurance and to recover thereon as reformed. The trial court found in favor of the plaintiff on all the issues, and the defendant appealed from the judgment.

For some time prior to 1906 the Consolidated Fire and Marine Insurance Company had been engaged in business in

the State of Minnesota, and was represented at St. Paul by Warner & Regensdorf as its duly appointed and commissioned agents, with authority to fix premiums, receive money, countersign, approve and issue policies, and generally <sup>78</sup> represent the company. Joseph Bergfeld was an insurance broker, duly licensed as such by the insurance department of the state of Minnesota, and for several years had been engaged in business as a broker in the city of St. Paul. He never was a commissioned agent of the appellant, but was known by its agents at St. Paul as being engaged in the insurance brokerage business. On July 12, 1906, Bergfeld applied to the plaintiff, Fredman, for leave to renew and continue for another year a policy of insurance theretofore issued and delivered to the plaintiff by the defendant. That policy covered a stock of wines, liquors, cigars and other merchandise. Fredman declined to renew the existing policy on the wines, liquors and cigars, and told Bergfeld that he then had all the insurance he wished to carry on that property, and that he had recently reduced the amount of his insurance. Bergfeld expressed the hope that he would not be left out and that his policy would not be dropped. Fredman told him that he might place a policy for the same amount on the restaurant and hotel fixtures and furniture. To this Bergfeld assented, and agreed with the plaintiff that the policy should be so written. Bergfeld then went to the office of Warner & Regensdorf, and informed them that the policy would be renewed, but did not inform them of the agreement with reference to the transfer of the policy from the wines, liquors and cigars to the restaurant furniture and fixtures. Warner & Regensdorf thereupon prepared a new policy, entered it upon their daily report to the company in conformity to the policy as actually issued, and gave it to Bergfeld for delivery to Fredman. Bergfeld, before delivering it, entered it in his own records as covering the property actually described in the policy.

It thus appears that the agents of the company issued the policy they intended to issue, and that they had no knowledge of any desire on the part of Fredman to do other than renew the policy on the wines, cigars and liquors. Bergfeld's conduct in entering the policy in his own records seems inconsistent with an understanding that it was not in fact issued as desired by Fredman; but the court found that by the mutual mistake of the parties the policy as issued did not express the true agreement and understanding of the parties

thereto, in that it did not cover and insure the property which the parties intended should be covered and insured thereby, but covered and insured other property not intended to be covered and insured thereunder. The <sup>79</sup> agreement, which the court orders made binding on the company, is the agreement between Bergfeld and Fredman; and it is admitted that the regularly appointed agents of the company at St. Paul knew nothing of any such agreement when they issued and delivered the policy, or until after the fire, more than three months thereafter. The effect is to hold that Bergfeld was the agent of the insurance company for the purpose of binding it by his agreement to insure the furniture and fixtures in the restaurant. When Bergfeld delivered the policy to Fredman, the latter placed it in his safe without examination, and did not know that an error or mistake had been made with reference to the property covered until the day after the fire, which occurred on September 5, 1906. Due proof of loss was made, and, payment being refused, this action was commenced; and the court found the facts in substance as stated, from which the conclusions of law were drawn that Bergfeld was the agent of the insurance company, that the policy should be reformed as prayed, and judgment entered thereon in favor of the plaintiff for the full amount claimed.

The assignments of error raise many questions upon the refusal of the court to make additional or modified findings of fact; but we do not find it necessary to consider them, as the judgment must be reversed if the court was in error in holding that Bergfeld was the agent of the company and that the agreement with him, although not communicated to Warner & Regensdorf, laid the foundation for a reformation of the policy on the ground of mutual mistake of the parties. The court did not find as a fact that Bergfeld was the agent of the insurance company, and the evidence would not have sustained such a finding. It did find, as a conclusion of law, that, "in virtue of the laws of this state and upon the facts above found," he was such agent. We think that this conclusion resulted from an erroneous construction of the statute.

Whatever was done by Bergfeld in connection with the issuance of this policy must be interpreted in the light of the admitted fact that he was an insurance broker and engaged in business as such. Necessarily a broker solicits insurance. We cannot disregard the fact that he was a broker, and then give to what was done by him a construction which it might possibly bear if he had not been a broker; that is, if he had



been an agent acting under some kind of actual authority from <sup>so</sup> the insurance company. Both Fredman and the insurance company must be taken to have known that the laws of the state recognized and provided for insurance brokers, as well as insurance agents. We find nothing in the record which tends to show that Bergfeld ever assumed to act as the agent of the insurance company, or of its duly commissioned agents, Warner & Regensdorf, in any way inconsistent with his status as a broker. There is nothing to suggest that Fredman understood that Bergfeld had any actual authority to represent the insurance company, or that he did anything with the consent or knowledge of the insurance company which would estop it from questioning his authority to bind the company. Everything that Bergfeld did in connection with the issuance of this policy was consistent with his character as a broker; that is, of one who acts as a middleman between the insured and the insurer, and who solicits insurance from the public under no employment from any particular company. Ordinarily, when a broker secures an application, he places the insurance with a company selected by the applicant, or, in the absence of such selection, with one selected by himself. He may receive his compensation from the insurance company or its agent under an arrangement for the division of the commission. Revised Laws of 1905, section 1620, provides that "whosoever, not being the appointed agent or officer of the insuring company, for compensation acts for or in any manner aids another in effecting insurance or reinsurance, shall be deemed an insurance broker; but no person shall act as such except as hereinafter provided." The subsequent provision of the statute relates to the licensing of such brokers by the insurance commissioner of the state.

The well-understood distinction between insurance agents and insurance brokers is thus recognized by the statute. Unless otherwise provided, an insurance broker represents the insured, although he may represent either the insured or the insurer, or both, for certain purposes. It is a question of fact to be determined by the evidence. He may be the agent of the insurer for the purpose of delivering the policy and collecting the premiums, for the collection of the premiums only, or not even for that purpose: See *Seamans v. Knapp-Stout & Co.*, 89 Wis. 171, 46 Am. St. Rep. 825, 61 N. W. 757, 27 L. R. A. 362; *John R. Davis Co. v. Hartford F. Ins. Co.*, 95 Wis. 226, 70 N. W. 84, 37 L. R. A. 131; *Indiana Ins. Co. v. Hartwell*, 123 Ind. 177, 24 N. E. 100; *Newark F. Ins. Co. v.*

<sup>81</sup> Sammons, 100 Ill. 166; Hermann v. Niagara F. Ins. Co., 100 N. Y. 411, 53 Am. Rep. 197, 3 N. E. 341; East Texas F. Ins. Co. v. Blum, 76 Tex. 653, 13 S. W. 572; Davis v. Aetna Mut. F. Ins. Co., 67 N. H. 335, 39 Atl. 902; Pottsville Mut. Fire Ins. Co. v. Minnequa Springs I. Co., 100 Pa. 137. An insurance company is bound by the knowledge of its agent; but it is not bound by the knowledge of a broker, unless such knowledge has been actually communicated to it: United Firemen's Ins. Co. v. Thomas, 92 Fed. 127, 34 C. C. A. 240, 47 L. R. A. 450; Devens v. Mechanics' & Traders' Ins. Co., 83 N. Y. 168; McFarland v. Peabody Ins. Co., 6 W. Va. 425; Fire Assn. v. Hogwood, 82 Va. 342, 4 S. E. 617; Ben Franklin Ins. Co. v. Weary, 4 Brad. (Ill. App.) 74; Royal Ins. Co. v. McCrea, 8 Lea (Tenn.), 531, 41 Am. Rep. 656; Bradley v. German-American Ins. Co., 90 Mo. App. 369; Fire Assn. v. American C. P. Co., 37 Tex. Civ. App. 629, 84 S. W. 1115.

It was not always easy to determine who this go-between or middleman actually represented in a given transaction, and the disposition of the insurance companies to disclaim any responsibility for his acts induced the legislature to define his status. Revised Laws of 1905, section 1716, provide that, "every insurance agent or broker who acts for another in negotiating a contract of insurance by an insurance company shall be held to be the company's agent for the purpose of collecting or securing the premiums therefor, whatever conditions or stipulations may be contained in the contract or policy." This section applies to agents, as well as brokers, and in so far as it refers to agents it does no more than declare the powers which they possess independent of the statute. A broker was generally held to represent the company for the purpose of collecting the premiums, but he probably had no power at common law to secure the payment of a premium; that is, he could not accept payment in anything but cash. But this statute gives the broker power to either collect or secure the premiums, and to this extent it enlarges his common-law powers. It is clear that the principal object which the legislature had in view was to make ineffective provisions which were often inserted in policies to the effect that the broker or soliciting agent should be regarded as the agent of the insured, although the fact might be quite otherwise. But the statute does not make the broker the agent of the company for any purpose other than the collection or securing of the premium, and the inference from this express provision is that the agency is limited to the

enumerated purposes. This construction is in harmony with the general notion of the <sup>82</sup> business of the broker. Except as thus declared, the powers of an insurance broker are not determined by the statute, but are left to be determined by contract between the parties, so long as the contract does not contravene the statutory provision.

Before the enactment of the statute, as said in *Gude v. Exchange Fire Ins. Co.*, 53 Minn. 220, 54 N. W. 1117, the broker might be deemed the agent of the company for the delivery of the policy and the collection of the premium, and nothing more. Now he must be considered as the agent of the company for the purpose of collecting or securing the premiums. It was held in the *Gude* case that the broker was not the agent of the insurance company for the purpose of waiving a condition in the policy. How can it, then, be claimed that he is the agent of the company for the purpose of making a contract of insurance, or binding the company by a contract to insure—particularly in view of the statute, which authorizes the company to insert in the standard form of fire policy the provision that “this policy shall not be valid until countersigned by the duly authorized agent of the company at ——”? The legislature must have intended that this statement should be given force and effect, and its purpose must have been to enable an insurance company to prevent the making of binding contracts by unauthorized persons assuming to represent it. The idea it suggests is utterly at variance with the claim that an ordinary licensed insurance broker can bind the company by his agreement that it will insure any particular property.

Bergfeld was the agent of the insurance company for the purpose of collecting or securing the premium, but, by virtue of the statute, for no other purpose. His agreement to insure the restaurant furniture and fixtures was not binding upon the company until approved by its duly authorized agent. The result is that there was no mutual mistake, such as justifies a reformation of this policy. The company, acting through its proper agents, issued the policy which it intended to issue. Fredman did not get the policy which he expected to get. There is nothing to show that the company would have issued the policy which Fredman desired. The risk may have been greater. The premium may have been different. These are matters which the company was entitled to take into consideration before assuming the risk. It did, in fact, insure Fredman's stock of wines and liquors, and if it had been <sup>83</sup> destroyed the company would unques-

tionably have been liable for the loss. But the furniture in the restaurant was destroyed, and the respondent seeks to have the policy reformed, so as to cover property which the company never knew that it had insured, and rests his right upon the understanding with the broker. If this can be done, the writing of insurance is placed in the hands of brokers, who may impose any kind of liabilities they desire upon insurance companies by the simple expedient of making an agreement with the applicant and reporting a different agreement to the company to which they offer the insurance. The result would be that no insurance company would dare to deal with an insurance broker. The statute was never intended to bring about such a condition. It intended that agents selected by insurance companies under the sense of responsibilities for their acts should bind the companies within the apparent scope of their authority, and that such brokers as the insurance commissioner thought proper to license should act as brokers within the ordinary acceptance of the term, subject to the restrictions expressly provided for in the statute.

Revised Laws of 1905, section 1642, provide that every person who solicits insurance and procures an application therefor shall be held to be the agent of the party afterward issuing insurance thereon, or a renewal. This section must be construed with the provision in the same statute relating to brokers which we have been considering. This general provision does not increase or extend the powers of brokers as declared in the statute. It provides that every person who solicits insurance shall be the agent of the company which accepts the insurance, and prevents the company from requiring the insured to stipulate that the soliciting agent shall be regarded as the agent of the insured. It does not purport to define the scope of the agency thus declared. When the company accepts the benefit of the work of a soliciting agent, it cannot thereafter disclaim the agency of the solicitor in the doing of anything necessarily implied in the specific act thus authorized: *Hankins v. Rockford Ins. Co.*, 70 Wis. 1, 35 N. W. 34; *United Firemen's Ins. Co. v. Thomas*, 92 Fed. 127, 34 C. C. A. 240, 47 L. R. A. 450.

The judgment is therefore reversed.

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*A Broker Obtaining Insurance* is not necessarily the agent of the assured. And whether the persons who acted as brokers in procuring insurance are to be deemed agents of the insurer or of the assured is to be determined from all the evidence bearing upon the question, and not merely from statements in the policy that they were the agents of the assured: *Lumbermen's Mutual Ins. Co. v. Bell*, 166 Ill. 400, 57 Am. St. Rep. 140.

*An Insurance Broker is an Agent of the Insured, and not of the Company, when he receives from the insured an application for a change in the policy, and undertakes to procure such change: Duluth Nat. Bank v. Knoxville Fire Ins. Co., 85 Tenn. 76, 4 Am. St. Rep. 744. See, also, Kister v. Lebanon Mut. Ins. Co., 128 Pa. 558, 15 Am. St. Rep. 696.*

*Notice to an Original Insurance Broker is not notice to the insurer: Arff v. Star Fire Ins. Co., 125 N. Y. 57, 21 Am. St. Rep. 721.*

*On the Waiver of Conditions in Insurance Policies by Agents of the company, see the note to Johnson v. Aetna Ins. Co., 107 Am. St. Rep. 99.*

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## D'AUTREMONT v. ANDERSON IRON COMPANY.

[104 Minn. 165, 116 N. W. 357.]

**NAMES—Christian and Middle Names.**—The common law recognizes but one Christian name, and failure in judicial or other proceedings, in giving the name of a party, to state his middle name or the initial thereof as commonly used, is not fatal to their validity. But this rule is not without exceptions. (p. 617.)

**PUBLICATION OF SUMMONS—Mistake in Name.**—If a mistake is made in the middle initial of the defendant's name in a summons where service is made by publication, the court does not acquire jurisdiction over the real defendant, but probably an entire failure to insert his middle name or initial is not a fatal error. (p. 618.)

**PUBLICATION OF SUMMONS—Strict Compliance with Law.** Statutes authorizing the service of process by publication are in derogation of the common law, and the mode which they prescribe must be strictly pursued. (p. 619.)

**PUBLICATION OF SUMMONS—Mistake in Name.**—The publication of summons in partition directed to "George H. Leslie" does not confer jurisdiction upon the court to adjudicate the rights of "George W. Leslie." (p. 622.)

Henry S. Mahon and John G. Williams, for the appellants.

Sullivan & Grant, for respondent Gaylord.

<sup>106</sup> BROWN, J. Proceedings to register title to real property under the Torrens system of land transfer. Respondent Gaylord had judgment confirming an asserted interest in the land, and applicants appealed.

The facts are as follows: The applicant, Charles D'Autremont, and others, including William C. Sherwood, were, on May 15, 1897, and for some time prior thereto had been, the owners, but in separate and undivided interests, of the land in question. On that day a judgment was duly rendered in the district court of St. Louis county, in which the land is situated, in an action therein pending, wherein George W. Leslie was plaintiff and the said William C. Sherwood was

defendant, in favor of Leslie and against Sherwood for the sum of two thousand and ninety-one dollars and fifty-two cents, which then became by the proper docketing thereof a lien upon Sherwood's interest in the land. Thereafter, on June 20, 1900, D'Autremont brought an action in the district court of said county for the partition of the land among the several owners. All persons having or claiming any interest in or to the land were made parties; Leslie being designated as a party defendant under the name of "George H. Leslie." The result of that action was a sale of the land by a referee appointed by the court for that purpose, a division of the same having been found impracticable, and D'Autremont became the purchaser. The sale was confirmed by the court, and a formal referee's deed executed and recorded on January 19, 1901. On September 29, 1902, said George W. Leslie duly sold and assigned the judgment against Sherwood to one Sarah L. McNulty, who in turn sold and assigned the same to respondent Gaylord; both instruments of assignment being filed in the office of the clerk of the district court. The proceeds realized from the lands in the partition proceedings were insufficient to discharge the numerous judgments against Sherwood, and no part of the judgment in favor of Leslie has ever been paid. Some time in 1906 Gaylord caused execution <sup>167</sup> to be issued on this judgment, under which the interest of Sherwood in and to the land was levied upon and sold; respondent Gaylord being the purchaser. In this proceeding to register title he asserted an interest in the land under and by virtue of this judgment, execution and sale.

The sole question involved is whether the court acquired jurisdiction of George W. Leslie in the partition suit, so that the judgment rendered therein and the sale of the land by the referee extinguished the lien of his judgment against Sherwood. The summons in that action was served by publication, and, as already mentioned, designated "George H. Leslie" as defendant. It is the contention of appellant that the error in the name, the use of the initial "H." instead of "W.," was an irregularity not going to the jurisdiction of the court; while respondent contends that the error was fatal, and the publication of the summons conferred no jurisdiction upon the court to adjudicate the rights of "George W. Leslie." The trial court held with respondent, and that the lien of the Sherwood judgment was not affected by the proceedings or judgment in the partition suit. Though the partition suit was a proceeding in rem, the mere fact that the

court acquired jurisdiction over the subject matter thereof, the land, did not authorize it to adjudicate the rights or interest of parties, in the absence of proper service of summons upon them: *Note to Pinney v. Providence L. & I. Co.*, 50 L. R. A. 597; *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914; *Hassall v. Wilcox*, 130 U. S. 493, 9 Sup. Ct. Rep. 590, 32 L. ed. 1001; *Dorr's Admr. v. Rohr*, 82 Va. 359, 3 Am. St. Rep. 106. And we have for consideration the question whether the publication of the summons in the form stated was a valid service thereof upon "George W. Leslie," the real party in interest.

As a general rule, the common law recognizes but one Christian name, and failure in judicial or other proceedings in giving the name of the party to state his middle name, or the initial thereof as commonly used, is not fatal to their validity. But the rule, like most rules of judicial procedure, is not without exceptions: *Stewart v. Colter*, 31 Minn. 385, 18 N. W. 98; *State v. Higgins*, 60 Minn. 1, 51 Am. St. Rep. 490, 61 N. W. 816, 27 L. R. A. 74. It had its origin during the early times in England, when a person had but one name, and that his Christian name. His further identification was indicated by some <sup>168</sup> designated physical characteristic, place of residence, or deed of valor or virtue. Even since the adoption of the system of family names, the first or Christian name has been held by the courts of England as the true name, in legal proceedings, for the designation of persons; the middle name, or the initial thereof, being regarded as wholly unimportant. The rule has been followed and applied in proceedings both judicial and extra-judicial in this country, with occasional exceptions based upon special circumstances.

In all proceedings where an error in the name may be corrected by appropriate application to the court, or that particular person may be identified by extrinsic evidence, a mistake in the name appearing in the proceeding or writing involved is not ordinarily fatal to its validity. Our statutes, as do the statutes of nearly all the states of this country, provide for the correction of mistakes in the names of parties in judicial proceedings: *Rev. Laws 1905, sec. 4157*; *Casper v. Klippen*, 61 Minn. 353, 52 Am. St. Rep. 604, 63 N. W. 737; *Kenyon v. Semon*, 43 Minn. 180, 45 N. W. 10. In respect to similar mistakes in conveyances of land, mortgages, contracts or statutory proceedings for the foreclosure of mortgages, the rules of evidence permit the full and complete identification of parties misnamed by error or mistake:

*Massillon E. & T. Co. v. Holdridge*, 68 Minn. 393, 71 N. W. 399; *Ansley v. Green*, 82 Ga. 181, 7 S. E. 921. Of course, to authorize such amendments in judicial proceedings, the court must have jurisdiction of the parties, and afford them an opportunity to be heard, and in other proceedings those interested in the subject matter must also be before the court, with opportunity to be heard on the question of identity.

It has often been held that the failure in any proceeding, judicial or otherwise, to include the initial of the middle name is unimportant, and not fatal to its validity: *Cleveland etc. Ry. Co. v. Peirce*, 34 Ind. 188, 72 N. E. 604; *State v. Hughes*, 31 Tenn. 261; *King v. Clark*, 7 Mo. 269. The rule has been declared otherwise, however, where a wrong initial is used, particularly in deeds or other instruments affecting the title to land: *Ambs v. Chicago etc. Ry. Co.*, 44 Minn. 266, 46 N. W. 321; *Burford v. McCue*, 53 Pa. 427. And there has been a tendency in some of the courts to break away from the old rule, and to hold the full true name of all parties essential in all <sup>169</sup> proceedings: *Parker v. Parker*, 146 Mass. 320, 15 N. E. 902; *Commonwealth v. Buckley*, 145 Mass. 181, 13 N. E. 368; *Dutton v. Simmons*, 65 Me. 583, 20 Am. Rep. 729; *Ming v. Gwatkin*, 6 Rand. (Va.) 551; *Bowen v. Mulford*, 10 N. J. L. 230. In most states it is held, in both civil and criminal actions, that an omission or the use of a wrong initial does not affect the jurisdiction of the court, where the right party is actually served with process and brought into court: *Casper v. Klippen*, 61 Minn. 353, 52 Am. St. Rep. 604, 63 N. W. 737; 14 Ency. of Pl. & Pr. 301, and cases cited.

There is reason and sound sense in that view of the law. In such case the right party is actually served, and the error may be corrected without prejudice to any of his rights. Only an extremely technical view sustains the position that in such cases the error is fatal: *Casper v. Klippen*, 61 Minn. 353, 52 Am. St. Rep. 604, 63 N. W. 737, overruling *Atwood v. Landis*, 22 Minn. 558. But should the same liberal view be taken where the defendant is only constructively served with summons, as in the case at bar, by publication? We think not.

The reasons for disregarding the error where there is personal service upon the right party do not apply where the only service is by publication against a nonresident of the state. In a case of that kind, the true name of the party becomes of especial importance. It is well known that there are numerous persons having the same Christian and surname, but with a different middle name, such as John O.



Johnson, John A. Johnson and John M. Johnson, James A. Green and James E. Green, and they are each identified and distinguished by the initial of the middle name. It would be intolerable, in the practical affairs of life, if persons by the name of Johnson, Green, or Brown, or even the numerous Jones family, should be required to take notice of every action brought by the publication of summons in which a part of his name appeared as the party defendant. No personal service is made in such cases, and that the real defendant has knowledge of the pendency of the action is an inference of the law only, and the use of a wrong initial is naturally misleading, and likely to result to his prejudice. The statute authorizing this form of process is in derogation of the common law, and the mode prescribed must be strictly pursued: *Reno on Nonresidents*, sec. 190; *Gilmore v. Lampman*, 86 Minn. 493, 91 Am. St. Rep. 376, 90 N. W. 1113; *Duxbury v. Dahle*, 78 Minn. 427, 79 Am. St. Rep. 408, 81 <sup>170</sup> N. W. 198. This method of acquiring jurisdiction and adjudicating the rights of parties constitutes due process of law only when the statutes providing therefor have been fully and completely complied with: *Corson v. Shoemaker*, 55 Minn. 386, 57 N. W. 134; *Clary v. O'Shea*, 72 Minn. 105, 71 Am. St. Rep. 465, 75 N. W. 115.

Some of the courts have held that the use of a wrong initial, or other error in defendant's name, not coming within the rule of *idem sonans*, where the summons is served by publication, is not a compliance with the statute, and is fatal to the jurisdiction of the court: 66 Cent. Law Jour. 338; 14 Ency. of Pl. & Pr. 302, and cases cited in note; *Cleveland etc. Ry. Co. v. Peirce*, 34 Ind. App. 188, 72 N. E. 604; *State v. Hughes*, 31 Tenn. 261; *King v. Clark*, 7 Mo. 269; *Fanning v. Krapfl*, 61 Iowa, 417, 14 N. W. 727, 16 N. W. 293; *Enewold v. Olsen*, 39 Neb. 59, 42 Am. St. Rep. 557, 57 N. W. 765, 22 L. R. A. 573; *Skelton v. Sackett*, 91 Mo. 377, 3 S. W. 874; *Freeman v. Hawkins*, 77 Tex. 499, 19 Am. St. Rep. 769, 14 S. W. 364; *Fitzgerald v. Salentine*, 51 Mass. 436; *Parker v. Parker*, 146 Mass. 320, 15 N. E. 902; *Davis v. Steeps*, 87 Wis. 472, 41 Am. St. Rep. 51, 58 N. W. 769, 23 L. R. A. 818; 1 Black on Judgments, sec. 232. The cases just cited are not all precisely in point but they are analogous, and bear out the claim that a service by publication, where there is a substantial error in the name of the defendant, confers no jurisdiction on the court. We are not prepared to say that the mere omission of the middle name, or the initial thereof, would wholly nullify the proceedings; but

where, as in this case, there is an attempt to give the full name of the defendant, and a wrong initial is used, it must, in view of the very common practice of identifying particular individuals by adding their middle name, be held that the error is misleading, and likely to result in prejudice to those who may perchance notice the same as published in the newspaper. It would be straining the rule requiring a strict observance of the statute permitting service of process in this manner to hold an error so likely to mislead and prejudice an irregularity only.

As bearing upon the question of jurisdiction, numerous instances are reported in the books where errors and defects of far less significance than the one here presented have been held to wholly vitiate a judgment based upon this form of constructive service. In *Barber* <sup>171</sup> v. *Morris*, 37 Minn. 194, 5 Am. St. Rep. 836, 33 N. W. 559, and *Brown v. St. Paul & N. P. Ry. Co.*, 38 Minn. 506, 38 N. W. 698, judgments were held void on collateral attack for the failure of the plaintiff to file his affidavit for publication within the time prescribed by statute. In the first of these cases the affidavit was not filed until the day of the entry of judgment. In the second case, a condemnation proceeding, the affidavit was not filed until after the summons had been published. An affidavit filed two days after the first publication was held insufficient in *Murphy v. Lyons*, 19 Neb. 689, 28 N. W. 328. If the affidavit be technically, in point of substance, not in compliance with the statute, a judgment rendered on service by publication is void: *Carrico v. Tarwater*, 103 Ind. 86, 2 N. E. 227, where the affidavit fails to show that the action is one in which service by publication is authorized: *Harris v. Clafin*, 36 Kan. 543, 13 Pac. 830; *Nelson v. Rountree*, 23 Wis. 367; *Forbes v. Hyde*, 31 Cal. 342. Insufficiently specific as to due diligence in ascertaining the residence of the defendant: *Little v. Chambers*, 27 Iowa, 522. In Illinois the statute requires the issuing and return of process "not found" before publication, and a judgment rendered upon such service, without the return was held void in *Chickering v. Failes*, 26 Ill. 507, and also in *Firebaugh v. Hall*, 63 Ill. 81. If the affidavit be not made by all the plaintiffs, where two or more join in bringing the action, the judgment rendered is void: *Kane v. Rock River Canal Co.*, 15 Wis. 179; *Mecklem v. Blake*, 19 Wis. 397. And also where the sheriff fails in observance of the statutory requirement to continue in an effort to find the defendant in the state pending publication: *Israel v. Arthur*, 7 Colo. 5, 1 Pac. 438; *Kennedy v. Lamb*, 182 N. Y.

228, 108 Am. St. Rep. 800, 74 N. E. 834. And where the summons is defectively addressed to defendant: *Durst v. Ernst*, 45 Misc. Rep. 627, 91 N. Y. Supp. 13. See, also, *Van Fleet on Collateral Attack*, secs. 331, 348; 6 Current Law, 1090, and cases cited.

There is a conflict in the adjudicated cases upon the question whether defects of the nature of those here mentioned are jurisdictional. Many courts hold to the doctrine that a judgment rendered in the face of such defects is not rendered absolutely void, but irregular, and that the irregularity may be corrected by motion. But the two Minnesota cases above referred to settle the rule in this state, and <sup>172</sup> are in harmony with the general principle that to confer jurisdiction in cases of this kind the statutes must be strictly complied with: 1 Black on Judgments, sec. 232.

But we need not pursue this subject. Reference is made to it only to emphasize the importance given by many courts to errors and defects in the proceedings leading up to the service of summons by publication. The affidavit of publication in such cases is not filed, nor required to be filed, for the information of defendant. He receives no benefit therefrom by way of notice of the suit or otherwise, nor by the sheriff's certificate of "Not found," nor from the order for publication, where an order is required; and if a judgment rendered on service by publication is void for want of jurisdiction for errors in these respects, and in others pointed out in the decisions referred to, for a stronger reason should the error of misnaming defendant be fatal, where the error does not come within the rule of *idem sonans*, and is such as is likely to mislead and result in his prejudice.

In *Ambs v. Chicago etc. Ry. Co.*, 44 Minn. 266, 46 N. W. 321, it appeared that the land there in question was at one time conveyed to "William H. Brown," and the chain of title disclosed a subsequent conveyance from "William B. Brown." The court there held, Judge Dickinson writing the opinion, that there was no presumption that the two Browns were one and the same person. If that be sound as to private writings, and we have no reason to question the decision, it follows naturally that the same rule should be applied to a judicial proceeding like that at bar, and if so, we have no right to assume that "George W. Leslie" and "George H. Leslie" are one and the same person.

It is urged by appellant that, inasmuch as in cases where the summons in an action is served by publication, the defendant may, upon good cause shown, which has been con-

strued as an answer stating a defense, come in and defend the action within a year after notice of its entry, the court should be more liberal in the consideration of errors of the character of those here involved, citing *Quarl v. Abbett*, 102 Ind. 233, 52 Am. Rep. 662, 1 N. E. 476. But we are not persuaded by this argument. If the error in the name is jurisdictional, as we hold, judgment entered is void, and to adopt the contention of appellant would result in compelling a defendant in a particular case to waive the want <sup>173</sup> of jurisdiction in the court to enter judgment against him and to come to this state and litigate the cause on its merits. This the court has no right to do. The law providing for the manner of acquiring jurisdiction over nonresidents is plain, and should not be ignored, even in a case of apparent hardship. We are sustained in this view by the supreme court of Michigan in the case of *Granger v. Judge*, 44 Mich. 384, 6 N. W. 848, where the court, speaking through Justice Campbell, said: "Where cases and proceedings are not according to the usual course, and are special in their character, they are held void on slighter grounds than regular suits, because the courts have not the same power over their records to correct them. So where there has been no personal service within the jurisdiction, the doctrine prevails that proceedings not conforming to the statutes are void. But this is on the ground that there has been no service whatever, and the party, therefore, has not been notified in any proper way of anything."

Counsel called attention to the case of *Illinois Cent. R. Co. v. Hasenwinkle*, 232 Ill. 224, 83 N. E. 815, 15 L. R. A., N. S., 120. While the court in that case in the course of the opinion said that the use of a wrong initial of the middle name of a nonresident defendant in condemnation proceedings would not necessarily render the judgment therein void, the real ground of the decision there made was that the defendant, so erroneously named, had permitted the judgment to remain unquestioned for over fifty years, during which time the railroad company had occupied the premises granted by the judgment as its right of way.

We therefore hold, in harmony with the views of the learned trial court, that the publication of the summons in the partition suit directed to "George H. Leslie" did not confer jurisdiction upon the court to adjudicate the rights of "George W. Leslie."

Judgment affirmed.

*When Service of Process is Made by Publication*, the statute must be at least substantially complied with (*Laney v. Garber*, 105 Mo. 355, 24 Am. St. Rep. 391), and generally the authorities declare that the statute must be followed strictly: *Gilmore v. Lampman*, 86 Minn. 493, 91 Am. St. Rep. 376; *Thomas v. Thomas*, 96 Me. 223, 90 Am. St. Rep. 342; *Coffin v. Bell*, 22 Nev. 169, 58 Am. St. Rep. 738. For an application of this rule to cases where an error is made in the name of the defendant against whom publication is made, see *Cruzen v. Stephens*, 123 Mo. 337, 45 Am. St. Rep. 549; *Jones v. Kohler*, 137 Ind. 528, 45 Am. St. Rep. 215; *Thornily v. Prentice*, 121 Iowa, 89, 100 Am. St. Rep. 317; *Thompson v. McCorkle*, 136 Ind. 484, 43 Am. St. Rep. 334; *Freeman v. Hawkins*, 77 Tex. 498, 19 Am. St. Rep. 769.

*Defects in the Service of Process* as affecting jurisdiction of the court are discussed in the note to *Sanford v. Edwards*, 61 Am. St. Rep. 485.

*The Law does not Regard a Middle Initial Letter* as part of a person's name, but ordinarily recognizes only the Christian name of a party: *Beattie v. National Bank*, 174 Ill. 571, 66 Am. St. Rep. 318. For other authorities discussing whether the omission of the middle initial of a person's name in judicial proceedings is material, see *State v. Higgins*, 60 Minn. 1, 51 Am. St. Rep. 490; *Wheeler v. Hanson*, 161 Mass. 370, 42 Am. St. Rep. 408; *Allison v. Thomas*, 72 Cal. 562, 1 Am. St. Rep. 89.

*The Doctrine of Idem Sonans* is the subject of a note to *Thornily v. Prentice*, 100 Am. St. Rep. 322.

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## CONHEIM v. CHICAGO GREAT WESTERN RAILWAY COMPANY.

[104 Minn. 312, 116 N. W. 581.]

**CARRIERS—Delay of Salesman's Baggage.**—Where baggage agents neglect to forward the trunks of a traveling salesman on the same train on which he takes passage, having knowledge of the character of the trunks and that the salesman cannot transact his business without their contents, whereby the latter is delayed in his business, the carrier is liable for the damages naturally resulting therefrom. (p. 624.)

**CARRIERS.—A Passenger is Entitled to have His Trunks**, which he delivers to the baggageman at the station in proper season, go forward on the same train which he takes. (p. 624.)

**CARRIERS—Damages for Delay in Delivering Salesman's Trunk.**—Where a carrier delays to forward a traveling salesman's trunk containing his samples, the measure of damages is the value of the use of the property during the period of delay, including such incidental expenses and damages as were in the contemplation of the parties at the time the contract was entered into. (p. 625.)

A. G. Briggs and Edward A. Knapp, for the appellant.

Markham & Calmenson, for the respondent.

<sup>313</sup> ELLIOTT, J. The respondent, Conheim, a traveling salesman for a house dealing in men's wearing apparel, desiring to go from St. Paul to Rochester, Minnesota, purchased a ticket and checked his trunk containing samples necessary for use in his business. This trunk, of the kind and style usually carried by traveling salesmen, was delivered to the appellant's baggageman at the Union Station in St. Paul at 4:30 P. M. of December 5, 1906. Conheim was known to the baggageman, who had seen his samples and knew that he was a traveling man. When the trunk was checked, Conheim told the baggageman that it must be sent forward to Rochester, Minnesota, on the Chicago Great Western train, which was to leave the station at 5:40 P. M. of that day. There was no other conversation between the parties. Conheim went to Rochester on that train, and did not learn until the next morning that the trunk had not accompanied him. It finally reached Rochester at 1:30 P. M. of that day, and in an action for damages Conheim claimed that, through the negligence of the railway company in failing to forward this trunk, as directed, he lost one day's time, to his damage in the sum of fifty dollars. The trial court awarded him seventeen dollars and fifty cents, and this appeal was taken from an order denying defendant's motion for a new trial.

Under the rule announced in *McKibbin v. Great Northern Ry. Co.*, 78 Minn. 232, 80 N. W. 1052, and *McKibbin v. Wisconsin Central Ry. Co.*, 100 Minn. 270, 117 Am. St. Rep. 689, 110 N. W. 964, 8 L. R. A., N. S., 489, the plaintiff established a cause of action for nominal damages, at least, against the railway company; but we regret to say that it is necessary to reverse the order because of the application of an erroneous rule for determining the damages, and the indefinite and unsatisfactory nature of the evidence offered to prove damages.

When the agent of a railway company knows the nature of the <sup>314</sup> trunks and the character of the business of a traveling salesman, and is aware of the fact that the passenger cannot transact his business without using the contents of the trunk, and that it is necessary that the trunk shall accompany him, and nevertheless neglects to forward the trunk as directed, whereby the passenger is delayed in his business, the carrier is liable for the damages naturally resulting therefrom. Under such circumstances the passenger is entitled to have a trunk, which he delivers to the baggageman at the station in proper season, go forward on the same train which he takes. This action was brought on the theory that the plaintiff was entitled to recover the value of the time lost

by him through the delay in forwarding his trunk according to directions. Assuming that the trunk was delivered to the station baggageman, and directions given, within a reasonable time before the departure of the train, the company was negligent, and plaintiff was entitled to recover the damages which he was able to prove resulted from such negligence. The action was brought on the theory that he could recover for the value of the time lost; but the respondent now practically concedes that the proper measure of damages in such a case is the value of the use of the property during the time of delay of delivery, including such incidental expenses and damages as were in the contemplation of the parties at the time the contract was entered into: *Southern Ry. Co. v. Coleman* (Ala.), 44 South. 837; *Texas & N. D. Ry. Co. v. Douglas* (Tex. Civ. App.), 30 S. W. 487; *Texas & P. Ry. Co. v. Russell* (Tex. Civ. App.), 97 S. W. 1090; *Elliott on Railroads*, 2d ed., sec. 1662a; *Moore on Carriers*, p. 730.

It was not pleaded, and there was no evidence to show, that the defendant's baggageman was notified that any special reason existed for expediting the delivery of the trunk. In a case very like this (*Katz v. Cleveland etc. Ry. Co.*, 46 Misc. Rep. 259, 91 N. Y. Supp. 720), the court said: "The reason given by plaintiff's principal witness why unusual damage resulted from the delay was that he needed the samples in order to fulfill engagements already made to meet prospective customers, and that he could not sell goods in the absence of his samples. He did not, however, give defendant any notice of these special circumstances. All he did was to notify defendant's baggageman that he had a large sample trunk which he wished checked. This certainly was not calculated to convey the intelligence that any special reason existed for expediting <sup>315</sup> this trunk, which would not apply to any trunk. Upon the evidence as it stood the plaintiff should have been nonsuited." If Conheim had been able to prove that the baggageman was notified of the special reasons why it was important that this trunk should go with him on the next train, he might have recovered what he lost by not having the use of the samples. He spent the morning after he learned that his trunk had not arrived in calling on his customers in Rochester. In the afternoon, after the trunk had arrived, he showed them his samples, and it is not claimed that he lost any sales in Rochester. He does claim that if the trunk had been in Rochester in the forenoon, when he called for it, he could have finished his work and left there about 3 o'clock in the afternoon, and gone to Owatonna, where he

intended to call upon other customers, and that because of the delay in Rochester he did not stay at Owatonna, but went on to Austin. He says that the loss for which he claims damage was "the subsequent loss of time from not having the samples at Rochester on that particular day." It does not appear that he had any regular customers at Owatonna, or that there was any reasonable probability that he would make any sales there. It was all left to conjecture.

The estimate of the value of his time was also very indefinite. He "figured that his time ran from twenty-five dollars to fifty dollars a day on the average," and sometimes more. He "estimated that his time ran not less than twenty-five dollars per day, and from that up, while he was on the road." He testified that the only loss he sustained was by reason of the loss of the commissions he might have made; but it appeared that, while he was working on a commission basis, the firm paid him a stipulated sum every month, regardless of his earnings—that is, he received a fixed amount each month to cover his living expenses. It does not appear what this amount was, although it is conceded that it was paid for the day which he claims to have lost. Upon this state of the evidence it is impossible to estimate with any reasonable degree of accuracy what the value of the use of the property would have been during the time its delivery was withheld.

The order is therefore reversed, and a new trial granted.

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*The Liability of a Carrier for Damages* is the subject of a note to *Wood v. Maine Cent. R. R. Co.*, 99 Am. St. Rep. 343. If a railroad station agent knows that property checked as baggage is in fact a sample case of goods, and the railroad company has formerly accepted and carried such case as baggage, it is liable for the value of the case and contents if they are lost in transit: *New Orleans etc. R. R. Co. v. Shackelford*, 87 Miss. 610, 112 Am. St. Rep. 461. Courts take judicial notice that it is the general custom of common carriers by rail to carry sample trunks with their contents of merchandise as the baggage of traveling salesmen, but not of the conditions or limitations, if any there be, under which this is done, and it is not necessary to prove knowledge on the part of the carrier or his agent of the contents of such trunks by evidence of a direct statement made by the traveling salesman, or by other direct evidence. Such fact may be inferred from the circumstances of the transaction: *McKibbin v. Wisconsin Cent. Ry. Co.*, 100 Minn. 270, 117 Am. St. Rep. 689.



## REA v. ALGREN.

[104 Minn. 316, 116 N. W. 580.]

**LANDLORD'S FAILURE TO REPAIR as Affecting Liability for Rent.**—While the breach of a landlord's agreement to repair may not relieve a tenant in possession from liability to pay rent, still if the failure to repair amounts to a constructive eviction, the tenant will be justified in leaving the premises, and his liability for rent will thereupon terminate. (p. 628.)

**LANDLORD'S FAILURE TO REPAIR as Constructive Eviction.**—The failure of a landlord to perform his agreement to repair a leaky roof and defective plumbing amounts to a constructive eviction, so that the tenant may abandon the premises and be absolved from liability for subsequently accruing rent. (p. 628.)

George T. Halbert and C. J. Bartleson, for the appellant.

E. E. Witchie, for the respondent.

<sup>316</sup> JAGGARD, J. Plaintiff and appellant sued for two months' rent of premises which the defendant and respondent had abandoned. The lease was oral and from month to month. Defendant asserted, by way of answer, inter alia, that the premises had become untenable because of a leaky roof and defective plumbing, both of which plaintiff had promised and failed to repair. The trial court found as facts, inter alia, that plaintiff agreed to make repairs, especially as to plumbing and fixing the roof; that "the plumbing in the bathroom was not in proper condition, in that when the bathtub was used the water would not pass through the outlet pipe, as the same was stopped up, and leaked out through the pipe into the kitchen below; that the roof needed repairing, <sup>317</sup> but the same was not done, in that the roof leaked considerably whenever it rained, and the water ran down through the attic roof into the apartments on the second floor. That the authorized agent of the plaintiff was notified of the condition of said roofing and bathtub, and requested the repairing of same, but neglected so to do." Judgment for defendant was ordered.

The principle that, where either party to a contract fails to perform a substantial part of his agreement, the other party is absolved from performance on his part, is of general, but not universal, application. Thus, the breach of warranty does not justify rescission: *Lynch v. Curfman*, 65 Minn. 170, 68 N. W. 5. So it has been held that there is an implied condition that a tenant may quit if repairs by the landlord are not made as agreed: See, for example, *Surplice v. Farnsworth*, 7 M. & G. 576. The correct opinion, and the

rule in this state, is, however, that, while the breach of the landlord's agreement to make repairs or improvements for the benefit of the tenant may not relieve the tenant in possession from liability to pay rent (*Long v. Gieriet*, 57 Minn. 278, 59 N. W. 194), none the less, where the failure to repair amounts to a constructive eviction, the tenant will be justified in leaving the premises, and his liability for rent will thereupon terminate: *Bass v. Rollins*, 63 Minn. 226, 65 N. W. 348; *Minneapolis Co-operative Co. v. Williamson*, 51 Minn. 53, 38 Am. St. Rep. 473, 52 N. W. 986. It has been said that constructive eviction results when the lessor renders the enjoyment of the premises impossible, or diminishes such enjoyment to a material degree: *Tiedeman on Real Property*, sec. 153. The natural tendency of defective plumbing (*Damkroger v. Pearson*, 74 Minn. 77, 76 N. W. 960; *Harthill v. Cooke's Exr.*, 19 Ky. 1524, 43 S. W. 705), or of a leaky roof (*Brolaskey v. Loth*, 5 Phila. 81), to result in a constructive eviction, must be recognized. The lessee was under no obligation "to have hired a carpenter with an armful of shingles and a handfull of nails," or to have hired a plumber, and to have fixed the roof or the plumbing at a fixed charge.

The trial court found, in effect, that defendants were constructively evicted. The present situation would have been much clearer if such an express finding had been made. To have made such an express finding would have conformed to approved practice. The defect of the findings in this respect, and in respect to the time at which the agent was notified of the condition of the roofing and of the bathtub, and requested to repair the same, and the circumstances in connection therewith, was not made the subject of a motion before the trial court. It would serve no useful purpose to grant a new trial in order that the court might supply these deficiencies.

Affirmed.

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*Eviction by a Landlord Relieves the Tenant from the Payment of rent accruing after his possession ceases: Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 37 Am. St. Rep. 248; *Cheairs v. Coats*, 77 Miss. 846, 78 Am. St. Rep. 546. And an actual or physical expulsion from the property is not essential to an eviction: *Edmison v. Lowry*, 3 S. D. 77, 44 Am. St. Rep. 774; *Barrett v. Boddie*, 158 Ill. 479, 49 Am. St. Rep. 172. A tenant is justified in abandoning the premises and refusing to pay rent if the landlord creates a nuisance which prevents a reasonable use of the premises: *Sully v. Schmitt*, 147 N. Y. 248, 49 Am. St. Rep. 659.

*If Leased Premises Become Out of Repair or Dangerous and unfit for occupancy while the tenant is in possession, and there is no agreement in the lease that the lessor shall make repairs, the lessee*

is liable for rent while the lessor is making repairs with the lessee's consent, although he is excluded from the premises during such time, unless there is an agreement that rent shall not continue during that time: *Petz v. Voigt Brewery Co.*, 116 Mich. 418, 72 Am. St. Rep. 531.

*A Lessee Takes a Tenement in the Condition in Which It is* when leased to him, and the landlord is under no obligation subsequently to make repairs unless he has so covenanted: *Phelan v. Fitzpatrick*, 188 Mass. 237, 108 Am. St. Rep. 469; *Gregor v. Cady*, 82 Me. 131, 17 Am. St. Rep. 466; *Ward v. Fagin*, 101 Mo. 669, 20 Am. St. Rep. 650.

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### BROOKS v. MOHL.

[104 Minn. 404, 116 N. W. 931.]

**COVENANT OF WARRANTY—Limitation of Action for Breach.**—Where a superior title is outstanding in a third person at the time of the execution of a warranty deed, the covenants of the deed are broken when that title is actually asserted and the covenantee obliged to yield thereto, so that the statute of limitations then commences to run rather than from the date of the delivery of the deed. (pp. 630, 631.)

**COVENANT OF WARRANTY—Breach Without Actual Ouster.** The grantee in a warranty deed is not compelled, in order to have an action for breach of covenant, to surrender possession when an outstanding superior title is asserted, but he may extinguish such title by purchase. (p. 631.)

**COVENANT OF WARRANTY—Measure of Damages for Breach.**—The measure of damages for breach of covenants of warranty, where there has been an eviction actual or constructive, is the consideration paid, with interest, together with costs and attorneys' fees reasonably and in good faith incurred in defending the title and resisting the eviction. (p. 631.)

Geo. Wilson & Son, for the appellants.

Town & Jones, for the respondents.

<sup>405</sup> **JAGGARD, J.** On December 25, 1890, defendants made and delivered to Samuel Brooks, now deceased, a warranty deed in the usual form conveying one hundred and sixty acres of land. Defendants had never been in actual possession of the land or any part thereof. At the time of the delivery of the deed the land was vacant and unoccupied. Within a few months after the delivery of the deed, the grantee, Samuel Brooks, took the actual possession of the land under the deed, and resided upon the land up to the day of his death. Since that, and up to the present time, his heirs at law, the plaintiffs, have continued such actual possession, and some of them now reside upon the land. On

January 17, 1903, an action in partition was brought by a plaintiff, claiming to own an undivided nine-fifteenths interest in the premises, against the heirs of Samuel Brooks, as the owners of an undivided two-fifteenths, and against two other defendants, each alleged to own an undivided two-fifteenths interest. The ownership of such respective undivided interests was found as a fact by the court. On August 9, 1905, the present plaintiffs procured conveyances from other cotenants of their interests for a total sum of one thousand seven hundred and twenty-nine dollars and eighty cents. Of this sum only one dollar was paid to one cotenant for a two-fifteenths interest, and the remainder to the other cotenants. Notice of the pendency of the partition suit was served by Brooks on Fred Mohl, one of the defendants in this suit, but not on the other defendant, his wife. This was an action brought by plaintiffs on July 30, 1906, for damages for the breach of covenant in the deed. The trial court in this case found these facts. It also found that plaintiffs <sup>406</sup> had accounted for the rental value of said lands to the original owners thereof, as determined in probate proceedings previously referred to.

The defendants urge that the complaint is one for damages for breach of the covenant of seisin only; that this covenant was broken as soon as the deed was delivered, to wit, on December 25, 1890; and that inasmuch as this action was not brought until July 30, 1906, it was barred by the six-year statute of limitations: Rev. Laws, sec. 4076. This position is not tenable.

Undoubtedly, for some purposes, the covenant for seisin is regarded as broken by failure of title as soon as the deed is delivered; but for the present purpose that rule is not properly invoked. It is the settled law of this state, in conformity with the general opinion on the subject, that "if, at the date of the covenant, there is a superior title in a third person, whenever that title is actually asserted against the covenantee, and the premises claimed under it, and the covenantee is obliged to yield and does yield his claim to such superior title, the covenant . . . is broken": *Allis v. Nininger*, 25 Minn. 525, per Gilfillan, C. J.; *Jones on Real Property*, sec. 987; 11 Cyc. 1134. The judgment in the partition suit was a sufficient eviction to constitute a breach of covenant, and the purchase out of the outstanding title by the covenantee, after resistance in good faith, in no wise affected the sufficiency of the eviction. It was not necessary that the covenantee should go through the formality of sur-

rendering possession and of immediately re-entering upon the premises. The purchase is equivalent to an entry of the claimant: *Parker, C. J., in Loomis v. Bedel*, 11 N. H. 74; *Ogden v. Ball*, 40 Minn. 94, 41 N. W. 453; *Wagner v. Finnegan*, 65 Minn. 115, 67 N. W. 795; *Jones on Real Property*, sec. 919. That is to say, the vendee may extinguish the paramount title by purchase: *Galbreath v. Doe*, 8 Blackf. (Ind.) 366; *Loomis v. Bedel*, 11 N. H. 74. This is not only clear on authority, but is obviously necessary on principle. Otherwise the covenantee, in unopposed possession for six years without notice of adverse claim of title, might be evicted and have no remedy against his grantor. His cause of action would be barred before he would know of its existence.

The breach of the covenants of the warranty deed and the failure <sup>407</sup> of title, admitted both in the pleadings and in the proofs, deprives of legal significance the failure to serve notice upon Mrs. Mohl.

Defendants assert, by way of "setoff and recoupment," the fair market value of the use of said premises, or at least six-fifteenths thereof, as the result of which they ask for judgment against the plaintiffs in the sum of two thousand and thirty dollars. We are at a loss to understand by what sophistry an appearance of reason can be given to making a breach of a warranty so profitable to the party violating his covenant. Plaintiffs were entitled to the use of two-fifteenths of the land as owners by purchase from defendants. They were liable to the owners of the thirteen-fifteenths interest for the market value of that portion of the premises until the time of settlement, which was found to have been made. From that time they were entitled to possession as owners of the whole. This was the proper conclusion of the trial court.

Defendants object, also, to the court's assessment of damages and of costs incurred or paid. It is elementary that in actions for a breach of the covenants, where there has been an eviction, actual or constructive, the plaintiff is entitled to recover for the loss of the land, usually measured by the consideration paid, with interest (*Devine v. Lewis*, 38 Minn. 24, 35 N. W. 711; *Devlin on Deeds*, sec. 894), and, in case of partial breach, damages pro tanto (*Downer's Admrs. v. Smith*, 38 Vt. 464; *McNally v. White*, 154 Ind. 163, 54 N. E. 794, 56 N. E. 214), and also costs and expenses and an attorney's fee reasonably and in good faith incurred in defending the title and resisting the eviction: *Allis v. Nininger*, 25 Minn. 525; *Sutherland on Damages*, 2d ed., sec. 617. The

trial court ordered judgment for the plaintiffs in the sum of five hundred and fifty-nine dollars and ninety-eight cents, with interest for not more than six years prior to the eviction at the rate of six per cent. This was less than six-fifteenths of the purchase price, and was obviously unobjectionable from that point of view.

Defendants also insist, however, that plaintiffs could only recover what they paid for the four-fifteenths outstanding interest, provided the amount was fair and reasonable, or worth what they paid, and that for the remaining interest only one dollar could be recovered. This position involves a misapplication of the ordinary rule of damages, and is not tenable under the rule applying to cases in which a vendee has bought in a paramount outstanding title. In the latter case the measure <sup>408</sup> of damages is the amount paid therefor and interest, providing the sum does not exceed the consideration money and interest. In the case of a partial breach, the damages awarded correspond: *Lawless v. Collier's Exrs.*, 19 Mo. 480; *Hutchins v. Roundtree*, 77 Mo. 500; *Dale v. Shively*, 8 Kan. 276, per Brewer, J. Within this rule the trial court's finding was obviously correct.

The court also ordered judgment for four hundred and fifty-eight dollars and forty-two cents in pursuance of the previous finding that in fact plaintiffs had necessarily expended various sums for the purpose of defending the action described in the complaint, and were liable for other necessary expenses of the same kind not then actually paid. Here, again, objection is made to paying the plaintiffs for money expended in perfecting title of the cotenant whose two-fifteenths was purchased for one dollar. There is no merit in this objection. The conclusion of law follows from the findings of fact. The findings of fact were fully justified by the evidence.

Other assignments of error have been examined, and have been found to be without merit. They call for no special discussion.

Affirmed.

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*A Covenant of Warranty is Prospective in Its Nature, and is broken only by an eviction under a paramount title existing at the time of the conveyance, or what in contemplation of law is equivalent to an eviction. It is, therefore, unlike a covenant of seisin or against encumbrances, which is broken instantly upon the execution of the conveyance if the grantor is not seised or an encumbrance exists: See note to Morgan v. Haley, 122 Am. St. Rep. 853.*

*Statute of Limitations to an Action upon an Implied Warranty resulting from the partition of real property does not commence to*

run until there has been an eviction by a superior title: *Jones v. Bigstaff*, 95 Ky. 395, 44 Am. St. Rep. 245. But if a private person conveys land owned by the United States, and warrants the title, the covenant of warranty is broken when made, and a right of action accrues thereon immediately, against which the statute of limitation immediately begins to run: *Pevey v. Jones*, 71 Mo. 647, 42 Am. St. Rep. 486.

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## STATE v. MINNESOTA TITLE INSURANCE AND TRUST COMPANY.

[104 Minn. 447, 116 N. W. 944.]

**TITLE INSURANCE—Return of Premiums on the Insolvency of Company.**—Where a title insurance company is judicially declared insolvent and a receiver appointed to close its affairs, a policy which it has issued is thereby annulled, and the insured is entitled to a return of the unearned part of the premium paid by him less the amount which the company is entitled to retain for the examination of the title preparatory to issuing the policy. (pp. 634, 635.)

Jay W. Crane, for the claimant.

Belden, Jamison & Shearer, for the defendant.

<sup>452</sup> **BROWN, J.** The facts in this case, as disclosed by a stipulation of the parties, are as follows: The Minnesota Title Insurance and Trust Company was organized under the laws of the state for the purpose, among other things, of insuring titles to real property and issuing policies therefor. In February, 1907, claimant applied to the company for a policy insuring the title to certain property it then owned, upon which, after due investigation, a policy was issued in due form insuring the title for the period of twenty-five years from its date, and claimant paid the premium charged therefor, amounting to forty-five dollars. Thereafter, on March 26, 1907, about two months after the issuance of the policy, the insurance company, in proceedings instituted by the attorney general, was duly adjudged insolvent, and a receiver appointed to wind up its affairs. In June, 1907, claimant filed with the receiver, as a demand against the company, a claim for the return of the premium so paid. The question whether the claim should be allowed came up for hearing before the court below, where judgment was ordered for claimant for the unearned part of the premium less ten dollars, which the court held the company was entitled to retain for services rendered <sup>453</sup> in the examination of the title

preparatory to the issuance of the policy. Both parties appealed.

We have found no case involving the right of a policy-holder in an insurance company like the one before us, an insurer of title to real property, to a return of the unearned part of the premium, where before the expiration of the policy the insurance company became insolvent and retired from business. The question is entirely new and one of first impressions. We discover no reason, however, for not applying the rule applicable to the, in a measure, analogous case of a fire insurance company. It has been held in respect to such companies that the adjudication of insolvency and the appointment of a receiver to close the affairs of the company in effect annul the policy, and entitle the holder thereof to a return of the unearned premium: *Taylor v. North Star Mut. Ins. Co.*, 46 Minn. 198, 48 N. W. 772; *In re Minneapolis Mut. Fire Ins. Co.*, 49 Minn. 291, 51 N. W. 921; *Smith v. National Credit Ins. Co.*, 65 Minn. 283, 68 N. W. 28, 33 L. R. A. 511; *McCallum v. National Credit Ins. Co.*, 84 Minn. 134, 86 N. W. 892.

In the case of fire, hail, storm, or other like insurance, the indemnity is against loss which may occur at some time in the future during the life of the policy, and the contract serves as a protection to the policy-holder during that time. In the title insurance the situation is the same, save that the loss suffered must arise from some defect in the title existing at the time of or before the policy was issued, and is subsequently successfully asserted to the damage of the policy holder. So that, substantially, the indemnity in either case is against future loss or damage; the loss arising in the one case from the happening of a future event, and in the other from a loss subsequent to the date of the policy by reason of the successful assertion of an adverse title or interest in the land insured which existed at the time or before the contract was made. That a loss of this kind might arise in the future, though the chances in this class of insurance are strongly against such a result, brings the case, by analogy, within the rule applicable to other insurance contracts, and the trial court was correct in applying it. The difference in probable or possible loss in the two classes of insurance is practically one of degree only; the probability <sup>454</sup> of loss in this class being materially less than in the case of fire insurance.

We are also of opinion, and so hold, that the court adopted the correct rule of damages. The court held that the claim-



ant was entitled to the return of the premium less a proportionate amount, which it may be said the company earned up to the time of its insolvency, and the sum of ten dollars, allowed for the examination of the title before issuing the policy. The allowance of this item is fully justified by the terms of the contract, by which claimant agreed to pay for the insurance the sum of forty-five dollars, with the understanding that ten dollars thereof, which was paid at the time of the application, should be retained by the company, whether the policy was issued or not, as compensation for services rendered in the investigation of the title. The company fully performed this service. If a policy had not been issued, the applicant could not demand its return; and if, under such circumstances, it could be retained by the company, the fact that it issued the policy should not forfeit its right to retain it for the same service.

The court adopted the rule of time in measuring the earned portion of the premium. It is urged that this was incorrect, and that some other more equitable rule should have been applied. We are unable to concur in this contention. While it is true that the risk of loss under a contract of this kind, unlike other insurance, diminishes with the lapse of time, and as the end of the period covered by the policy approaches, there is less and less likelihood of loss, yet to attempt to say from this basis what proportion of the premium has been earned would involve the matter in arbitrary speculation and bring up at an exceedingly unsatisfactory result, since no certain or definite rule could be evolved from that process of reasoning; whereas, on the other hand, to apportion the time during which the policy was in force to that of the unexpired period leaves no room for speculation or conjecture, does not involve an effort to measure the value of the possibility or probability of a loss, and fixes a rule which, if not wholly satisfactory, is at least definite and certain.

Our conclusions, therefore, are in harmony with those reached by the learned trial judge, and his order in the premises is affirmed.

Affirmed.

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*An Insolvent Life Insurance Company, discontinuing business and failing to carry on its policies, is liable to policy-holders in damages for breach of contract; the policy-holders are creditors for the value of their policies at the date of the dissolution of the company; and the claims of holders of unmaturing policies are not to be postponed to death claims maturing before the dissolution: People v. Security Life Ins. etc. Co., 78 N. Y. 114, 34 Am. Rep. 522.*

*A Life Insurance Company, When Adjudged Insolvent and Dissolved,* has broken its engagement with its policy-holders, and becomes liable to them in damages for such breach. The measure of damages is the net value of the policies, without regard to the health of the holder, calculated as of the date of the dissolution of the company, according to the tables of mortality used in the business of life insurance, less the outstanding premium notes, if any: *Commonwealth v. American Life Ins. Co.*, 162 Pa. 586, 42 Am. St. Rep. 816.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**MISSISSIPPI.**

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**DALTON v. STATE.**

[91 Miss. 162, 44 South. 802.]

**LARCENY—Diverse Ownership—Single Taking.**—However diverse the ownership of property which is the subject of larceny if the act of taking constitutes but a single act, but one offense is committed. (p. 637.)

**LARCENY—Diverse Ownership—Indictment.**—An indictment which charges the larceny of property belonging to different owners in a single count is not demurrable. (p. 638.)

The indictment in question alleged that the appellees “unlawfully and feloniously did take, steal and carry away two thousand and sixty-seven dollars, lawful money of the United States of America, the personal property then and there of the Southern Express Company, and thirty dollars, lawful money of the United States of America, the personal property then and there of Jefferson Marshall, against the peace and dignity of the state of Mississippi.” This indictment was demurred to upon the ground that it was double, in that it charged two separate and distinct felonies in the same count.

R. V. Fletcher, attorney general, for the appellant.

Le Roy Kenneday and F. Roberson, for the appellees.

<sup>165</sup> **MAYES, J.** It was error for the court to sustain the demurrer filed to this indictment. The precise question was decided by this court in the case of *Ward v. State*, 90 Miss. 249, 43 South. 466. However diverse may be the ownership of property which is the subject of larceny, if the act of taking constitutes but a single act, but one offense is committed. The allegation of ownership in the indictment is  
(637)

merely descriptive of the offense committed. The prosecution is not conducted in the name of the owner, nor for his benefit; but it is conducted in the name of the state, and the state alone, in so far as the prosecution is concerned, is the aggrieved party. An offense is committed against the state whenever there is an act of larceny, and there are just as many offenses as there are separate and distinct acts of larceny; but whenever by a single act property belonging to different owners is the subject of the theft, there is but one offense committed. This holding is in accord with almost the unanimous authority on this subject: 12 Ency. of Pl. & Pr. 1006, and notes; 1 Bishop's Criminal Law, 637; Wharton's Criminal Law, sec. 948; Hoiles v. United States, 3 McArthur (D. C.), 370, 36 Am. Rep. 106.

<sup>106</sup> The decision of the court sustaining this demurrer being erroneous, the case is reversed, and the cause remanded.

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*The Crime of Larceny* is the subject of a monographic note to *People v. Miller*, 88 Am. St. Rep. 559-608. The theft of several articles at one and the same time and place constitutes but one offense, though they belong to different persons; it is otherwise, however, if the theft is at different and distinct times and places on the same expedition, from the same or different owners: *State v. Emery*, 68 Vt. 109, 54 Am. St. Rep. 878, 34 Atl. 432; *State v. Maggard*, 160 Mo. 469, 83 Am. St. Rep. 484, 61 S. W. 184.

*The Stealing of the Property of Different Persons* at the same time and place, and by the same act, may be prosecuted, at the pleasure of the state, as one offense or several distinct offenses: *State v. Douglas*, 26 Nev. 196, 99 Am. St. Rep. 688.

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## SOUTHERN ELECTRIC SECURITIES COMPANY v. STATE.

[91 Miss. 195, 44 South. 785.]

**CORPORATIONS—Res Judicata.**—If a corporation is not a party to a bill to restrain another corporation from voting a large amount of the first corporation's stock, on the ground that the holding corporation is a trust, the judgment is not *res judicata* against the original corporation in a subsequent action to forfeit its charter. (p. 646.)

**CORPORATIONS—Trusts—Illegal Evidence.**—In determining whether a corporation is an illegal trust the courts may look through the various steps which led to its organization to discover the reason therefor. (p. 646.)

**CORPORATIONS—Illegal Trusts.**—A combination of two or more corporations for legitimate purposes, unobjectionable as a combination, may be subject to attack, if an illegal trust form is adopted. (p. 647.)

**CORPORATIONS—Rights and Duties.**—Corporations have not all the rights and powers of individuals, and cannot surrender their franchises, nor delegate their duties to others with the same freedom that an individual can abandon his occupation and turn over his business. (p. 647.)

**CORPORATIONS—Consolidation—Monopolies.**—The consolidation of several corporations into a new one, and the control of the stock of the old ones by the new, leaving each to continue its corporate existence for the purpose of stifling competition, is an illegal trust, for which each of the constituent members of the trust may be attacked in the court having jurisdiction in the locality of its existence, and the whole trust body may be proceeded against in the state in which it exists, or in the courts of other states to whose jurisdiction it may be amenable. (p. 647.)

**CORPORATIONS—Consolidation—Monopolies—Action by State.**—If several corporations consolidate to stifle competition by organizing a dominating corporation, the state may proceed against any one of them organized under its laws which violates its charter rights or public policy, or it may pass over such corporation and proceed against the dominating corporation, domestic or foreign, which, within the state, attempts in any way to prosecute a business, which a subordinate corporation could not. (pp. 647, 648.)

**CORPORATIONS—Action by Agents.**—A corporation can act only through its agents, and these are selected by its stockholders. (p. 648.)

**CORPORATIONS, Foreign—Combinations—Right of State to Control by Injunction.**—If a corporation is organized in another state for the primary purpose of doing business therein, instead of that of its domicile, and the purpose of its organization is to dominate and control a domestic corporation which is itself engaged in a combination and illegal trust, the courts of the state have power to control its corporate power, and by injunction prevent it from doing any act within the state having relation to, and in furtherance of, the contract under which it was organized. (pp. 649, 650.)

Catchings & Catchings, C. P. Fenner and Smith, Kirsh & Landau, for the appellant.

R. V. Fletcher, attorney general, Anderson & Voller, Alexander & Alexander, and G. B. Power, for the appellee.

197 CALHOON, J. The state of Mississippi, upon the relation of the district attorney, exhibited its original, and subsequently its amended, bill in the chancery court of Warren county against the appellant herein. Primarily the purpose of the bill was to enjoin the defendant, the Southern Electric Securities Company, from voting in a stockholders' meeting of the Vicksburg Railway and Light Company, a domestic corporation, and to enjoin the said defendant from in any manner controlling, operating, managing or reorganizing the said Vicksburg Railway and Light Company, or from electing any officers of the company, or from doing anything in the management, control or operation thereof. The ground of attack is that the Southern Electric Securities Company, a corporation organized under the laws of the

state of New Jersey, is an illegal trust, exercising its corporate powers in this state in violation of its statutes and policy. The defendants to the original bill were the Southern Electric Securities Company, the Interstate Trust and Banking Company, a corporation chartered under the laws of the state of Louisiana, and Lynn H. Dinkins, H. M. Young, J. H. Levy, Sam Henderson, E. M. Loeb, K. K. McLaurin, Charles Levy, R. S. Sternes, and R. J. Wood. By the amended bill S. R. Hughes and C. P. Fenner were made defendants.

The bill charges that on the 20th of May, 1903, a written contract was entered into between Sol Wexler, W. B. Rogers, J. H. Levy, and S. S. Bullis, severally, but not jointly, as parties of the first part, and Harry K. Johnson, party of the second part, whereby it was recited that the parties of the first part owned and controlled three hundred and seventy-five thousand dollars of the five hundred thousand dollars of the capital stock of the Southern Light and Traction Company, which was a corporation owning and operating the street railroad, gas and electric light properties in Natchez, Mississippi, and <sup>188</sup> that Harry K. Johnson owned or controlled three hundred and seventy-five thousand dollars of the four hundred thousand dollars capital stock of the Vicksburg Railway and Light Company, which was a corporation owning and operating a street railway and electric light plant in the city of Vicksburg; that it was agreed that these parties should organize a securities holding company under the laws of the state of New Jersey, with a capital stock of one hundred thousand dollars or more, to which company all of said stock owned by the said parties, together with all the securities held, owned and controlled by the Natchez and Vicksburg, Mississippi, street railroad companies, should be turned over, in consideration of which each of the said parties should receive one-fifth of the capital stock of such securities holding company. A copy of the contract referred to was made an exhibit to the bill, by which it appears that Johnson agreed, in the event he should gain an option on, or acquire the ownership of, the balance of the capital stock of the Beaumont Traction Company, over and above that then owned by him, he should, at the option of the said securities holding company, sell and transfer the same to that company at the price paid by him. The bill further averred that the said parties did obtain a controlling interest in the Beaumont Traction Company, which was a corporation operating street railroads and other industries in the city of Beaumont, in

the state of Texas, and in a like corporation engaged in a like business in the city of Jennings, in the state of Louisiana, and under an arrangement such as that described in the said contract agreeing to turn over and transfer to the said securities holding company said stock and securities. The bill averred that the purpose and intent of the contract was to place within the power of the said securities holding company and create in it a monopoly in the running and operating of any of the street railroads or electric companies in any of the states mentioned in said contract, and to put it in the power of said securities holding company, or a large majority of the stockholders thereof, to dictate and control the management and business of the Vicksburg Railway and <sup>100</sup> Light Company and the other like corporations in the other states mentioned, and to create a pool, trust, combination or understanding for the purpose of regulating and fixing the price of fares on the street railways, and the price of electricity for power and illuminating purposes, and the price of the stocks, bonds and securities held, owned or operated by said Vicksburg Railway and Light Company and the other corporations mentioned. The bill averred that, in pursuance of said contract and the other agreements as stated, there was organized under the laws of New Jersey a securities holding company under the corporate name of the Southern Electric Securities Company, to which a majority of the capital stock of the said Vicksburg Railway and Light Company, the Southern Light and Traction Company, the Beaumont Traction Company, and the Jennings Company was transferred and turned over, to be used in accordance with said contract, and that the said Southern Electric Securities Company, in pursuance of said agreement, issued its stock. The bill further alleged that the Interstate Trust and Banking Company, a Louisiana corporation, has acquired and now holds and controls a large part of the capital stock of the Southern Electric Securities Company and of the other corporations mentioned, and, in connection with the Southern Electric Securities Company, many of whose officers are also the officers, agents and representatives of the Interstate Trust and Banking Company, has taken control of the operation and business of the Vicksburg Railway and Light Company, and has called a stockholders' meeting for the purpose of electing officers and taking other steps to the management and control of the said corporation. The prayer of the bill is that an injunction may be issued restraining the Southern Elec-

tric Securities Company from voting as a stockholder in said meeting, or taking any part in the management, control or operation of the Vicksburg Railway and Light Company. The bill also prays that on final hearing the injunction shall be made perpetual, and that all the pains and penalties prescribed <sup>200</sup> by the act of 1900 and by the Code of 1906 against trusts and combines shall be adjudged against said defendants and each of them. An injunction was issued as prayed.

The defendants answering the bill, admitted the execution of the contract, exhibit A thereto. They admit that defendants Wexler, Rogers, Levy, and Bullis, after the execution of the said contract (exhibit A), obtained a controlling interest in the Beaumont Traction Company, a Texas corporation operating a street railway in the city of Beaumont, and in a like corporation in the city of Jennings, in the state of Louisiana, and in pursuance of an arrangement similar to that set forth in said contract (exhibit A). The defendants aver that the said contract (exhibit A) was made in the state of Louisiana, and was a perfectly valid and lawful contract under the laws of that state, and claim that no statute of the state of Mississippi could have any extraterritorial effect, so as to invalidate such contract, and that, if there is such statute in the state of Mississippi, it is unconstitutional. The defendants also set up that the Southern Electric Securities Company is a corporation created under the laws of the state of New Jersey, and file a copy of the act of incorporation as an exhibit to their answer. Defendants claim that by said charter the Southern Electric Securities Company has corporate authority conferred upon it to acquire by purchase, subscription or otherwise, and to hold as an investment any bonds, debentures or other securities as evidence of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations of the state of New Jersey or of any other state, territory or country, and, while the owner of such stock, to exercise all the rights, powers and privileges of ownership, including the right to vote the same. The defendants claim that under its charter the Southern Electric Securities Company had the right to acquire the stocks of the various corporations mentioned, and aver that such stock was not acquired or purchased within the territorial limits of the state of Mississippi. They deny that the statutes of this <sup>201</sup> state prohibit, or can be construed to prohibit, such acquisition of stock by said corporation, and, if such is their nature, that they are unconstitutional and void. The defendants aver that the stock in



these companies was personal property, assignable under their corporate by-laws and charters, and that the owners thereof had the right to transfer the same, and the Southern Electric Securities Company, under its charter, had the power and authority to purchase the stock. They deny that the statutes of Mississippi have, or can have, any extraterritorial force. They deny that their purpose or true construction is to prohibit such sale and purchase, and aver that, if such is their purpose and proper construction, the same are unconstitutional and void, as depriving the holders of said corporate stock desiring to sell the same, and the Southern Electric Securities Company desiring to purchase the same, of valuable property rights. The defendants admit that the Southern Electric Securities Company would, and will, if permitted, vote as a stockholder in the corporate meetings of the Vicksburg Railway and Light Company. The defendants admit that certain stockholders of the Southern Electric Securities Company entered into a contract by which they agreed to transfer the stock held by them to the Interstate Trust and Banking Company as a trustee, and selected a certain stockholders' committee, with authority to direct the trustee in reference to the vote of the stock. That contract is filed as an exhibit to the answer. They also admit that the Interstate Trust and Banking Company is a stockholder in the Southern Electric Securities Company. The defendants deny unlawful confederation and combination, and aver that in the nature of things it is not possible for street railroads in the states of Texas and Louisiana, and in different cities in the state of Mississippi, to be competitors the one with the other.

A motion was made to dissolve the injunction, on the hearing of which testimony was offered, some of which was admitted by the court, and some of which seems to have been excluded. The analysis of this evidence made by counsel for the appellant <sup>202</sup> seems to be accurate, and is accepted by counsel for the appellee as correct. From this analysis we make the following statement of the evidence offered before the chancellor: "In the year 1901, one Harry K. Johnson built, and was chief owner of, a street railway in Natchez, which was known as the Natchez Electric Street Railway and Power Company. At that time there were in Natchez companies known as the Natchez Gaslight and Power Company and the Natchez Light, Power and Traction Company, respectively; the former being engaged in the manufacture and selling of illuminating gas, and the latter in that of manufacturing and selling electricity for light and power purposes.

On September 16, 1902, the Natchez Light, Power and Traction Company conveyed to one S. S. Bullis all of the property owned by it in the city of Natchez, and on September 30, 1902, Bullis conveyed the same property to the Natchez Electric Railway and Power Company. On February 28, 1903, the Natchez Gaslight and Power Company conveyed all of its property to H. G. Dufour, and, on March 24, 1903, Dufour conveyed the same property to S. S. Bullis. On March 31, 1903, the Natchez Electric Street Railway and Power Company conveyed all its property to S. S. Bullis; and on April 21, 1903, Bullis conveyed to the Southern Light and Traction Company all of the property theretofore purchased by him as aforesaid. On May 20, 1903, Wexler, Rogers, Levy, and Bullis entered into the contract with Harry K. Johnson, which appears in the record as exhibit A to the original bill of complaint, whereby it was agreed that the securities holding company should be organized under the laws of the state of New Jersey, and that there should be conveyed to this company, by the various parties to the agreement, certain shares of stocks and certain bonds owned by them in the Southern Light and Traction Company, a corporation which was then operating a street railway, gas and electric light plant in the city of Natchez, and certain shares of the capital stock and certain bonds of the Vicksburg Railway and Light Company, a corporation which was <sup>203</sup> then operating a street railway and electric light plant in the city of Vicksburg, Mississippi; and it was further agreed that, should the said Johnson acquire the ownership of certain stock in a corporation known as the Beaumont Traction Company, it should also be conveyed to the said securities holding company. By the terms of the agreement the securities holding company was to become the absolute owner of the stock and bonds in its own right, and not as trustee for any other person, and, in return therefor, was to deliver to the parties to the agreement certain of its own stock and bonds. Subsequently it was agreed that certain of the stock and bonds of the corporation operating a street railway company at Jennings, Louisiana, should be conveyed to the securities holding company, which should deliver to the owners of the said stock certain of its own stock and bonds in payment therefor. In accordance with this agreement the Southern Electric Securities Company was, on July 6, 1903, organized in New Jersey, with full power under its charter and the laws of New Jersey to own the stocks and bonds of other corporations. The various stocks and bonds specified by the agree-

ment were, in effect, transferred to the Southern Electric Securities Company, which issued its own stocks and bonds in payment therefor as stipulated. As the result of these various transactions the Southern Electric Securities Company became the holder of about three-fourths of the capital stock of the Vicksburg Railway and Light Company and of the Southern Light and Traction Company, besides some of the bonds of both companies. Early in the year 1903 certain persons in the city of Natchez, being dissatisfied with the rate charged for electricity, conceived the plan of building another electric light plant. In order to induce them to abandon this enterprise a written contract, dated June 1, 1903, was entered into with them by the Southern Light and Traction Company, by the terms of which these persons were to receive thirty thousand dollars of the capital stock of that company and were to be furnished with electricity at specified rates, being less than the amount charged to the <sup>204</sup> public. This written contract, it is said by counsel for the appellant, does not appear to have been authorized by the stockholders or directors of the Southern Light and Traction Company; but there is nothing in the record to indicate that it was not, and, so far as the record discloses, the terms of the contract were carried out by that company. In addition to the facts analyzed and stated by counsel for appellant, it is further shown by the testimony of Mr. Johnson that the receipts from the Beaumont, Jennings, and Natchez railroads were paid into the Southern Electric Securities Company, and used by that company as its property; the same being applied to the payment of its debts.

"The motion to dissolve the injunction was submitted and denied, and from this action of the chancellor the present appeal is prosecuted 'to settle the principles of the case.'"

It is said by counsel that the chancellor was controlled in his decision by the case of Woodberry v. McClurg, 78 Miss. 831, 29 South. 514, but for which decision he would have dissolved the injunction. It is unnecessary to the present decision for us to consider the advisory opinion in the Woodberry case. In that case the effort was by mandamus to compel the attorney general of the state to give an affirmative opinion upon the validity of a charter which had, under the statute, been submitted to him for his professional opinion as the law officer of the state. While the court denied its jurisdiction to pass authoritatively upon the question, it nevertheless expressed the opinion that, under our general act of incorporation, no charter could be given to one corporation authorizing it to be-

come a stockholder in another. It is not necessary to decide whether the opinion in the Woodberry case is authoritative, or, if it is, whether it should be overruled. Quite apart from anything said in that case, we think the decree of the court below should be affirmed.

It is said by counsel for appellant that the pleadings do not present an issue under which evidence is admissible in reference <sup>205</sup> to the transaction antedating the agreement of May 20, 1903, and having relation to the organization of the Southern Light and Traction Company. It is argued that, aside from matters relating to the organization of that company, nothing is shown except a transfer to the Southern Electric Securities Company of stocks in various noncompeting corporations, and that no public policy or statute of this state forbids anything which is shown to have been done, or intended to be done, in relation to such noncompetitive companies. The subject of trusts and combinations presents so many varied phases, the discussion of which would protract this opinion, that we confine ourselves to a single controlling feature of the case. We do not decide that the effect of the contract of May 20, 1903, and what was done under it, was the creation of a partnership between the various corporations of this and other states, the stock of which was transferred to the Southern Electric Securities Company. There is evidence in the record suggestive of the fact that the securities company dealt with the income of these various corporations as its own, not distributing the same to the stockholders of the various companies, but devoting it to the payment of its own debts. The Southern Light and Traction Company is not a party to this suit. There is no effort on the part of the state to annul the charter of that company or of the other corporations whose assets were secured by it. What is now said is, upon well-settled principles, not conclusive as against that company, if any action shall be taken by the state to forfeit its charter. We are, however, of opinion that, in determining the question whether the Southern Electric Securities Company can perform any corporate function in this state, the court, under the averment of the bill that it is an illegal corporation and trust, may look through the various steps which led to the organization of that company to discover the reason of its organization, the purposes for which it was organized, and whether or not those purposes conflict with our statute.

The argument of counsel that a public corporation may do <sup>206</sup> whatever an individual may do is not true in its broadest

aspect. An individual owns property unaffected by a necessity to use it in the performance of duties in which the public have an interest, and is not restrained by charter limitations. A combination of two or more corporations for legitimate purposes, and which is unobjectionable as a combination, may be subject to attack, if a trust form is adopted, upon the ground that each constituent corporation has violated some provision of its charter or some principle of the law of its creation. "Corporations being creatures of the law, and deriving their right to exist and all their powers from the law, they are debarred from exercising many of the privileges of an individual. They cannot surrender their franchises, nor delegate their duties to others, with the same freedom that an individual can abandon his occupation and turn over his business": Eddy on Combinations, sec. 606.

It is manifest from the record that the several competing corporations in the city of Natchez transferred to the Southern Light and Traction Company, through Bullis, the intermediary, their corporate assets, and that the organization of that corporation and the taking over of such assets was for the purpose of stifling competition and putting the lighting plants at Natchez in the hands of an illegal monopoly. The Southern Electric Securities Company was organized for the purpose, among other things, of taking over a majority of the stock of the Southern Light and Traction Company and of controlling the business of that corporation as a majority stockholder. The method, so frequently adopted in corporate combinations, of keeping alive the corporate existence of what are practically the constituent companies, and fixing the controlling powers over them in trustees, or another dominating corporation, instead of protecting against assailment, subjects the scheme, as pointed out by Mr. Eddy, to new hazards, and is the most vulnerable of all forms; for each of the constituent members may be attacked for participation in the unlawful scheme in <sup>207</sup> the court having jurisdiction in the locality of its existence, and the trust body itself may be proceeded against in the state in which it exists, or in the courts of other states to whose jurisdiction it may be amenable: Eddy on Combinations, sec. 607.

The state may proceed against any single corporation organized under its laws which violates its charter rights or the public policy of the state, or it may pass over such corporation and proceed, if it will, against a dominating corporation, domestic or foreign, which, in this state, attempts in any way to prosecute the business which the subordinate corporation

could not. The distinction insisted upon by counsel for appellant between the conduct of the corporation and of its stockholders is of importance and of controlling influence when the question involved arises between the corporation and its stockholders, or between the corporation, or its stockholders, and third persons; but this distinction rests upon a mere fiction that the corporate existence and corporate functions are distinct from that of stockholders. This fiction is introduced for convenience and to subserve the ends of justice; but, when invoked in support of an end subversive of its policy, should be and is disregarded by the courts. This question has been very fully considered in the case of *State v. Standard Oil Co.*, 49 Ohio St. 137, 34 Am. St. Rep. 541, 30 N. E. 279, 15 L. R. A. 145; *People v. North River Refining Co.*, 54 Hun (N. Y.), 354, 3 N. Y. Supp. 401, 2 L. R. A. 33, 7 N. Y. Supp. 406, 5 L. R. A. 386. A corporation can act only through its agents, and these are selected by the stockholders; but it is not true that the various steps leading up to the organization of the Southern Light and Traction Company were not the steps of the corporation whose franchises were abandoned and whose property was transferred to that company. Whether there were any minority dissenting stockholders is not shown by the record. If there were, no evidence is given of any steps having been taken by them to present the formation of the illegal <sup>208</sup> trust and combination represented by the Southern Light and Traction Company. When we look to the contract of May 20, 1903, and the charter of the Southern Electric Securities Company, it is evident that one supplements the other and both were parts of one single scheme. The contract had relation to the organization of this company, and the company was organized for the purpose of carrying the contract into execution. The transfer to the securities company of the stock in the Vicksburg Railway and Light Company was an integral part of the common scheme, one of the purposes of which was to dominate, control and operate the Southern Light and Traction Company, a corporation which, on the facts of this record, is operating in violation of the laws of this state.

The record of this cause does not present the case of a foreign corporation organized for the purpose of doing business in the state of its domicile, and granted by its charter the right to exercise various powers and privileges, some of which are, and some of which are not, permitted to be exercised in this state, even by its domestic corporations, which powers, of course, could not be exercised by any foreign cor-

poration. However numerous may be the corporate powers of this company, it is manifest that it was called into existence for the primary purpose of carrying out the contract of May 20, 1903. Its total corporate stock was issued in payment to the stockholders in the Mississippi corporation for the stock in such corporations assigned to it. It took under its charter the right to own and deal in the stock of other corporations; but, so far as this record discloses, its principal corporate purpose is to own a majority of the stock of other corporations. It does not appear to deal as a trader in these stocks, buying and selling the same, or to deal in any stocks, unless it secures control of a majority of the stock in that particular corporation. It is said, however, by counsel, that this is a foreign corporation, having, by its charter, the right to acquire stocks in other corporations, and that the courts of this state have no jurisdiction to control this corporate power; <sup>209</sup> that, as an incident of ownership, the right to vote the stock exists; and so it is argued that, however inimical to the policy of this state the control of its domestic corporations may be by this foreign corporation, there is no power in the court to enjoin the exercise of that right. This contention, of course, concedes that the voting of the stock is against the policy of this state and would be controlled by the court if it had the power; for the contention is unnecessary, if the voting of the stock is not against public policy and is owned by a person or corporation having the right to vote the stock in this state. The courts of this state, of course, have no jurisdiction over foreign corporations confining their operations to the state in which they are created. But quite a different question is presented when a corporation is organized in another state for the primary purpose of doing business in this state, instead of that of its domicile, and where the very purpose of its organization is to dominate and control a domestic corporation, which is itself engaged in business as a combination and trust.

It is not denied in argument that the Southern Light and Traction Company is a trust and combination, now that it is being operated in violation of the statutes and public policy of this state. It cannot be denied, in the light of this record, that the Southern Electric Securities Company, was organized for the express and agreed purpose of controlling, inter alia, this illegal domestic corporation. But it is said that the Southern Light and Traction Company and the Vicksburg Railway and Light Company are the only corporations doing business in this state; that the Southern Electric Securities

Company is not doing business in this state, and for that reason the court has no jurisdiction over it. The reason of this connection is simple. The Southern Electric Securities Company is not doing business in this state as the Vicksburg Railway and Light Company, nor as the Southern Light and Traction Company. It is neither running a street railroad nor a light plant. Its corporate function and purpose is to control, as the majority stockholder, the subordinate <sup>210</sup> companies engaged in other business. But the Southern Electric Securities Company is doing business in this state as the controller of the domestic corporations. That is why it was organized, and it is the exercise of that particular corporate function that is sought to be restrained by this proceeding. Three-fourths of the stock of the Mississippi corporations is owned by the Southern Electric Securities Company, less about thirty thousand dollars of the stock of the Southern Light and Traction Company which was given to the promoters of a rival company to stifle its competition. This stock can be voted only by the Southern Electric Securities Company, and it can be only voted in a corporate meeting held in this state. Certainly, it cannot be said that the Southern Electric Securities Company is not exercising its corporate function in voting this stock, nor will it be contended that the stock can be voted anywhere except in the state of Mississippi. It is the exercise of this corporate function in this state that is restrained by the injunction issued in this case.

The case before the court is not that of a foreign corporation doing business in this state, and which has done some act in violation of its public policy, by reason of which it is sought to exclude such corporation from doing any other legitimate business in this state. The question before the court is whether a corporation, organized in another state under the terms of a contract and for the purpose of controlling a domestic corporation in violating our anti-trust statute, can be permitted to do any act in this state having relation to, and in furtherance of, the contract under which it was organized. Under such circumstances, we are of opinion that it should be enjoined from such action.

Affirmed and remanded.

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*Unlawful Trusts and Monopolies* are considered in the note to *Harding v. Glucose Co.*, 74 Am. St. Rep. 235.

*The Consolidation of Corporations* is considered in the note to *Morrison v. American Snuff Co.*, 89 Am. St. Rep. 604; and the sale by a corporation of all its property and assets is considered in the note to *Tanner v. Lindell Ry. Co.*, 103 Am. St. Rep. 548. If one corporation



purchases a majority of the stock of another for the purpose of controlling the latter and preventing competition, the transaction is one which the courts will not uphold: *Dunbar v. American Telephone etc. Co.*, 224 Ill. 9, 115 Am. St. Rep. 132.

*The Doctrine that a Corporation is a Legal Entity* existing separate and apart from the natural persons composing it is a mere fiction which will be disregarded when the ends of justice require: *Pott v. Schmucker*, 84 Md. 535, 57 Am. St. Rep. 415; *State v. Standard Oil Co.*, 49 Ohio St. 137, 34 Am. St. Rep. 541.

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## MERCHANTS' AND PLANTERS' PACKET COMPANY v. STREUBY.

[91 Miss. 211, 44 South. 791.]

**CORPORATIONS—Void Subscription to Stock.**—If a corporation has no power to subscribe to the stock of another corporation, such subscription is void, and the person taking such stock knowing of such illegality, does not bind its agent, who, assuming to bind the corporation and not himself, signs himself as agent. (pp. 651, 652.)

The plaintiff corporation sued the defendant Streuby on a subscription for stock in plaintiff corporation. Plaintiff alleged that Streuby subscribed for the said stock by written subscription, signed "F. Streuby, for Levy Bros. Oil Mill, Limited," and that inasmuch as such firm was a corporation, it could not hold stock in another corporation, and that as Streuby had no authority to subscribe in the name of the oil mill, he became personally liable for the payment of the subscription.

Judgment for defendant and plaintiff appealed.

McLaurin, Armistead & Brien, for the appellant.

W. R. Harper, for the appellee.

**216 CALHOON, J.** This action is to hold Streuby liable personally as a subscriber on his signature to the capital stock of a corporation. His signature is in these words: "F. Streuby, for Levy Bros. Oil Mills, Ltd." This oil mill was a corporation, and so it was powerless, in this state, to subscribe for stock of another corporation. This was equally known to him and appellant corporation, and no fraud or fraudulent representation appears. We have, therefore, not a case where the principal was or could have been bound by the subscription in any event; it being *ultra vires*. We hold that the signature did not bind Streuby personally, and adopt

the reasoning of Judge Brewer in the two cases of *Holt v. Winfield Bank* (C. C.), 2 Fed. 812, and *Abeles v. Cochran*, 22 Kan. 405, 31 Am. Rep. 194.

Affirmed.

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*The Right of One Corporation to Acquire Stock* in another is the subject of a monographic note to *Denny Hotel Co. v. Schram*, 36 Am. St. Rep. 137-142. See, too, the subsequent cases of *Cannon v. Brush Elec. Co.*, 96 Md. 446, 94 Am. St. Rep. 584; *State v. Newman*, 51 La. Ann. 833, 72 Am. St. Rep. 476; *Lanier Lumber Co. v. Rees*, 103 Ala. 622, 49 Am. St. Rep. 57. And subscriptions for stock in a land corporation made by a railroad company have been held ultra vires, although made in the names of trustees for the company: *McC Campbell v. Fountain Head B. R. Co.*, 111 Tenn. 55, 102 Am. St. Rep. 731. And if one corporation purchases a majority of the stock of another for the purpose of controlling the latter and preventing competition, the transaction is one which the courts will not uphold: *Dunbar v. American Telephone etc. Co.*, 224 Ill. 9, 115 Am. St. Rep. 132.

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### MOORE v. STATE.

[91 Miss. 250, 44 South. 817.]

**PERJURY**—Indictment.—An indictment for perjury which fails to allege that the accused gave false testimony in a material matter is fatally defective. (p. 653.)

Pearson & Lamb, for the appellant.

R. V. Fletcher, attorney general, for the appellee.

254 **MAYES, J.** The indictment in this case is upon the charge of perjury. On the trial appellant was convicted under this indictment and given a sentence of ten years in the penitentiary. After he was convicted and before sentence there was a motion in arrest of judgment. There are several reasons assigned in the motion, but the main one is because the indictment does not charge that the testimony of Moore, in reference to which it is alleged that the testimony was material, was false. The indictment charges that the material matter was whether Moore met Robert Ivy in Moore's field on Monday night of a certain day in August, 1901. If Moore swore falsely about this matter, and swore that he did not meet Ivy on the date named, it was necessary to allege in the indictment that he so stated, and it was further necessary to allege in the indictment that this statement by him was false, and that in truth and in fact he did meet Ivy. Before Moore could ever have been convicted of perjury it was

necessary to prove all these facts as constituting the crime, and, if it was necessary to prove these facts in order to constitute the crime, it was necessary to charge them in the indictment. When the indictment failed to do this, it failed to so substantially charge the crime as that a conviction under this indictment could lawfully stand. This is not a formal defect, but it is a defect of substance.

In the case of *Cook v. State*, 72 Miss. 517, 17 South. 228, <sup>255</sup> it is held, under section 1354 of the Annotated Code of 1892 (section 1426 of the Code of 1906), providing how objections to an indictment shall be taken, that "the statute was not intended to rob, and could not have been intended to rob, any citizen accused of a felony of his right to have the nature and cause of the accusation preferred against him clearly and fully stated, and any abridgment of the right to be thus informed in any substantial particular would be unconstitutional." And in the case, *supra*, it was held on an indictment for murder that the omission of the word "did" in the indictment was not a formal defect, advantage of which must be taken by demurrer, but that it was a substantial defect, and that its omission made the indictment fatally defective, where the indictment merely alleged that the defendant "feloniously, willfully, and with malice aforethought kill and murder one John Bryan," without inserting the word "did" in the indictment. In the case of *Commonwealth v. Porter*, 17 Ky. Law Rep. 554, 32 S. W. 138; a case very similar to the one before the court, it was held on an indictment for perjury that the indictment alleged that the false swearing consisted in the appellee, while testifying as a witness before the grand jury, saying that he did not see Barker at the colored church the night one Millen was shot and said breach of the peace occurred, either during the shooting by said Millen, or prior thereto, or thereafter on that night, and the court in this case said: "While it is true that the indictment charges that the answer given was false, and known to appellee to be so when given, yet it fails to charge in terms that he did see Barker at the time it is alleged the accused testified he did not see him. It should have been alleged that the accused did see Barker at the colored church the night Millen was shot and the breach of the peace occurred"; and for failure to do this the court held that the indictment was fatally defective.

In the case now before the court it is charged that the false testimony consisted in the witness swearing that he did <sup>256</sup> not meet Ivy, yet nowhere in the indictment is it alleged

that Moore did meet Ivy. In order to constitute the offense of perjury, it being necessary to prove this, it was necessary to allege it. All that this indictment alleges is that it was material to prove that Moore met Ivy in his (Moore's) field in August, 1901, and the indictment then alleges that Moore, being sworn, unlawfully, willfully, feloniously, falsely, knowingly, and corruptly swore that he did not leave his house that night. If, upon this indictment, it had been proven that Moore swore that he did not meet Ivy, and it had further been proven that he stated that he did not leave his house, these facts would not have been sufficient to sustain the conviction of perjury, because it was necessary to go one step further, and prove, not only that Moore swore that he did not meet Ivy, but that in truth and in fact he did meet Ivy. As was stated above, it being necessary to prove this, it was necessary that it be charged in the indictment, in order that defendant might be informed of the nature of the charge against him in clear and unmistakable language. This is not mere matter of form. It is *sine qua non* to the conviction.

Reversed and remanded.

#### INDICTMENTS FOR PERJURY.

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**I. General Requisites of Indictment.**

a. **At Common Law and Under Modern Statutes.**—The rule is general that an indictment should allege explicitly every fact and circumstance constituting the crime charged, so that the defendant may know the particular offense of which he is accused, and therefore have due opportunity to make his defense. The application of this rule to indictments for perjury at the common law resulted in useless precision and prolixity, especially in that the indictments were required to recite the organization of the court wherein the perjury was committed and also recite the entire proceedings therein. The consequences of these technicalities was not so much to apprise the accused of the offense charged against him, but rather to make it almost impossible to draw an indictment which would withstand attack. In order to overcome these difficulties and to prevent the miscarriage of justice incident thereto, the following statute was enacted in the time of George II: "In every information or indictment to be prosecuted against any person for willful and corrupt perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court or before whom the oath was taken (averring such court or person or persons to have competent authority to administer the same), together with the proper averment or averments to falsify the matter or matters wherein the perjury or perjuries is or are assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, other than as aforesaid, and without setting forth the commission or authority of the court or person or persons before whom the perjury was committed; any law, usage or custom to the contrary notwithstanding": *State v. Green*, 24 Ark. 591; *State v. Gallimon*, 24 N. C. 372; *State v. Terline*, 23 B. I. 530, 91 Am. St. Rep. 650, 51 Atl. 204; *Fitch v. Commonwealth*, 92 Va. 824, 24 S. E. 272; *United States v. Walsh*, 22 Fed. 644.

This statute has in substance been adopted in most of the states of the Union, and now an indictment is everywhere considered good which states the substance of the proceedings in which the false testimony was given, the materiality of the testimony, the court or officer who administered the oath, his authority to administer it, the fact testified to on which the perjury was assigned, and that the

testimony of the defendant in that behalf was willfully and corruptly false: *Barnett v. State*, 89 Ala. 165, 7 South. 414; *Walker v. State*, 96 Ala. 53, 11 South. 401; *People v. De Carlo*, 124 Cal. 462, 57 Pac. 383; *Stefani v. State*, 124 Ind. 3, 24 N. E. 254; *State v. Gregory*, 46 Kan. 290, 26 Pac. 747; *State v. Huckby*, 87 Mo. 414; *State v. Gordon*, 196 Mo. 185, 95 S. W. 420; *People v. Ostrander*, 64 Hun, 335, 19 N. Y. Supp. 324, 328; *People v. Root*, 87 N. Y. Supp. 962, 94 App. Div. 84; *Fisher v. United States*, 1 Okl. 252, 31 Pac. 195; *State v. Stillman*, 47 Tenn. 341; *Lawson v. State*, 71 Tenn. 309; *United States v. Cuddy*, 39 Fed. 696; *United States v. Law*, 50 Fed. 915.

In some of the states the legislature has prescribed a still more liberal and reasonable rule, so that a simple allegation that the defendant did "commit perjury," together with the name of the case and the court and the words sworn to, constitutes a sufficient indictment. The word "perjury" necessarily implies that the defendant was lawfully sworn, that his testimony was false and material, and that he gave it willfully and corruptly, and therefore there is no necessity for making detailed allegations in regard to these ingredients of the crime. An indictment in this form apprises the defendant of the charge against him, and hence satisfies the law, for this is the purpose of an indictment, that the defendant should be advised of the particular crime charged against him to the end that he may defend against it: *State v. Gates*, 107 N. C. 832, 12 S. E. 319; *State v. Camley*, 67 Vt. 322, 31 Atl. 840; *State v. Webber*, 78 Vt. 463, 62 Atl. 1018.

The formal conclusion "against the peace and dignity of the state," and "against the form of the statute," etc., is unnecessary: *State v. Peters*, 107 N. C. 876, 12 S. E. 74. And if the offense is fully alleged, but referred in the conclusion of the indictment to the wrong section of the statute, this may be regarded as mere surplusage: *People v. Lane*, 124 Mich. 271, 82 N. W. 896.

**b. Statutory Forms.**—An indictment containing the allegations prescribed in the statutory form is good. But it is not necessary, in framing an indictment, to employ the exact words of the statute defining the offense: *State v. Anderson*, 103 Ind. 170, 2 N. E. 338; *State v. Ah Lee*, 18 Or. 540, 23 Pac. 424. The form of indictment given by the Minnesota statute is as follows: "On his examination as a witness, duly sworn to testify the truth, on the trial of a civil action in the court of —, between C. D., plaintiff, and E. F., defendant, which court had authority to administer such oath, he testified falsely, that [stating the facts to be alleged to be false] the matters so testified being material, and the testimony being willfully and corruptly false": *State v. Scott*, 78 Minn. 311, 81 N. W. 3. The statutory form in Vermont is this: "State of Vermont, — County,—ss: Be it remembered that at a term of the county court begun and held at —, within and for the county of —, aforesaid, on the — day of —, A. D. —, the grand jurors within and for said county of —, upon their oath present that A. B., of —, in the county of —, at —, in the said

county of ———, on the — day of ———, in the year of our Lord eighteen hundred and —, appeared as a witness in a proceeding in which C. D. and E. F. were parties, then and there being heard before a tribunal of competent jurisdiction, and committed the crime of perjury, by testifying in substance as follows [here set out the matter sworn to and alleged to be false]; which said testimony was material to the issue then and there pending in said proceeding, against the peace and dignity of the state": *State v. Rowell*, 72 Vt. 28, 82 Am. St. Rep. 918, 47 Atl. 111.

## II. Time and Place of Commission of Offense.

a. *Time of Commission.*—It is sometimes said that in an indictment for perjury, the day on which the perjury was committed must be truly laid: *State v. Offutt*, 4 Blackf. 355; *United States v. Bowman*, 2 Wash. C. C. 328, Fed. Cas. No. 14,631; *United States v. Law*, 50 Fed. 915. But unless the case is one where time is an essential ingredient of the offense, this strict requirement need not be observed: *State v. Perry*, 117 Iowa, 463, 91 N. W. 765; *State v. Peters*, 107 N. C. 876, 12 S. E. 74; *Foreman v. State*, 47 Tex. Cr. App. 179, 85 S. W. 809. An averment that the offense was committed "on or about" a specified date is sufficient: *State v. Perry*, 117 Iowa, 463, 91 N. W. 765. And time, not being of the essence of the statutory offense of false swearing, need not be alleged further than that the offense occurred before the indictment was found: *State v. John* (Iowa), 93 N. W. 61; *Goslin v. Commonwealth*, 28 Ky. Law Rep. 683, 90 S. W. 223.

b. *Place or Locality of Offense.*—A mistake in an indictment for perjury respecting the testimony of the accused, in so far as it related to a place or locality, is not descriptive of the identity of the offense, and hence is not a legal essential thereof: *State v. Terline*, 23 B. I. 530, 91 Am. St. Rep. 650, 51 Atl. 204.

## III. Description of Proceedings Wherein Oath was Administered.

a. *Necessity for, in General.*—An indictment for perjury must describe the controversy or matter in respect to which the alleged false swearing was committed, and designate in what court, in what proceeding, and before whom the false oath was taken, to the end that it may distinctly appear that the oath was not extra-judicial, that the false testimony was material to the issue, and that the accused may be apprised of the particular offense with which he is charged. But it is sufficient to set forth the substance of the controversy or matter in respect to which the offense was committed; and it is not necessary to set forth the pleadings, record or proceedings with which the oath is connected: *Jacobs v. State*, 61 Ala. 448; *Bradford v. State*, 134 Ala. 141, 32 South. 742; *People v. Ah Bean*, 77 Cal. 12, 18 Pac. 815; *Dennis v. State*, 17 Fla. 389; *Humphreys v. State*, 17 Fla. 381; *Maynard v. People*, 135 Ill. 416, 25 N. E. 740; *State v. Flagg*, 25 Ind. 369; *State v. Walls*, 54 Ind. 407; *Burk v.*

State, 81 Ind. 128; Commonwealth v. Combs, 30 Ky. Law Rep. 1300, 101 S. W. 312; State v. Gibson, 26 La. Ann. 71; State v. Bixler, 62 Md. 354; State v. Jolly, 73 Miss. 42, 18 South. 541; Hinch v. State, 2 Mo. 158; State v. Hoyle, 28 N. C. 1; Crusen v. State, 10 Ohio St. 258; State v. Witham, 6 Or. 366; Woods v. State, 82 Tenn. (14 Lea) 460; State v. Argo, 118 Tenn. 377, 100 S. W. 106; State v. Oppenheimer, 41 Tex. 82; McMurtry v. State, 38 Tex. Cr. Rep. 521, 43 S. W. 1010; Higgins v. State, 38 Tex. Cr. App. 539, 43 S. W. 1012; Bailey v. State, 41 Tex. Cr. App. 157, 53 S. W. 117; Curtis v. State, 46 Tex. Cr. App. 480, 81 S. W. 29; State v. Chamberlin, 30 Vt. 559; State v. Sleeper, 37 Vt. 122; State v. Rowell, 70 Vt. 405, 41 Atl. 430; State v. Roberts, 22 Wash. 1, 60 Pac. 65; State v. Lamont, 2 Wis. 437; United States v. Bartow, 20 Blatchf. 351, 10 Fed. 873; United States v. Wood, 44 Fed. 753; United States v. Pettus, 84 Fed. 791; United States v. Wilcox, 4 Blatchf. 391, Fed. Cas. No. 16,692.

b. **Illustrations of Descriptions.**—An information for perjury is insufficient where there is no allegation that the false testimony was given in any cause, matter or proceeding before any court, tribunal, public body or officer: State v. Ayer, 40 Kan. 43, 19 Pac. 403. An indictment averring that the offense was committed on the trial of one under indictment for burglary, but not stating on whose property the burglary was committed, was held uncertain and insufficient in Davis v. State, 79 Ala. 20. Recitals merely describing the transaction about which the false testimony was given do not make the information bad: State v. Hoel (Kan.), 94 Pac. 267.

Under a statute requiring the indictment to state the acts constituting the offense in such a manner as to enable a person of common understanding to know what is intended, an indictment for perjury has been held demurrable which alleges that it was committed by A "upon a proceeding wherein the state of Washington was plaintiff and B was defendant, why said B should not be punished for contempt," etc.: State v. See, 4 Wash. 344, 30 Pac. 327, 746.

An indictment setting forth the name of the court, its location, the term, the parties to the cause, the nature of the action, and the judge, and stating that the case was tried in due form of law by a jury taken before the parties and duly sworn, and that the accused there appeared as a witness and testified falsely, charges that the perjury was committed in the course of a judicial proceeding, without a specific averment of that fact: Kizer v. People, 211 Ill. 407, 71 N. E. 1035. An averment that the alleged false oath was taken before the orphans' court "in due form of law" in an application for letters of administration is a sufficient averment that the oath was taken in a proceeding in the course of administration of justice: State v. Mercer, 101 Md. 535, 61 Atl. 220.

An indictment averring that the false oath was taken in a proceeding before A, who had been duly appointed commissioner by B, the register in chancery, with authority to take the written testimony of the accused in a suit for divorce, naming the parties to the suit and the court wherein it was pending, sufficiently avers the



substance of the proceeding: *Hicks v. State*, 86 Ala. 30, 5 South. 425. An information which avers that a certain information was pending against the defendant, that issue thereon was joined, that the cause was tried in due form before a jury, and that the defendant was sworn to testify as a witness to certain facts, sufficiently avers that the testimony was given on the trial of an actual cause: *State v. McLain*, 43 Wash. 124, 86 Pac. 388.

The description of the court in an indictment is sufficient when it is averred that the testimony was given "in open court and during the pendency and as a part of the evidence in a criminal case then and there pending before" A on a complaint charging the defendant with petit larceny: *People v. Ennis*, 137 Cal. 263, 70 Pac. 84. The description of the proceeding in which the oath was administered is sufficient when it is alleged that the defendant was duly sworn in a certain case then and there at issue, giving the title of the case and setting out his testimony: *People v. Collins*, 6 Cal. App. 492, 92 Pac. 513. Where the perjury was committed on a preliminary examination, it is a sufficient statement of the controversy to aver that the offense was one which the justice had lawful power to investigate: *State v. Booth* (Iowa), 88 N. W. 344.

An indictment for perjury in applying for a continuance of a trial under a former indictment need not set forth such indictment: *Ross v. State*, 40 Tex. Cr. App. 349, 50 S. W. 336. And an indictment which charges that the accused swore that all the matters and facts in a complaint were true is not bad for failing to set out the verification of the complaint: *State v. Luper* (Or.), 95 Pac. 811.

When perjury is assigned on an affidavit intended for use as a preliminary complaint for a felony, there is no necessity for further averment that the oath was taken in a judicial proceeding: *People v. Robertson*, 3 Wheel. C. C. 180. All indictments for perjury upon an affidavit state the charge in one of two ways; either that the accused did corruptly say, depose, swear and make affidavit in writing, or that he did produce and exhibit a certain affidavit in writing: *Copeland v. State*, 23 Miss. 257.

**c. Particularization of Issues.**—When an indictment so describes the action or proceeding in which the perjury is charged to have been committed that the defendant can understand the charge, this is sufficient without a specific particularization of the issues: *People v. Grimshaw*, 33 Hun, 505; *Peter v. United States*, 2 Okl. 138, 37 Pac. 1081; *State v. Miller*, 26 R. I. 282, 58 Atl. 882; *Covey v. State*, 23 Tex. App. 388, 5 S. W. 283. An allegation that the perjury was committed in respect to a question of usury which had become material on a trial of a cause charges with sufficient certainty the issue: *State v. Voorhis*, 52 N. J. L. 351, 20 Atl. 26. And an allegation that issue was joined between the state and the defendant in the trial of a certain case is sufficient without an averment that he entered a plea of not guilty: *Montgomery v. State* (Tex. Cr. App.), 40 S. W. 805. The indictment need not aver a joinder of issues in

the cause in order sufficiently to charge the issue therein: *State v. Nelson*, 146 Mo. 256, 48 S. W. 84.

**d. Pendency of Proceedings.**—It has been affirmed that in stating the substance of the offense, the indictment should state the cause, process or proceeding as pending, or that the perjury was committed on the trial of some civil or criminal proceeding; that it is not enough to aver that the perjury was committed in a proceeding in a court of justice: *State v. Hanson*, 39 Me. 337. The indictment should state that the oath was taken and the matter sworn to in some judicial proceeding, and should state where and when such proceeding was pending: *State v. Oppenheimer*, 41 Tex. 82.

**e. Determination of Proceedings.**—Indictments for perjury need not allege that the action or proceeding wherein the false oath was made has been finally determined, or that a final judgment therein has been entered: *Commonwealth v. Moore*, 9 Pa. Co. Ct. 501. In an indictment for perjury committed by testifying falsely in a land contest, it is not essential that it appear that the contest has finally been determined: *Finch v. United States*, 1 Okl. 396, 33 Pac. 638. And in an indictment for falsely testifying before referees, it is unnecessary to aver that there has been a final determination of the controversy before the referees; it is enough to allege that they proceeded to hear the parties, and that the false testimony was given in due course of the proceedings: *State v. Keene*, 26 Me. 33.

**f. Investigation of Offense by Grand Jury.**—In an indictment for perjury committed before a grand jury it is necessary to allege that the offense was under investigation by the grand jury: *Banks v. State*, 78 Ala. 14; *State v. Wiggins* (Miss.), 30 South. 712; *People v. Tatum*, 112 N. Y. Supp. 36; *Gallegos v. State*, 50 Tex. Cr. App. 190, 95 S. W. 123; and to specify the subject matter thereof: *Commonwealth v. Taylor*, 96 Ky. 394, 29 S. W. 138; *State v. Webber*, 78 Vt. 463, 62 Atl. 1018. But it is not necessary to aver that the person whose offense was being investigated and about which the defendant swore was or was not guilty, nor the facts in regard to such offense: *State v. Schill*, 27 Iowa, 263.

#### IV. Description and Authority of Court or Officer.

**a. Description of Tribunal or Officer.**—An indictment for perjury should designate in what court and before whom the alleged false oath was taken: *Kerr v. People*, 42 Ill. 307; *Hitesman v. State*, 43 Ind. 472; *State v. Ellison*, 8 Blackf. (Ind.) 225; *State v. Harlis*, 33 La. Ann. 1172; *Geston v. People*, 4 Lans. (N. Y.) 487; *Guston v. People*, 61 Barb. 35; *State v. Oppenheimer*, 41 Tex. 82; *Conner v. Commonwealth*, 2 Va. Cas. 30; *United States v. Wilcox*, 4 Blatchf. 391; *Fed. Cas. No. 16,692*. When, however, the court before whom the alleged perjury was committed is distinctly set forth, the person holding the court need not be named: *Smith v. People*, 32 Colo. 251, 75 Pac. 914; *United States v. Walsh*, 22 Fed. 644. Neither is it necessary to allege the name of the clerk or other officer adminis-

tering the oath: *Smith v. People*, 32 Colo. 251, 75 Pac. 914; *State v. Spencer*, 6 Or. 152. It is not error, however, to state, in addition to the name of the court, the names of the justices who sat at the trial: *State v. Flowers*, 109 N. C. 841, 13 S. E. 718.

In an indictment for perjury, the style of the court before which the perjury is alleged to have been committed must be correctly set out: *State v. Street*, 5 N. C. 156, 3 Am. Dec. 682. An indictment which alleges that the offense was committed in a specified town and county of the state, in the court of a named justice of the peace, which court was authorized to administer the oath, sufficiently describes the court: *State v. Stein*, 48 Minn. 466, 51 N. W. 474. And if an indictment distinctly states that an application to become a citizen was before "the district court of the said United States then and there holden for the said district of Massachusetts," and that the said respondent "did then and there, in said matter and proceeding, knowingly swear falsely and make oath before said court," it sufficiently describes the court: *United States v. Walsh*, 22 Fed. 644. In Massachusetts an indictment alleging perjury on the trial of a crime in a certain district court, before the justice of that court, need not aver that the court trying the case was then held for criminal business: *Commonwealth v. Bouvier*, 164 Mass. 398, 41 N. E. 651.

An indictment following the statutory form is good, without averring the particular officer or court that administered the oath: *State v. Sargood*, 80 Vt. 415, 68 Atl. 49. But "while it would seem that an indictment need not aver the particular officer before whom the oath was taken, and it would be sufficient to aver in the code form that the defendant was 'duly sworn,' yet when the state undertakes to particularize the offense, the proof must correspond with the allegation": *Jackson v. State (Ala.)*, 47 South. 77.

b. **Jurisdiction of Court.**—Jurisdiction of the proceeding in which the false testimony was given, being an element without which there can be no perjury, such jurisdiction must appear with certainty either by a direct averment or a statement of the facts, in an indictment for perjury. The direct averment that there was jurisdiction, however, is enough, without setting out the facts from which jurisdiction can be seen: *People v. Howard*, 111 Cal. 655, 44 Pac. 342; *People v. Collins*, 6 Cal. App. 492, 92 Pac. 513; *Franklin v. State*, 91 Ga. 712, 17 S. E. 987; *Maynard v. People*, 135 Ill. 416, 25 N. E. 740; *State v. Booth (Iowa)*, 88 N. W. 344; *Roundtree v. Roundtree*, 2 Ky. 56; *Commonwealth v. Weingartner (Ky.)*, 27 S. W. 815; *Sweat v. Commonwealth*, 29 Ky. Law Rep. 1067, 96 S. W. 843; *Commonwealth v. Combs*, 30 Ky. Law Rep. 1300, 101 S. W. 312; *State v. Schlessinger*, 33 La. Ann. 564; *State v. Grover*, 38 La. Ann. 567; *State v. Thibodeaux*, 49 La. Ann. 15, 21 South. 127; *State v. Eddens*, 52 La. Ann. 1461, 27 South. 742; *State v. Furlong*, 26 Me. 69; *State v. Plummer*, 50 Me. 217; *State v. Keel*, 54 Mo. 182; *Guston v. People*, 61 Barb. 35; *Steinston v. State*, 14 Tenn. (6 Yerg.) 531; *State v. Wise*, 71 Tenn. 38; *Powers v. State*, 17 Tex. App. 428;

*Anderson v. State*, 18 Tex. App. 17; *Manning v. State*, 46 Tex. Cr. App. 326, 81 S. W. 957; *Moss v. State*, 47 Tex. Cr. App. 459, 83 S. W. 829.

In fact the authorities now generally agree that an express or specific allegation that the court had jurisdiction of the action in which the alleged perjury was committed is unnecessary, and that it is sufficient to allege that the court had authority to administer the oath in question: *People v. De Carlo*, 124 Cal. 462, 57 Pac. 383; *Thompson v. People*, 26 Colo. 496, 59 Pac. 51; *Kizer v. People*, 211 Ill. 407, 71 N. E. 1035; *State v. Newton*, 1 G. Greene, 160, 48 Am. Dec. 367; *Commonwealth v. Knight*, 12 Mass. 274, 7 Am. Dec. 72; *Eighmy v. People*, 79 N. Y. 546; *People v. Tredway*, 3 Barb. 470; *People v. Phelps*, 5 Wend. 9; *State v. Roberson*, 98 N. C. 751, 4 S. E. 511; *State v. Green*, 100 N. C. 419, 5 S. E. 422; *Halleck v. State*, 11 Ohio, 400; *State v. Farrow*, 10 Rich. 165; *State v. Peters*, 42 Tex. 7; *People v. Greenwell*, 5 Utah, 112, 13 Pac. 89; *State v. Douette*, 31 Wash. 6, 71 Pac. 556. It was necessary, "in an indictment for perjury at common law, to set forth the record of the cause upon the trial whereof the perjury complained of was charged to be committed, so as to show that the oath was administered in a judicial proceeding and by lawful authority, and also to show that the tribunal wherein the cause was tried had jurisdiction over it. The jurisdiction of the tribunal must have been made to appear from the facts stated in the indictment, or the jurisdiction be expressly averred. This was indispensable. These requirements caused indictments for perjury at common law to be set forth with much detail and great prolixity, resulting, often, by reason of inaccuracies, in the acquittal of guilty parties upon mere technicalities, and without regard to the merits of the case. To obviate these difficulties, and simplify indictments for perjury, the following statute was enacted in the time of George II: 'In every information or indictment to be prosecuted against any person for willful and corrupt perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court or before whom the oath was taken (averring such court or person or persons to have competent authority to administer the same, together with the proper averment or averments to falsify the matter or matters wherein the perjury or perjuries is or are assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, other than as aforesaid, and without setting forth the commission or authority of the court or person or persons before whom the perjury was committed; any law, usage or custom to the contrary notwithstanding.' The effect of this statute was to dispense with the necessity of setting out the record or the facts to show the jurisdiction of the tribunal, or of alleging in terms that it had jurisdiction over the cause or proceeding in which the false testimony was given. It was thereafter held by the courts of England to be sufficient to set forth the substance of the offense, and the name of the court before whom the oath was

taken, to aver that it had competent authority to administer the same, and to falsify, by proper averments, the defendant's assertions": *Fitch v. Commonwealth*, 92 Va. 824, 24 S. E. 272.

In an indictment for perjury committed in a case tried by a constable it is enough to charge that he had competent authority to try the case and to administer the oath: *State v. Bellew*, 79 Mo. 584. And to constitute perjury as defined by section 5392, Revised Statutes of the United States, it is sufficient if the indictment charges that the false oath was taken before an officer duly authorized under the laws of the United States to administer oaths: *Rich v. United States*, 2 Okl. 146, 37 Pac. 1083, modifying 1 Okl. 354, 33 Pac. 804.

c. *Authority of Officer who Administered Oath.*—The general rule is that an indictment for perjury must aver the authority of the officer who administered the oath to the accused: *Craft v. State*, 42 Fla. 567, 29 South. 418; *McGragor v. State*, 1 Ind. 232; *Commonwealth v. Hillenbrand*, 96 Ky. 407, 29 S. W. 287; *State v. Harlis*, 33 La. Ann. 1172; *State v. Owen*, 73 Mo. 440; *State v. Woolridge*, 45 Or. 389, 78 Pac. 333; *Stewart v. State*, 6 Tex. App. 184; *State v. McCone*, 59 Vt. 117, 7 Atl. 406. This may be done in general terms without setting forth the official character of the officer administering the oath or otherwise specifying the particular authority under which he acted: *Commonwealth v. Hughes*, 87 Mass. 499; *State v. Langley*, 34 N. H. 529; *Burns v. People*, 59 Barb. 531; *United States v. Boggs*, 31 Fed. 337. And when the facts alleged in the indictment show that the oath was one which the officer had authority to administer, it is not essential that such authority should be expressly averred: *Masterson v. State*, 144 Ind. 240, 43 N. E. 138; *State v. Cunningham*, 66 Iowa, 94, 23 N. W. 280. The authority may be made to appear by express averment that the official had such authority or by setting out such facts as make it judicially to appear that he had such authority. Courts take judicial notice that certain officers, such as a clerk in the district court or the receiver of a land office, are clothed with authority to administer oaths, and an averment of that fact is unnecessary: *State v. Hopper*, 133 Ind. 460, 32 N. E. 878; *State v. Harter*, 131 Iowa, 199, 108 N. W. 232; *United States v. Eddy*, 134 Fed. 114. And under the Vermont statute an indictment is good, though it fails to allege that the accused was sworn by a person legally qualified to administer the oath, since the allegation that the accused committed perjury necessarily implies that an oath was lawfully administered: *State v. Webber*, 78 Vt. 463, 62 Atl. 1018.

An indictment which charges that the oath was administered in open court by a deputy clerk is sufficient, when the evidence shows that the oath was administered in open court by one who was performing the duties of deputy clerk: *State v. Townley*, 67 Ohio St. 21, 93 Am. St. Rep. 636, 65 N. E. 149. When an indictment charges that "the defendant was duly sworn" by the foreman of a grand jury to speak the truth concerning all such legal questions as might be asked him by the said foreman, it is sufficient: *State v. Green*, 24 Ark. 591. An indictment for perjury before a grand jury need

not allege the name of the foreman thereof, or that he administered the oath when the jury was in session. This can be shown by the records of the court: *St. Clair v. State*, 11 Tex. App. 297.

**d. Election and Commission of Judge or Officer.**—While an indictment for perjury must aver that the false oath was administered by a tribunal or person legally authorized to administer it, there is no necessity for setting out the various facts which conferred the authority, such as his election, qualification or commission: *Burk v. State*, 81 Ind. 128; *State v. Marshall*, 47 Mo. 378; *State v. Nelson*, 146 Mo. 256, 48 S. W. 84; *State v. Dineen*, 203 Mo. 628, 102 S. W. 480; *State v. Bryson* 4 N. C. 115; *State v. Peters*, 42 Tex. 7; *Stewart v. State*, 6 Tex. App. 184; *Bradberry v. State*, 7 Tex. App. 375. "The setting forth of the commission, or the particular powers and authority of the officer, and the source whence they are derived, is not necessary, if he is alleged to hold an office which apparently confers upon him the authority to administer the oath in the particular case specified. This being done, the general allegation, that he had competent authority to administer the oath is declared to be sufficient": *United States v. Wilcox*, 4 Blatchf. 391, Fed. Cas. No. 16,692.

#### V. Administration of Oath.

**a. Necessity of Allegation.**—An indictment for perjury must allege that the accused was sworn in the proceedings in which he is alleged to have testified falsely; and the fact that he was sworn should be alleged distinctly and positively, and not left to appear by inference or argument: *People v. Dunlap*, 113 Cal. 72, 45 Pac. 183; *People v. Cohen*, 118 Cal. 74, 50 Pac. 20; *People v. Simpton*, 133 Cal. 367, 65 Pac. 834; *State v. Hamilton* 65 Mo. 667; *State v. Divoll*, 44 N. H. 140; *Parker v. State*, 44 Tex. Cr. 147, 69 S. W. 75; *Curtley v. State* 42 Tex. Cr. 227, 59 S. W. 44; *Brown v. State*, 91 Wis. 245, 64 N. W. 749; *United States v. Hearing*, 26 Fed. 744; *United States v. McConaughy*, 13 Saw. 141, 33 Fed. 168. The participial form of averment, namely, "having taken an oath," while not to be commended, has been sustained: *People v. Ennis*, 137 Cal. 263, 70 Pac. 84. And in Vermont the rule has been adopted that an allegation that the defendant committed "perjury" sufficiently alleges that he was legally sworn and willfully and falsely testified, these being included in the allegation that he committed the crime of perjury by giving the testimony set forth in the indictment: *State v. Camley*, 67 Vt. 322, 31 Atl. 840. This certainly is a liberal and commendable rule.

**b. Sufficiency of Allegation.**—The authorities all concede that it is enough to allege that the accused was duly sworn, without stating the substance of the oath or alleging in what particular form he was sworn to testify: *People v. Collins*, 6 Cal. App. 492, 92 Pac. 513; *State v. O'Hagan*, 38 Iowa, 504; *Commonwealth v. Kane*, 92 Ky. 457, 18 S. W. 7; *State v. Mercer*, 101 Md. 535, 61 Atl. 220; *State v. Scott*, 78 Minn. 311, 81 N. W. 3; *State v. Foulks*, 57 Mo. 461; *Dodge v. State*, 24 N. J. L. 455; *Tuttle v. People*, 36 N. Y. 431; *State v. Woolridge*, 45 Or. 389, 78 Pac. 333; *Respublica v. Newell*, 3

Yeates, 407, 2 Am. Dec. 381; *State v. Farrow*, 10 Rich. 165; *State v. Umdenstock*, 43 Tex. 554; *Beach v. State*, 32 Tex. Cr. 240, 22 S. W. 976; *Flournoy v. State* (Tex. Cr. App.), 59 S. W. 902. In discussing this question in *Lamar v. State*, 49 Tex. Cr. 563, 95 S. W. 509, the court said: "Appellant made a motion to quash the indictment; one ground being that the indictment should have set out the oath administered to the witness. In support of this contention, appellant refers us to *Shely v. State*, 35 Tex. Cr. 190, 32 S. W. 901; *State v. Perry*, 42 Tex. 238. These cases are not in point, inasmuch as the perjury assigned was predicated on certain affidavits. It was there held that the affidavits themselves or enough of the same should be stated to show the character of oath taken, and that it was an oath required by law in a judicial proceeding. Here the prosecution is not upon the oath taken by the witness on an affidavit made, but in the trial of a case in the corporation court, and for swearing falsely at said trial; the oath taken being the ordinary one required of a witness in the trial of a case, and the allegation that the witness was sworn and took his corporeal oath before said court as a witness to testify in said cause, and that the judge of said court duly and legally administered the same according to the law in such cases made and provided, as stated in the indictment, was sufficient."

"It must appear," to quote from *State v. Divoll*, 44 N. H. 140, "that the defendant was regularly sworn: Ch. Cr. L. 309; Whart. Cr. L. 169; Russ. Cr. 1286; 9 East, 537. All the forms contain this allegation, though the phraseology varies. Thus we find, was sworn and took his corporeal oath; Whart. Prec. 279, 285-320; 2 Ch. Cr. L. 172-262; Arch. Cr. Plead. 312, 317, 318; C. C. C., 572, 575-624; was in due manner sworn and took his oath; Whart. Prec. 284, 286, 294, 314; was in due manner sworn and did make affidavit in writing and take his corporeal oath: Whart. Prec. 290; was in due manner sworn to make true answers: Whart. Prec. 291; 2 Ch. Cr. L. 179; was then and there duly sworn: Whart. Prec. 294, 316; did take his corporeal oath and then and there did swear: Whart. Prec. 300, 304; 2 Ch. Cr. L. 202; was legally sworn: 2 Swift Sys. 834; took his solemn affirmation: Whart. Prec. 305; took his corporeal oath: 2 Ch. Cr. L. 184, 189, 195, 258; C. C. C. 568; did take his oath: 2 Ch. Cr. L. 185." The words "corporeal oath" and "solemn oath" are synonymous, and an oath taken with uplifted hand is properly described by either term: *Jackson v. State*, 1 Ind. 184.

An averment that the defendant was called and sworn as a witness includes that he was lawfully required to depose the truth in a proceeding in a court of justice: *Commonwealth v. Knight*, 12 Mass. 274, 7 Am. Dec. 72; *Commonwealth v. Wright*, 166 Mass. 174, 44 N. E. 129.

## VI. Materiality of Testimony.

a. **Necessity of Allegation of Materiality.**—The materiality of the false testimony to the issue involved in the investigation where the testimony was given must, in most jurisdictions, appear from the indictment for perjury, either by express averment or by the facts

set forth: *Parrish v. State*, 18 Fla. 902; *Robinson v. State*, 18 Fla. 898; *Hembree v. State*, 52 Ga. 242; *Wilkinson v. People*, 226 Ill. 135, 80 N. E. 699; *State v. Flagg*, 25 Ind. 243; *Burk v. State*, 81 Ind. 128; *Weathers v. State* (Ind.), 2 Blackf. 278; *State v. Brown*, 111 La. 170, 35 South. 501; *People v. Collier*, 1 Mich. 137, 48 Am. Dec. 699; *State v. Booker*, 84 Miss. 187, 36 South. 241; *State v. Holden*, 48 Mo. 93; *State v. Beard*, 25 N. J. L. 384; *Wood v. People*, 59 N. Y. 117; *Guston v. People*, 61 Barb. 35; *People v. Root*, 87 N. Y. Supp. 962, 94 App. Div. 84; *State v. Moffat*, 26 Tenn. 250; *State v. Bowlin*, 50 Tenn. 29; *Donohoe v. State*, 14 Tex. App. 638; *Agar v. State*, 29 Tex. App. 605, 16 S. W. 761; *Ross v. State*, 40 Tex. Cr. 349, 50 S. W. 336; *Morris v. State*, 47 Tex. Cr. 420, 83 S. W. 1126; *Rosebud v. State*, 50 Tex. Cr. 475, 98 S. W. 858; *McCoy v. State*, 43 Tex. Cr. 606, 68 S. W. 686; *McVicker v. State*, 52 Tex. Cr. App. 508, 107 S. W. 834; *State v. Trask*, 42 Vt. 152; *State v. Chandler*, 42 Vt. 446; *United States v. Singleton*, 54 Fed. 488; *United States v. Pettus*, 84 Fed. 791; *United States v. Cowing*, 4 Cranch C. C. 613, Fed. Cas. No. 14,880; note to *State v. Shupe*, 85 Am. Dec. 498. This rule, however, has wisely been abolished in some states: *State v. Byrd*, 28 S. C. 18, 13 Am. St. Rep. 660, 4 S. E. 793; *State v. Miller*, 26 R. I. 232, 58 Atl. 882; a charge that one "committed perjury" necessarily involves that the false testimony was material: *State v. Cline*, 146 N. S. 640, 61 S. E. 522. The materiality of the testimony need not be averred in an indictment for the statutory offense of false swearing: *Gammage v. State*, 119 Ga. 380, 46 S. E. 409; *Richey v. Commonwealth*, 81 Ky. 524.

Where perjury is charged in the making of an affidavit for a continuance, the indictment must show that the swearing related to matters material to the point in question: *State v. Anderson*, 103 Ind. 170, 2 N. E. 332; and an indictment for perjury committed before a grand jury which fails to aver that the matter sworn to was material in the investigation is bad: *State v. McCormick*, 52 Ind. 169; *Ford v. Commonwealth* (Ky.), 29 S. W. 446; *State v. Gibson*, 26 La. Ann. 71; *Buller v. State*, 33 Tex. Cr. 551, 28 S. W. 465.

**b. Two Forms of Alleging Materiality.**—The materiality of the testimony may be averred in either of two ways: First, by setting forth facts from which materiality may be inferred, or, second, by a direct allegation that the testimony was material. It is generally conceded that either of these methods will satisfy the law: *Thompson v. People*, 26 Colo. 496, 59 Pac. 51; *Brown v. State*, 47 Fla. 16, 36 South. 705; *Gibson v. State*, 47 Fla. 34, 36 South. 706; *State v. Horine*, 70 Kan. 256, 78 Pac. 411; *Henry v. State*, 43 Tex. Cr. 176, 63 S. W. 642; *Harrison v. State*, 41 Tex. Cr. 274, 53 S. W. 863. "Two modes are recognized by which the materiality of the alleged false statements may be shown in a pleading charging perjury: (1) By setting forth the nature of the issue and the evidence given thereon, so that as a matter of law it may be said the testimony upon which the perjury is assigned is material to the issue; (2) By showing an action at issue in a court of competent jurisdiction, the testimony



given, its willful and felonious falsity, coupled with the averment that it was material to the issue": *People v. Von Tiedeman*, 120 Cal. 128, 52 Pac. 155. Both methods may be employed in the same indictment; but if it clearly appears from an inspection of the indictment that the alleged testimony was not material, the indictment is bad, though it contains a general averment that the testimony was material. An allegation of materiality cannot save an indictment, if the recited testimony is manifestly not material; the indictment defeats itself: *Kizer v. People*, 211 Ill. 407, 71 N. E. 1035; *State v. Ela*, 91 Me. 309, 39 Atl. 1001. Generally speaking, however, when an indictment contains an express averment of the materiality of the evidence, it is sufficient unless it affirmatively appears from other averments that the testimony was immaterial: *People v. Brilliant*, 58 Cal. 214. To quote from the supreme court of Georgia: "It is sufficient in an indictment for perjury to charge generally that the testimony alleged to have been false was in relation to a matter material to the point or question in issue, without setting forth in detail the facts showing how such testimony was material. The authorities to this effect are abundant. When the record does not positively show that the testimony was immaterial, an express averment that a question was material lets in evidence to prove that it was so": *King v. State*, 103 Ga. 263, 30 S. E. 30.

c. **Necessity of Allegation of Facts Showing Materiality.**—While occasional statements to the contrary may be found (*State v. Shanks*, 66 Mo. 560; *Territory v. Remuzon*, 3 N. M. 648, 9 Pac. 598), it is now generally recognized that an indictment for perjury which expressly charges that the false testimony was material to the issue in the trial where given, is sufficient without setting forth the facts from which the materiality appears. The indictment must show that the matter sworn to and assigned as perjury was material. But this need not be by setting out the testimony; it may be by an express averment to that effect. Nor is it necessary to aver or allege facts showing how or in what manner the testimony was or became material: *Williams v. State*, 68 Ala. 551; *People v. Rodley*, 131 Cal. 240, 63 Pac. 351; *Markey v. State*, 47 Fla. 38, 37 South. 53; *Kimmel v. People*, 92 Ill. 457; *Greene v. People*, 182 Ill. 278, 55 N. E. 341; *State v. Brownfield*, 67 Kan. 627, 73 Pac. 925; *State v. Maxwell*, 28 La. Ann. 361; *State v. Jean*, 42 La. Ann. 946, 8 South. 480; *Commonwealth v. McCarty*, 152 Mass. 577, 26 N. E. 140; *Flint v. People*, 35 Mich. 421; *Lea v. State*, 64 Miss. 278, 1 South. 235; *State v. Nelson*, 146 Mo. 256, 48 S. W. 84; *Territory v. Lockhart*, 8 N. M. 523, 45 Pac. 1106; *Campbell v. People*, 8 Wend. 636; *State v. Mumford*, 12 N. C. 519, 17 Am. Dec. 573; *State v. Cline*, 146 N. C. 640, 61 S. E. 522; *Dilcher v. State*, 39 Ohio St. 130; *Rich v. United States*, 1 Okl. 354, 33 Pac. 804; *Cutler v. Territory*, 8 Okl. 101, 56 Pac. 861; *Washington v. State*, 22 Tex. App. 26, 3 S. W. 228; *Partain v. State*, 22 Tex. App. 100, 2 S. W. 854; *Sisk v. State*, 28 Tex. App. 432, 13 S. W. 647; *Adams v. State* (Tex. Cr. App.), 28 S. W. 270; *Scott v. State*, 35 Tex. Cr. 11, 29 S. W. 274; *Jernigan v. State*, 43 Tex. Cr. 114, 63

S. W. 560; *Chavarria v. State* (Tex. Cr. App.), 63 S. W. 312; *Lamar v. State*, 49 Tex. Cr. 563, 95 S. W. 509; *State v. Sleeper*, 37 Vt. 122; *State v. McLain*, 43 Wash. 124, 86 Pac. 388; *Barnard v. United States*, 162 Fed. 618. Indeed, it would seem that it is the better practice to make an express averment of the materiality and not attempt to set forth the facts: *State v. Davis*, 69 N. C. 495. Nevertheless, it is permissible to set out the alleged material testimony in detail, but in so doing the statements of fact should be clear, concise and succinct: *State v. Wakefield*, 73 Mo. 549; *Higgins v. State*, 50 Tex. Cr. App. 433, 97 S. W. 1054; where a great mass of testimony is thrown into an indictment without pointing out in what answers to questions the alleged perjury is contained, the indictment is bad for uncertainty: *State v. Rowell*, 72 Vt. 28, 82 Am. St. Rep. 918, 47 Atl. 111.

**d. Necessity of Express Allegation of Materiality.**—An express allegation in an indictment that the false testimony was material is not indispensable when the materiality of the testimony is apparent from the face of the indictment; the court, thus being apprised of the facts, may draw the legal conclusion without any allegation: *State v. Nees*, 47 Ark. 553, 2 S. W. 184; *People v. Kelly*, 59 Cal. 372; *State v. Hall*, 7 Blackf. 25; *State v. Johnson*, 7 Blackf. 49; *Galloway v. State*, 29 Ind. 442; *State v. Grover*, 38 La. Ann. 567; *Commonwealth v. Knight*, 12 Mass. 274, 7 Am. Dec. 72; *State v. Dayton*, 23 N. J. L. 49, 53 Am. Dec. 270; *People v. Robertson*, 3 Wheel. C. C. 180; *Campbell v. People*, 8 Wend. 636; *Partain v. State*, 22 Tex. App. 100, 2 S. W. 854; *Tellis v. State*, 42 Tex. Cr. App. 574, 61 S. W. 717; *State v. Chamberlin*, 30 Vt. 559; *United States v. McHenry*, 6 Blatchf. 503, Fed. Cas. No. 15,681.

In *Hendricks v. State*, 26 Ind. 493, the court said: "It is objected to the indictment that it does not sufficiently aver that the testimony upon which the perjury is assigned was material to the issue. No express averment was necessary upon that subject in this case. The materiality of the evidence appeared conclusively from the nature of the case in which it was alleged to have been given. The charge, to wit, bigamy, in marrying the appellant, necessarily, as a matter of law, made material evidence that no such marriage took place. An express allegation of the mere legal proposition was not necessary. The courts will take notice of the public law of the land, though it be not pleaded." And in *State v. Marshall*, 47 Mo. 378, the court said: "In indictments for perjury, the materiality of the oath must be made to appear either by direct averment . . . or by setting forth facts that shall show the materiality of the oath charged to be false; . . . for it has always been held that if the materiality of its oath appear from the facts or documents set forth in an indictment, it is sufficient without any express allegation upon the subject."

Where an indictment for perjury charges that the accused committed perjury by swearing that he did not execute a certain order in writing, which is set out in *hæc verba* in the indictment, it is not necessary that the indictment should allege the materiality of such

order, the execution of the instrument, and not the instrument itself, being the material subject of inquiry before the grand jury: *Rahm v. State*, 30 Tex. App. 310, 28 Am. St. Rep. 911, 17 S. W. 416.

**e. Sufficiency of Allegation of Materiality.**—It is necessary that it should appear from the face of an indictment for perjury that the false testimony was material to the matter in issue. This may be accomplished either by an express averment of materiality or by a statement of facts showing the materiality. Either method may be employed, but one or the other must be: *People v. De Carlo*, 124 Cal. 462, 57 Pac. 383; *People v. Ennis*, 137 Cal. 263, 70 Pac. 84; *People v. Collins*, 6 Cal. App. 492, 92 Pac. 513; *State v. Hopper*, 133 Ind. 460, 32 N. E. 878; *State v. Sutton*, 147 Ind. 158, 46 N. E. 468; *State v. Wilson*, 156 Ind. 343, 59 N. E. 932; *State v. Booth* (Iowa), 88 N. W. 344; *Fitch v. Commonwealth*, 92 Va. 824, 24 S. E. 272; *Stofer v. State*, 3 W. Va. 689. This rule is applied in the case of oaths taken before taxing officers in *State v. Reynolds*, 108 Ind. 353, 9 N. E. 287; *State v. Wood*, 110 Ind. 82, 10 N. E. 639; *State v. Cunningham*, 66 Iowa, 94, 23 N. W. 280; *State v. Crumb*, 68 Mo. 206; *State v. Smith*, 43 Tex. 655; and in the case oaths taken in insolvency and supplementary proceedings in *People v. Naylor*, 82 Cal. 607, 23 Pac. 116; *State v. Cunningham*, 116 Ind. 209, 18 N. E. 613; *Commonwealth v. McCarty*, 152 Mass. 577, 26 N. E. 140.

From the facts alleged, or by direct averment, the false testimony should plainly appear to have been material to the issue: *Mattingly v. State*, 8 Tex. App. 345; *Martin v. State*, 33 Tex. Cr. 317, 26 S. W. 400. It is said not to be enough that the indictment shows that the testimony might have been material: *Commonwealth v. Byron*, 80 Mass. (14 Gray) 31. But "it is not true that the averments of an information for perjury relative to the testimony given by the accused in the original action should show affirmatively that that testimony was admissible and competent, and could not have been excluded on any legal ground, and that, failing so to show, and to set out all the facts necessary to have made it admissible, the information is fatally defective": *State v. Spencer*, 45 La. Ann. 1, 12 South. 135.

The fact that an indictment contains some statements that are immaterial is not a fatal defect: *State v. Williams*, 60 Kan. 837, 58 Pac. 476; *Jefferson v. State* (Tex. Cr. App.), 49 S. W. 88; but where the alleged false testimony is inserted in detail in the indictment, and it clearly appears that such testimony was not material to the issues of the case in which it was given, and had no tendency whatever to affect or influence the judgment of the court or jury, the indictment is bad: *State v. Smith*, 40 Kan. 631, 20 Pac. 529. Indictments for perjury were held insufficient for not properly averring the materiality of the alleged false testimony in the following cases: *Brooks v. State*, 29 Tex. App. 582, 16 S. W. 542; *Weaver v. State*, 34 Tex. Cr. 554, 31 S. W. 400; *McMurty v. State*, 38 Tex. Cr. App. 521, 43 S. W. 1010; *Crow v. State*, 49 Tex. Cr. App. 103; 90 S. W. 650; *United States v. Singleton* (D. C.), 54 Fed. 488. On the other hand,

indictments were held to sufficiently aver the materiality of the false testimony in *Johnson v. State*, 76 Ga. 790; *State v. Gonsoulin*, 42 La. Ann. 579, 7 South. 633; *Shaffer v. State*, 87 Md. 124, 39 Atl. 313; *State v. Mercer*, 101 Md. 535, 61 Atl. 220; *Commonwealth v. Flynn*, 57 Mass. (3 Cush.) 525; *Commonwealth v. Johns*, 72 Mass. (6 Gray) 274; *Commonwealth v. Wright*, 166 Mass. 174, 44 N. E. 129; *Hoch v. People*, 3 Mich. 552; *State v. Cave*, 81 Mo. 450; *State v. Woolridge*, 45 Or. 389, 78 Pac. 333; *Johnson v. State*, 34 Tex. Cr. 555, 31 S. W. 397; *Pyles v. State*, 47 Tex. Cr. App. 435, 83 S. W. 811; *Lamar v. State*, 49 Tex. Cr. App. 563, 95 S. W. 509; *State v. Chamberlin*, 30 Vt. 559; *State v. Clogston*, 63 Vt. 215, 22 Atl. 607; *State v. Douette*, 31 Wash. 122, 71 Pac. 556; *Noah v. United States*, 128 Fed. 270, 62 C. C. A. 618.

**f. Necessity of Allegation that Oath was Required by Law for Use.**—An indictment for perjury in making a false affidavit should aver that the oath was taken for use in respect to a matter in which an oath is required by law: *People v. Robels*, 117 Cal. 681, 49 Pac. 1042; *People v. Fox*, 25 Mich. 492; *People v. Gaige*, 26 Mich. 30; *Heintz v. Court of General Quarter Sessions of Peace of Union County*, 45 N. J. L. 523; *Ortner v. People*, 4 Hun, 323; *People v. Allen*, 9 N. Y. St. Rep. 622; *Shely v. State*, 35 Tex. Cr. 190, 32 S. W. 901; *State v. Collins*, 62 Vt. 195, 19 Atl. 368; *State v. Estabrooks*, 70 Vt. 412, 41 Atl. 499; *State v. Dow*, 74 Vt. 119, 52 Atl. 419; *State v. Lloyd*, 77 Wis. 630, 46 N. W. 898; but it need not show that the affidavit was actually used: *State v. Whittemore*, 50 N. H. 245, 9 Am. Rep. 196; *Noah v. United States*, 128 Fed. 270, 62 C. C. A. 618. Said the supreme court of Washington in *State v. Smith*, 3 Wash. 14, 27 Pac. 1028: "Many of the formalities, and much of the detail, required at the common law in an information for perjury, has undoubtedly been made unnecessary by our statute; but we do not understand that such statute has gone so far as to make the taking of a purely voluntary oath a crime. Even under such statute, one can only be convicted of perjury for the making of a false affidavit when such affidavit is sworn to for the purpose of being used in some action or proceeding wherein by law such affidavit could be material, or by using or consenting to the use of such affidavit, after having been sworn to, in such action or proceeding."

## VII. Setting Forth False Testimony.

**a. Necessity and Form of Allegation in General.**—An indictment for perjury must so set forth the alleged false testimony that the defendant may be apprised of the particular offense with which he is charged. It is not necessary, however, to set forth the exact language of the testimony; it is sufficient to set out the substance and effect thereof; either method satisfies the law: *State v. Mace*, 76 Me. 64; *People v. Warner*, 5 Wend. 271; *People v. Phelps*, 5 Wend. 9; *People v. Ostrander*, 64 Hun, 335, 19 N. Y. Supp. 324, 328; *State v. Groves*, 44 N. C. 402; *State v. Umdenstock*, 43 Tex. 554; *Rohrer v. State*, 13 Tex. App. 163; *Gabrielsky v. State*, 13 Tex. App. 423;

Jackson v. State, 15 Tex. App. 579; Higgins v. State, 50 Tex. Cr. App. 433, 97 S. W. 1054; State v. Bishop, 1 D. Chip. (Vt.) 120; United States v. Walsh, 22 Fed. 644. And it is not necessary to set forth the entire oath; it is enough to set out the part of it in which the perjury is alleged to have been committed: State v. Neal, 42 Mo. 119; Campbell v. People, 8 Wend. 636. These rules apply where the perjury is committed by making a false affidavit, although in such case it is more reasonable to require that the indictment set out the precise words than where the false statements are made in giving testimony before a jury: People v. Robertson, 3 Wheel. C. C. 180; Shely v. State, 35 Tex. Cr. 190, 32 S. W. 901; Simpson v. State, 46 Tex. Cr. App. 77, 79 S. W. 530; United States v. Law, 50 Fed. 915; and some authorities hold that it is not sufficient to set forth only the substance of the affidavit: Coppack v. State, 36 Ind. 513; State v. Blackstone, 74 Ind. 592.

b. **Testimony in a Foreign Language.**—Though the testimony was given in a foreign language, it is not necessary, in an indictment for perjury, to show that fact or to state in such language the testimony alleged to have been false. It is sufficient to set out in English the substance of the testimony: State v. Terline, 23 R. I. 530, 91 Am. St. Rep. 650, 51 Atl. 204.

### VIII. Assignment of Perjury.

a. **Allegation of Falsity of Testimony in General.**—The falsity of the testimony is the main ingredient of the crime of perjury, and must be alleged in the indictment; and the omission to charge that the facts sworn to were false renders the indictment fatally defective: Morrell v. People, 32 Ill. 499; People v. Clements, 42 Hun, 353; Perdue v. Commonwealth, 96 Pa. 311; Juaraqui v. State, 28 Tex. 625; Fitch v. Commonwealth, 92 Va. 824, 24 S. E. 272; United States v. Singleton, 54 Fed. 488. More than this, it has usually been held insufficient to allege in general terms that the testimony is false, without negating the alleged false statements and without setting out the truth in regard to them; at common law, it was necessary to make direct and specific allegations negating the truth of the alleged false testimony, by setting out the true facts by way of antithesis, a mere general allegation that the testimony was false being insufficient. This rule still prevails in many, and perhaps a majority of the American commonwealths: Gibson v. State, 44 Ala. 17; Thomas v. State, 54 Ark. 584, 16 S. W. 568; United States v. Morgan, Morris (Iowa), 341, 41 Am. Dec. 234; State v. Gallagher, 123 Iowa, 378, 98 N. W. 906; Ferguson v. Commonwealth (Ky.), 1 S. W. 435; Commonwealth v. Weingartner (Ky.), 27 S. W. 815; Commonwealth v. Compton (Ky.), 36 S. W. 1116; State v. Ela, 91 Me. 309, 39 Atl. 1001; State v. Silberberg, 78 Miss. 858, 29 South. 761; In re Rothaker, 11 Abb. N. C. 122; State v. Mumford, 12 N. C. 519, 17 Am. Dec. 573; Gabrielsky v. State, 13 Tex. App. 428; Harrison v. State, 41 Tex. Cr. App. 274, 53 S. W. 863; Morris v. State, 47 Tex. Cr. App. 420, 83 S. W. 1126; Crow v. State, 49 Tex. Cr. App. 103, 90 S. W. 650;

State v. Guse, 21 Wash. 269, 57 Pac. 831; United States v. Pettus, 84 Fed. 791.

The supreme court of Minnesota, in considering the sufficiency of an indictment in this respect, said: "It will be observed that this indictment contains no 'assignments of perjury,' as they are technically termed; that is, no special averments negating each fact falsely deposed, so as to specify wherein the testimony was false. There is merely a general averment that all the matter so testified to was false. Nothing is better settled than that, at common law, it was absolutely necessary, in an indictment for perjury, to make direct and specific allegations negating the truth of the alleged false testimony, by setting forth the true facts by way of an antithesis, and that a mere general allegation that the testimony was false was not sufficient. This requirement was not technical or a mere matter of form, but of the very essence of the indictment, and necessary in order to inform the accused of the nature and cause of the accusation against him, by setting out wherein or in what respect his testimony was claimed to be false. This, as a general rule, at least, is the only way by which he can be fully informed of the nature and cause of the accusation against him": State v. Nelson, 74 Minn. 409, 77 N. W. 223.

The supreme court of New Mexico, in passing upon the sufficiency of the indictment in Territory v. Lockhart, 8 N. M. 523, 45 Pac. 1106, remarked: "Nowhere in any assignment of perjury in either count is there any specific negative of any fact testified to. Speaking of this part of an indictment for perjury, Mr. Bishop observes: 'This is the gist of the offense—not mere inducement. Consequently the allegations must be direct and specific—not in terms of uncertain meaning, or by way of implication. Simply to say, for example, that the defendant falsely swore is not adequate.' And furthermore: 'It must particularize wherein the testimony was false; a general allegation that it was so not being sufficient': 2 Bishop's New Criminal Procedure, secs. 918, 919. In Rex v. Perrott, 2 Maule & S. 386, Lord Ellenborough said: 'Suppose the offense had branched out into twenty or thirty matters, of which some might be true, and used only as the vehicle of the falsity; are we to understand from this form of charge that it indicates the whole to be false, and that the defendant is to prepare to defend himself against the whole? That would be contrary to the plain sense of the proceeding, which requires that the falsification should be applied to the particular thing to be falsified, and not to the whole.' 'The charge should be specific, in order to give notice to the party of what he is to come prepared to defend, and to prevent his being distracted amidst the confusion of a multifarious and complicated transaction, parts of which only are meant to be impeached for falsehood.' In Gibson v. State, 44 Ala. 17, the court say: 'It is necessary that the indictment should expressly contradict the matter falsely sworn to by the defendant; and a general averment that the defendant falsely swore upon the whole matter of the oath is not sufficient. The indictment must pre-

ceed by particular averment to negative that which is false.' This subject received a full consideration in *Gabrielsky v. State*, 13 Tex. App. 428; and speaking of an indictment in that case which covered a number of facts sworn to, upon which the assignment of perjury was general, the court say: 'It is simply a general averment that the several alleged false statements, as set out in the indictment, are each and all false, without negating them in detail, and without stating the truth in regard to each. At common law all the authorities hold this to be insufficient, and we have been unable to find a single precedent, either at common law or in our own state, where the assignment of perjury has been dispensed with.' "

In accordance with these technical rules, it has been affirmed that an indictment is bad which avers that the testimony was false and that the defendant well knew it to be so, without proceeding by particular averments to negative that which is false, contradicting the alleged false matter in express and specific terms: *State v. Gallaughter*, 123 Iowa, 378, 98 N. W. 906; *State v. Brown*, 128 Iowa, 24, 102 N. W. 799; *Turner v. State*, 30 Tex. App. 691, 18 S. W. 792. In this last case the court of appeals of Texas in the course of its opinion says: "It will be observed that the indictment, as we have above copied it, in the case in hand, does not negative the matter assigned as perjury specifically and pointedly, but, after stating the matter upon which the perjury is assigned, simply recites: 'Which said statement so made by the said Will Turner, before and to the said W. H. Dudley, justice of the peace as aforesaid, was willfully and deliberately false, and the said Will Turner knew the same to be false when he made it,' etc. In the case of *Gabrielsky v. State*, 13 Tex. App. 428, where a similar allegation or assignment was passed upon by this court, and the only assignment of perjury was that the statements were willfully and deliberately made by the accused, that the same were false, and that the accused well knew them to be false when he made them, it was held that 'such a general averment that the alleged false statements as set out are false, without negating them, and without setting out the truth in regard to said statement, is not sufficient to charge the offense of perjury.' It was further held that 'an indictment for perjury, to be sufficient, must negative specifically the truth of the alleged false statement'; and where this has not been done, it was said, 'at common law, the authorities hold such an indictment to be insufficient; and we have not been able to find a single precedent, either at common law or in our own state, where the assignment has been dispensed with.' In that case the previous decisions are collated, and the case of *State v. Lindenburg*, 13 Tex. 27, which had been cited as holding a different doctrine, is shown not to be in conflict with the weight of authority."

The purpose of an indictment for perjury is to apprise the accused of the particular offense with which he is charged so that he may have due opportunity to make a defense. An indictment which fails to do this is bad, but an indictment which does this should be held sufficient: *People v. Collins*, 6 Cal. App. 492, 92 Pac. 513; *State v.*

Roche (Iowa), 114 N. W. 1034; Shackelford v. Commonwealth, 25 Ky. Law Rep. 1830, 79 S. W. 192; State v. Mace, 76 Me. 64; State v. Voorhis, 52 N. J. L. 351, 20 Atl. 26; People v. Tatum, 60 Misc. Rep. 311, 112 N. Y. Supp. 36; Jordan v. State, 47 Tex. Cr. App. 133, 83 S. W. 821; State v. Rowell, 72 Vt. 28, 82 Am. St. Rep. 918, 47 Atl. 111; Markham v. United States, 160 U. S. 319, 16 Sup. Ct. Rep. 288, 40 L. ed. 441. Clearly, a direct and distinct allegation of the falsity of the matter is of the very essence of the indictment, but when the falsity is alleged in ordinary and concise language, with such certainty and in such manner as to enable a person of common understanding to know what is intended, the indictment should be sustained. Some of the courts have shown a most commendable disposition to take this view of the law, and to repudiate the extreme technical requirements further than is necessary to advise the defendant accurately with reference to the essential requirements charged: Blevins v. State, 85 Ark. 195, 107 S. W. 393; People v. Rodley, 131 Cal. 240, 63 Pac. 351; King v. State, 103 Ga. 263, 30 S. E. 30; Commonwealth v. Schwieters, 29 Ky. Law Rep. 417, 93 S. W. 592; State v. Corson, 59 Me. 137; People v. Clements, 107 N. Y. 205, 13 N. E. 782; People v. Williams, 50 Hun, 601, 2 N. Y. Supp. 382; State v. Murphy, 101 N. C. 697, 8 S. E. 142; State v. Smith, 63 Vt. 201, 22 Atl. 604.

The Kentucky court, in holding an indictment for perjury was not demurrable for failure properly to negative the truth of the testimony by a special averment of the real facts, said: "By section 122 of the Civil Code of Practice an indictment must contain a statement of the acts constituting the offense, in ordinary and concise language and in such a manner as to enable a person of common understanding to know what is intended, and with such degree of certainty as to enable the court to pronounce judgment according to the right of the case. If the facts are stated in such a manner as to enable a person of common understanding to know what is intended, this is sufficient. The accused must be informed of the nature and cause of the accusation against him, and he has the right to look to the indictment to ascertain what the facts are to which he is to answer. The words used in an indictment must be construed according to their usual acceptation in common language, unless they are words and phrases defined by law: Civ. Code Prac., sec. 137. Only certainty to a common intent is required, and if the language used, construed according to its usual acceptation, is sufficient to inform the defendant of what is charged against him, the indictment is good": Commonwealth v. Schwieters, 27 Ky. Law Rep. 417, 93 S. W. 592.

And the New York court, in holding that an indictment in substance negated the facts the defendant had sworn to and was therefore sufficient, used this language: "The objection now made to the indictment is that the indictment does not, in direct terms, aver that the statements contained in the report, and in respect to which the perjury is assigned, were, as matter of fact, untrue, but only



that the defendant well knew them to be untrue, and well knew the facts to be otherwise than as stated in the report. The district attorney contends that the indictment does in direct terms negative the affidavit, which was that the report was a true statement, etc., 'according to the best of his knowledge and belief.' That it avers that his knowledge was directly the contrary of what he swore to. There is much force in this contention. But giving full effect to the proposition that it was necessary to negative the facts which the defendant swore to on information and belief, we think that the indictment did, in substance, contain such a negative. It averred, in the first place, that the defendant had at the time full and certain knowledge as to the real and true condition of the bank in respect to the matters in question, and that he well knew that the facts were other than as stated in the report, and well knew that the statements in the report were false. It logically follows that these averments amount to an allegation that the statements were false. His knowledge as to the matters stated being full and certain, he could not know the statements to be false unless they were so. Under the common-law system of pleading it was a rule that statements must be certain and positive, and not by way of reasoning or argument which would lead to the fact intended to be averred; and it was a good objection to a pleading that its allegations were argumentative. But this objection was not one of substance, but only of form, and could only be taken advantage of by special demurrer. It was not available on general demurrer, or on motion in arrest of judgment: *Spencer v. Southwick*, 9 Johns. 314; *Marie v. Garrison*, 83 N. Y. 14. A pleading is deemed to allege what can by fair and reasonable intendment be implied from the facts stated, and a general demurrer for insufficiency was not sustainable on the ground that the facts were argumentatively or otherwise imperfectly or informally stated. The objection to this indictment, if there be any, was that the falsity of the statements sworn to was only argumentatively alleged; but that it was fairly and even necessarily to be implied from the facts stated is very clear. The objection goes only to the form of the allegation. The Code of Criminal Procedure enumerates the grounds upon which a demurrer may be interposed (section 323), and does not permit a demurrer for imperfection in the form of the allegations, but, on the contrary, section 285 declares that 'no indictment is insufficient, nor can the trial, judgment or other proceedings thereon be affected, by reason of an imperfection in matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits.' Under the indictment in question the prosecution was required, for the purpose of convicting the defendant, to prove that he knew the specified statements in the report to be false, and this proof necessarily involved proof that they were false": *People v. Clements*, 107 N. Y. 205, 13 N. E. 783.

In *State v. Smith*, 63 Vt. 201, 22 Atl. 604, it is decided that an averment that a person did not sign a paper sufficiently negatives the statement of the defendant that he saw such person sign the paper,

the averment not being open to the objection that it is indirect and argumentative.

**b. Averments on Information and Belief.**—It has been said that an indictment for perjury in verifying an affidavit wherein are averments on "information, knowledge and belief," should not only negative the truth of the oath, but also the information and belief: *Lambert v. People*, 76 N. Y. 220, 32 Am. Rep. 293. Indictments were held good in this respect, although the court did not affirm the necessity for negating the belief sworn to, in *State v. Ellison*, 8 Blackf. (Ind.) 225; *State v. Cruikshank*, 6 Blackf. (Ind.) 62.

**c. Negating Exceptions in Statute.**—In *Brown v. State*, 9 Tex. App. 171, it was contended that an indictment was defective in failing to aver that the false statement was not made through inadvertence or under agitation or by mistake, the statute providing that a false statement made under such circumstances was not perjury; but the court held that as the statutory provision was in a separate article of the code, and did not appear as an exception in the article defining the offense, the rules of pleading did not require such exceptions to be negated in the indictment, for they did not constitute a part of the description of the offense, but were available as proof as matter of defense.

**d. Joinder of Assignments in One Count.**—Several assignments of perjury given under one oath in one proceeding may be embraced in one count of an indictment, and proof of the falsity of one is sufficient to sustain a conviction. One good assignment will support a verdict of guilty, although the others are bad: *De Bernie v. State*, 19 Ala. 23; *McLaren v. State* (Ga. App.), 62 S. E. 138; *Commonwealth v. Johns*, 72 Mass. 274; *Commonwealth v. McLaughlin*, 123 Mass. 449; *Hoffman v. Allegan Circuit Judge*, 150 Mich. 58, 113 N. W. 584; *State v. Gordon*, 196 Mo. 185, 95 S. W. 420; *State v. Bordeaux*, 93 N. C. 560; *Cover v. Commonwealth* (Pa.), 8 Atl. 196; *Fry v. State*, 36 Tex. Cr. 582, 37 S. W. 741, 38 S. W. 168; *Dorrs v. State* (Tex. Cr. App.), 40 S. W. 311; *State v. Smith*, 63 Vt. 201, 22 Atl. 604; *State v. Bishop*, 1 D. Chip. 120. It has been said, however, that if the accused swore to several facts, these should be stated in distinct and separate assignments, and each traversed; and then, if either assignment is proved, it will be sufficient: *Higgins v. State*, 50 Tex. Cr. App. 433, 97 S. W. 1054. And in *Brown v. State*, 40 Tex. Cr. App. 48, 48 S. W. 169, where the assignment was in solido, the court held that a failure to prove all the statements substantially as alleged would be fatal to the prosecution.

### IX. Intent, Willfulness and Knowledge.

**a. Willfulness of Swearing.**—An indictment for perjury must allege that the false swearing was willful: *Parrish v. State*, 18 Fla. 902; *Robinson v. State*, 18 Fla. 898; *State v. Morse*, 90 Mo. 91, 2 S. W. 137; *State v. Day*, 100 Mo. 242, 12 S. W. 365; *State v. Gibson*, 26 La. Ann. 71; *Thomas v. Commonwealth*, 2 Rob. (Va.) 795; *United States v. Lake*, 129 Fed. 499. Willful, in this connection,

means intentional: *King v. State*, 103 Ga. 263, 30 S. E. 30. But it means more than merely intentional; it implies a bad purpose or intent: *Williams v. People*, 26 Colo. 272, 57 Pac. 701. "A person acts willfully when he acts intentionally, as distinguished from accidentally or involuntarily. In the ordinary sense in which the word is used in statutes, it means, not merely voluntarily, but designedly and perversely. The use of the word implies that the act was done knowingly, and of stubborn purpose. It has been well said that a charge of willful behavior amounts to an allegation that the accused knew what he was doing, and, as a free agent, intended to do what he was doing": *State v. Stein*, 48 Minn. 466, 51 N. W. 474.

In *People v. Turner*, 122 Cal. 679, 55 Pac. 685, it is held that an indictment which does not state in the charging part that the swearing was willful is not cured by stating in the concluding portion of the indictment; "whereby he, the said J. F. Turner, did then and there, as aforesaid, willfully, corruptly, contrary to his oath, and knowing his testimony to be false, swear falsely, and feloniously, commit willful perjury"; the court holding this language to be but a mere conclusion of law. But in *United States v. Eddy*, 134 Fed. 114, the averment of willfulness was construed as a part of the charge and not as a conclusion of the pleader.

The omission of the word "willfully," however, is not fatal, if other words of similar import are used. Thus an indictment which charges that the defendant feloniously, falsely and corruptly testified, implies that the testimony was willfully given, and is sufficient. "Felonious" is at least equivalent to "willful": *Blevins v. State*, 85 Ark. 195, 107 S. W. 393; *Williams v. People*, 26 Colo. 272, 57 Pac. 701; *State v. Anderson*, 103 Ind. 170, 2 N. E. 332; *State v. Spencer*, 45 La. Ann. 1, 12 South. 135.

But neither "knowingly" nor "corruptly" is equivalent to "willfully," and their use in an indictment has been held insufficient to sustain it in case of the omission of "willfully": *Williams v. People*, 26 Colo. 272, 57 Pac. 701; *United States v. Edwards*, 43 Fed. 67. Said the court in the last case: "Corruptly means viciously, wickedly. 'Willfully' means with design, with some degree of deliberation. To say that testimony was corrupt is to say that it was wicked or vicious, whereas, to say that it was willful, is to aver that it was given with some degree of deliberation; that it was not due to surprise, inadvertence or mistake, but to design. The statute uses the word 'willfully,' and makes it of the essence of the offense; and the court is not persuaded that the averment that a false oath was corruptly taken is of the same import as the averment that it was willfully taken."

**b. Knowledge of Falsity.**—Some courts have thought that an indictment for perjury must allege that the accused not only swore falsely but that he knew that he swore falsely: *Adams v. Commonwealth*, 29 Ky. Law Rep. 683, 94 S. W. 664; *State v. Brown*, 110 La. 591, 34 South. 698; *State v. Williams*, 111 La. 1033, 36 South. 111; *Commonwealth v. Cook*, 1 Rob. (Va.) 729; *United States v.*

Babcock, 4 McLean, 113, Fed. Cas. No. 14,488. But when it is charged that he willfully and corruptly, or willfully and feloniously, swore falsely, this, according to the better rule, satisfies the law (unless perhaps when the testimony is given on information and belief), although the word "knowingly" is omitted, for one who swears willfully and corruptly or willfully and feloniously to a false statement can hardly help doing so knowingly: *Territory v. Anderson*, 2 Idaho, 573, 21 Pac. 417; *Johnson v. People*, 94 Ill. 505; *State v. Raymond*, 20 Iowa, 582; *State v. Gallagher*, 123 Iowa, 378, 98 N. W. 906; *State v. Stein*, 48 Minn. 466, 51 N. W. 474; *Ferguson v. State*, 36 Tex. Cr. 60, 35 S. W. 369; *Chavarria v. State* (Tex. Cr. App.), 63 S. W. 312; *State v. Sleeper*, 37 Vt. 122; *State v. Smith*, 63 Vt. 201, 22 Atl. 604; *United States v. Pettus*, 84 Fed. 791. An indictment charging the defendant with "knowing the said statement or statements to be false, or being ignorant whether or not said statement was true," was held sufficient in *State v. Champion*, 116 N. C. 987, 21 S. E. 700, as being in the exact words of the form prescribed by statute.

c. **Corrupt Intent.**—It is not necessary to charge in an indictment for perjury that false testimony was "corruptly" given, for one cannot willfully give false testimony with other than an evil intent, or, in other words, corruptly: *State v. Anderson*, 92 Iowa, 764, 60 N. W. 630; *State v. Bixler*, 62 Md. 354; *United States v. Hearing*, 26 Fed. 744. Some authorities, however, take the view that the indictment must use the words "willfully and corruptly": *Wilkinson v. People*, 226 Ill. 135, 80 N. E. 699; *State v. Carland*, 14 N. C. 114. In speaking of the indictment in *State v. Davis*, 84 N. C. 787, the court remarked: "It is defective in that it does not aver that the defendant willfully and corruptly took the false oath. There is nothing in the indictment to exclude the idea of the false oath having been taken by inadvertence or mistake. The epithets of willful and corrupt are indispensable in an indictment for perjury to express the wicked purpose with which the false oath was taken." A charge that one "deposed and gave in evidence to the jury willfully and corruptly" amounts to a charge that he swore willfully and corruptly: *State v. Bobbitt*, 70 N. C. 81.

d. **Felonious Intent.**—It is generally unnecessary to charge in an indictment for perjury that the false swearing was done feloniously: *People v. Parsons*, 6 Cal. 487; *State v. Harris*, 145 N. C. 456, 59 S. E. 115. In Kentucky, however, it has been decided that, since perjury is a felony, an indictment therefor must allege that the false testimony was given with felonious intent: *Commonwealth v. Swager*, 108 Ky. 579, 57 S. W. 10.

e. **Deliberation and Willfulness.**—In Texas it has been affirmed that indictments for perjury must allege that the false statement was "deliberately and willfully" made: *State v. Perry*, 42 Tex. 238; *Allen v. State*, 42 Tex. 12; *Smith v. State*, 1 Tex. App. 620.

# MOBILE, JACKSON AND KANSAS CITY RAILROAD COMPANY v. HICKS.

[91 Miss. 273, 46 South. 360.]

**RAILROADS—Negligence—Death of Employé.**—If a railroad section foreman, while walking along a piece of new and unballasted track, is killed by the derailment of a mixed freight and passenger train, being run at the rate of thirty or forty miles per hour, while the schedule for freight trains is fifteen miles per hour, the railroad company is liable for such death. (p. 681.)

**RAILROADS—Negligence—Excessive Verdict.**—If a railroad foreman at the time he is killed through its negligence is a young man, in good health, industrious, and of good habits, and leaves a widow with four children from two to eight years of age, a verdict against the company for seven thousand five hundred dollars is not excessive. (p. 682.)

**RAILROADS—Negligence—Wrongful Death.**—If a railroad sectionman while walking along a new unballasted railroad track is killed by the derailment of a mixed train, being run at an excessive rate of speed, the injury is not due to accident so as to relieve the railroad company of a charge of negligence. (p. 683.)

**NEGLIGENCE—What Constitutes.**—To render a person liable in negligence, it is not necessary that he should have contemplated, or even been able to anticipate, the particular consequences which ensued, or the precise injuries sustained by the plaintiff, and it is sufficient if, by the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or, that consequences of a generally injurious nature might have been expected. (p. 683.)

**CONSTITUTIONAL LAW—Railroads—Negligence.**—A statute enacted with reference to railroad companies and grounding the liability for their negligence on the inherently dangerous nature of their business in operating their cars by the highly dangerous agency of steam, is not in violation of the constitution of the United States. (p. 684.)

**RAILROADS—Negligence—Damages—Evidence.**—In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotive, or the cars of such company, is, by the code of Mississippi, prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury. (p. 685.)

**RAILROADS—Fellow-servants.**—If a section foreman is killed while walking along the track, by the fact that a mixed freight and passenger train is being operated at a negligent and excessive rate of speed, the decedent is within the class of employés entitled to the benefit of a statute abrogating the fellow-servant rule with regard to certain employés of a railroad company injured as the result of the negligence of a fellow-servant engaged in another department of the labor. (p. 685.)

**RAILROADS—Fellow-servants—Liability.**—A statute or constitutional amendment exempting railroad employés from the application of the fellow-servant rule protects the injured employé, not against what he himself is doing, but against what his coemployés of certain kinds are doing. (p. 685.)

**RAILROADS—Fellow-servants, Who are not.**—A railroad section foreman is not a fellow-servant with the crew running a mixed freight and passenger train. (p. 686.)

**MASTER AND SERVANT—Fellow-servants—Defense—Burden of Proof.**—To show that the injury to a servant was not due to the negligence of his fellow-servant, the burden of proof is on the master. (p. 688.)

**RAILROADS—Negligence—Right to Sue.**—If a statute provides that railroad companies shall be liable for the death of their servants caused by the negligence of fellow-servants in certain cases, and that the legal or personal representative of the injured person shall have the same rights and remedies as are allowed to the representatives of other persons, and that the statute shall not deprive an employé or his legal or personal representative of any right or remedy now possessed by him by law; and another statute provides that whenever a death is caused by a negligent act, which would, if such death had not ensued, have entitled the injured person to recover damages, and such deceased person leaves a widow or children, or both, the party liable if death had not ensued or the representative thereof shall be liable in damages notwithstanding such death, the action may be brought in the name of the widow for the death of her husband, or in the name of a child for the death of its parent, but there can be but one suit for the same death, which shall inure to the benefit of all the parties, and if the widow and children have brought suit for the wrongful death of the husband and father, the widow is not entitled to bring another action as her husband's administratrix to recover damages sustained by her husband. (p. 691.)

**RAILROADS—Death by Wrongful Act—Consolidation of Actions.**—If a widow and children sue as the legal representatives of the husband for his wrongful death caused by the negligence of a railroad company, and the widow also sues as his administratrix for damages sustained by the decedent, only one of the suits can be maintained, and as all of the damages sustained can be recovered in either, the consolidation of the two suits is not prejudicial to the defendant. (p. 699.)

May, Flowers & Whitfield, for the appellant.

Alexander & Alexander, G. B. Power, and C. Alexander, for the appellees.

**351** **WHITFIELD, C. J.** On October 28, 1905, Ray Hicks, a section foreman on appellant's railroad, was working with his crew at a point about two or three miles north of Decatur Junction, in Newton county. The crew had stopped for dinner, but were still on the track and near it, when a mixed passenger and freight train approached. Immediately behind the locomotive were several **352** freight-cars, and a passenger-coach was on the back end of the train. The train was going north. Hicks and his crew were walking in the same direction; Hicks being farther north than the rest of the crew, and on the east side of the track. He had stepped off a few feet as the train approached. About the fourth car from the locomotive, when it was at a point about two hundred and eighty feet from Hicks, left the track, and about four other cars were then derailed; two of them falling on

the west side of the track, and three on the east side, on which Mr. Hicks was. The last derailed car seems to have remained on the cross-ties until it reached a point nearly opposite where Hicks was standing, and it then turned over, falling on Hicks and inflicting injuries from which he died in about three days. There were a passenger-coach and a caboose in the train; the passenger-coach being at the rear end, and the caboose immediately in front of the coach. These two cars were filled with passengers on their way to a Baptist Association at Philadelphia, in Neshoba county. The coach and the caboose did not leave the track, and the passengers were unhurt.

It is shown by the testimony that the schedule fixed by this railroad, for its freight trains, was fifteen miles an hour; that it was a new road, and not ballasted, and hence necessarily rough; that this was the first train ever run over this road carrying passengers, and that the speed at which this first train was actually run was thirty to forty miles an hour; that the passengers were very much alarmed at the excessive rate of speed, and were in great concern about it, just before the derailment occurred. We think the testimony shows, with sufficient clearness that this injury was due to the incompetency of the engineer, which would make the master itself liable, and the excessive rate of speed of this first passenger train over this new, unballasted and rough road. There can be no reasonable controversy as to the injury being due to these two causes. The incompetency of the engineer is manifested by the very nature of the occurrence. "*Res ipsa loquitur*" fits it perfectly as <sup>353</sup> showing his gross incompetency. Hicks was a young man, about twenty-eight years of age, in good health, industrious and of good habits. He left a widow, twenty-seven years old, and four children, from two to eight years of age. The jury returned a verdict for the plaintiff for seven thousand five hundred dollars, and it is from this judgment that this appeal is prosecuted.

Two suits were filed—one by Mrs. Hicks as administratrix, and another by the widow and children. The administratrix bases her claim upon the allegation that the wreck was caused by the negligence of the engineer in charge of the locomotive running the train at an excessive rate of speed, and on the further fact that the said engineer carelessly, grossly and recklessly, while the train was running at this dangerous and rapid rate of speed, suddenly checked the speed of the locomotive. This declaration sets out Hicks' earning capacity at one hundred dollars per month, and that he was the sole

support of his widow and children, and that he lingered for several days before he died in great agony. The declaration claimed thirty thousand dollars damages, and it is manifestly bottomed on section 193 of the constitution of 1890. The second declaration, by Mrs. Hicks for herself and her children, proceeds upon the theory of the negligence of the defendant company in knowingly employing an inexperienced, unskillful and reckless engineer, as the result of which the train was run at the excessive rate of speed, in view of the condition of the track; and, second, upon the negligence of the engineer, in that he suddenly and wantonly attempted to check the train, and upon the negligence of the defendant company in having improper and defective appliances, trucks of an improper gauge, so that the wheels did not properly fit the tracks, and flanges on the wheels of the first box-car which jumped the track which were worn, defective and unsafe, and in not having good and sufficient brakes and brake-shoes on the car which first jumped the track, so that its speed could be controlled, and in not having said car properly equipped with air-brakes, etc. This declaration also claims thirty thousand dollars damages, <sup>354</sup> and is bottomed, manifestly, on section 3559 of the Code of 1892, which is a rescript of section 193 of the constitution of 1890, and on chapter 65, page 82, of the Laws of 1898, as explained later herein. We may say at once, and so dismiss this matter, that the cause on the testimony is bottomed chiefly, if not exclusively, upon the negligence of the master in having in its employ a thoroughly incompetent and reckless engineer, and upon the willful and reckless conduct of this engineer in running this first passenger-coach over this new, rough, unballasted road at this excessive rate of speed.

The learned counsel for the appellant set up six defenses, in briefs which we have never seen surpassed, either in ingenuity or profound ability, and which we direct the reporter to set out, together with the very able briefs of learned counsel for appellees, in full, in order that railroad attorneys having cases of like kind hereafter may first read these briefs and know whether they should trouble this court with the suits of that sort which they may have in hand. There ought not to be repeated suits brought to this court by appeal bottomed on the same grounds. Once we have determined a cause, the principles in that cause settled ought to be decisive of all other causes of like nature; and it is because of the exceeding ability and the extreme thoroughness of the briefs of the learned counsel for the appellant, which present, it seems



to us, every possible phase that could be given to a case like this, that we thus direct their full publication for the guidance of railroad counsel, and other counsel, in the future, where similar cases arise.

Taking up these defenses in the order in which they are presented, the first is that the injury was an accident, pure and simple. We cannot accept this view. There is nothing improbable, or which might not reasonably be foreseen as logically likely to happen, in the connection between negligence, such as here shown, and derailment. It is true that the railroad company could not possibly foresee what particular person might be hurt, or in what particular manner he might be hurt; but <sup>355</sup> that is not determinative. The question is, Ought not the company reasonably to have foreseen that sending its first mixed passenger and freight train over this new, rough, unballasted road at a rate of speed nearly three times its schedule rate would necessarily result in derailment, or at least would most probably so result? It is said in 21 American and English Encyclopedia of Law, at page 487, that, "In order, however, that a party may be liable in negligence, it is not necessary that he should have contemplated, or even been able to anticipate, the particular consequences which ensued, or the precise injuries sustained by the plaintiff. It is sufficient if, by the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected": See, also, Wharton's Law of Negligence, 2d ed., sec. 77, and *Payne v. Georgetown Lbr. Co.*, 117 La. 983, 42 South. 475. The section foreman and all his crew are constantly near the tracks, working on them, repairing them, and looking after them in every way. These section crews are always at work on the track, or so near it that they are liable to be injured by the constantly passing trains at all hours of the day, and it would be a dangerous doctrine, indeed, to establish that persons thus situated, when injured by a passing train, are injured as the result of accident, pure and simple.

The second contention of learned counsel for appellant is because no evidence was offered in support of any allegation upon which the claims are based, except the one to the effect that the engineer was running at a dangerous rate of speed, and section 3559 of the Code of 1892, under which the suit by the administratrix was brought, is violative of the fourteenth amendment of the federal constitution. Our first ob-

servation with respect to his contention is that it incorrectly states the facts in this: That this action by the administratrix is necessarily bottomed, not only on the negligence of the engineer in running at an excessively dangerous rate of speed. wantonly <sup>356</sup> and willfully, but, as a necessary corollary of this, upon the negligence of the master in having in its employ this utterly incompetent engineer. We do not deem it necessary to say more than we have heretofore held in *Ballard v. Cotton Oil Co.*, 81 Miss. 507, 95 Am. St. Rep. 476, 34 South. 533, 62 L. R. A. 407, and in other cases since, to show that the fourteenth amendment to the federal constitution is not in any way violated by section 3559 of the Annotated Code of 1892, which was enacted with reference to railroad corporations, grounding liability in this class of causes on the inherently dangerous nature of their business in operating cars by the highly dangerous agency of steam. On the contrary, we follow the United States supreme court in repeated decisions, pointed out in the case of *Ballard v. Cotton Oil Co.*, 81 Miss. 507, 95 Am. St. Rep. 476, 34 South. 533, 62 L. R. A. 407, in maintaining the constitutionality of this statute relating to railroad corporations. We refer to that case, and the cases since, and with that dismiss this contention. It is certainly unnecessary to repeat what we have once so thoroughly and at such great length pointed out.

The third contention of learned counsel for the appellant is that "it plainly appears that the deceased did not belong to that class of employes for whose benefit section 3559 of the Annotated Code of 1892 and section 193 of the state constitution of 1890 were made." Ingenuity and ability have both been exhausted in the effort to maintain this contention; but a close and careful analysis shows clearly that it is artificial and unsound. Perhaps the best answer of all to this contention that Hicks did not belong to a class of employes, the nature of whose employment exposed them to the inherent perils attending the operation of railroad trains, is the fact that he was killed by one of the cars composing the train. "*Res ipsa loquitur*" again suffices. It is useless to say that Hicks was exposed to no such peril, in the light of the fact that it was just such a peril which resulted in inflicting upon him death. He was killed by the running of the train. Really, the argument is not accurately stated in saying that he was not exposed at all <sup>357</sup> to such peril; but it is, exactly, that the peril was so remote, the danger so unusual, that the consequences to be apprehended from the peril could not readily be foreseen. This is the true gist of the argument presented

by the learned counsel for the appellant, reduced to its genuine analysis. And, thus viewed, it is manifest that there is really no question of the construction of section 193 of the constitution involved, but a mere question arising under the ordinary general law of negligence, and we have already fully covered this in what we have above said. We may add to this the further statement that the verdict may be properly referred to the general presumption of negligence created by section 1985 of the Code of 1906, which is as follows: "Injury to Persons or Property by Railroads Prima Facie Evidence of Want of Skill, etc.—In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotives, or cars of such company, shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury. This section shall also apply to passengers and employés of railroad companies." The last clause of this section is an amendment of the previously existing law. In other words, Hicks was plainly one of the class of employés, under section 193, exposed, from the nature of his employment, to the perils attending the inherent danger of operating railroad cars. Whilst, at the same time, the verdict here is maintainable under the presumption created by this statute, it is very true, as counsel for appellant say, that it is not instances which are to be classified, but employments. Section 193 of the constitution, nevertheless, protects the injured employé, not against what he himself is doing, but against what his coemployés of certain kinds are doing. The inquiry is not whether he is at the time operating a train, and thus exposing other employés to a peril, but whether, in the discharge of his duty, he is where the negligence of certain coemployés operating the train may injure him. This is the construction we have <sup>358</sup> given to section 193 in the recent case of Bradford Construction Co. v. Heflin, 88 Miss. 314, 42 South. 174, 12 L. R. A., N. S., 1040, and this construction is in harmony with the supreme courts in the state of Iowa, Kansas, Minnesota and Missouri construing their employer's liability statutes. In the case of Haden v. Sioux City & P. Ry. Co., 92 Iowa, 226, 60 N. W. 537, the court said: "It is true that plaintiff was not engaged in the operation of trains in the sense of being an employé on a train; but his work was along and on a track on which trains were operated, and had especial reference to train movements in the way of keeping the track in repair and in condition therefor. His work was of the haz-

ardous kind contemplated by the statute": See, particularly, the note to *Jemming v. Great Northern Ry. Co.*, 96 Minn. 302, 104 N. W. 1079, 1 L. R. A., N. S., 696. It was held in *Croll v. Atchison etc. Ry. Co.*, 57 Kan. 548, 46 Pac. 972, that an employé was, within their statute, one who, while working on a ditch along the track, was struck by a piece of coal from the tender of a passing engine. In another case, to which we make special reference (*Keatley v. Illinois C. R. R. Co.*, 94 Iowa, 685, 63 N. W. 560), it was held that an employé, standing on a derrick platform used in building a side wall, and killed by the wrecking of a train crossing an uncompleted bridge, was within the protection of the statute in that state. The decedent was a mere water-boy, having nothing to do in the operation of the road or in the building or repairing of the track. Yet he was exposed to the peril from derailment: See *Keatley v. Illinois C. R. R.*, 103 Iowa, 282, 72 N. W. 545, and the other cases cited in the brief of learned counsel for the appellee. It may be remarked here that there is no contention, since there could be none, that Hicks was not in a different department of labor from that in which the crew of the passing train was.

The fifth contention of the learned counsel for the appellant is that the court gave an instruction for the plaintiffs and denied an instruction for the defendant upon the theory that the plaintiffs were entitled to the benefit of the presumption created by <sup>359</sup> section 1808 of the Annotated Code of 1892, which is section 1985 of the Code of 1906. We have had this section set out before in this opinion, and refer to it again here. It is perfectly obvious that the amendment to this section was intended, both by the commissioners, in the form in which they expressed it in the dummy code, and by the legislature, in the somewhat different form in which they expressed it in the last clause of the section, to utterly abrogate the construction by this court of said section, as it appeared in section 1808 of the Annotated Code of 1892, in *Chicago etc. Ry. Co. v. Trotter*, 60 Miss. 442; *Short v. New Orleans etc. Ry. Co.*, 69 Miss. 848, 13 South. 826, and *Yazoo etc. R. Co. v. Humphrey*, 83 Miss. 721, 36 South. 154. That erroneous construction of the statute, as it originally existed in the form of section 1808 of the Code of 1892, has been, by this legislative amendment, utterly abrogated. The legislature was manifestly dissatisfied with the limitation ingrafted upon the plain language of section 1808 of this court in the cases named, and determined to frame a new amendment, which could not be pared away. The code commis-

sioners in the dummy code had amended the section, (section 1808 of the Annotated Code of 1892), so as to make this presumption attach in favor of all standing in "contract relations" to the railroad. The legislature made an immaterial change, and extended said presumption to passengers and employés. It is perfectly idle, in the face of this plain declaration of the legislature, to argue any further that employés and passengers are not to be given the benefit of this presumption. It is clear, however, in any possible view, that this particular employé, Hicks, was engaged in a different department of service from the employés on the train who caused his injury; not a fellow-servant at all, and hence we think, under section 193 of the constitution, he is clearly within the reason and spirit of this presumption, and entitled to its benefit, whatever may be the true construction, generally, of this section. So that in no event could the benefit of this presumption of the facts of this case be denied to this employé, Hicks, such as he was, and situated as he ~~was~~ was, and injured under the circumstances under which he was injured.

The strongest argument made by the learned counsel for the appellant against allowing this section to extend the benefit of this presumption to all employés is that it might, in certain peculiar cases, result in extending the presumption to cases where the negligence presumed might be that of a fellow-servant. This is not a sound construction of this statute. It would impute to the legislature absolute folly to give it this construction, and this we must never do, if it can possibly be avoided. If the purpose of this amendment was to raise, in favor of an injured employé, the presumption that the negligence was the negligence of a fellow-servant, this would result instantly in no liability; and if this purpose is attributed to the legislature, it would be convicted of the absurdity of creating a presumption of nonliability in the effort to create a presumption of liability. As well said by counsel for appellee: "If, in order to avail of the presumption, it be necessary for the employé to show that the injury resulted from the negligent act of some employé in a different department of labor, or of some superior officer, etc., then the presumption would be entirely destroyed. It would be yielding to proof. There is never any need for a presumption after proof of liability is completed. Surely, this court will not say that the legislature meant that where an employé will take the burden of proof, and show that he was in fact injured by one of the excepted classes of fellow-

servants, he is entitled to the presumption; for the presumption would then be given after it was not needed, and could not have any application, for, as has often been held by this court, when the facts are known, presumptions are to be ignored. Of course, it is open to the railroad company always, when the presumption exists, to show that the negligence of a fellow-servant was not embraced in section 193. In this case, in which we invoke the presumption, it was competent for the defendant to have shown that the negligence, in fact, was the negligence of a <sup>361</sup> fellow-servant, if that could have been shown; but no such effort was made—no such defense was set up or pleaded.”

So far as concerns the point pressed, that there may be cases in which an employé would be given the benefit of the presumption of negligence where on the disclosed evidence it would appear that the negligent employé was a fellow-servant, it is insufficient to say that it is manifestly the duty of the railroad company to make that showing itself, since it is defensive, and since, when made, it will end, not only presumptions, but the whole case of the plaintiff. And it is further to be said on this precise point that if there should ever occur the extreme case suggested by appellant's counsel, in which the plaintiff, an employé, should stand upon the presumption of liability given by the statute, when he had within his command the proof showing that the negligence in the given case was the negligence of a fellow-servant, and hence that there was no liability, then it is to be said, with respect to such extraordinary case—rarely ever possible to happen—that it is better, on the ground of public policy, that the presumption should be given the employé, even in that case, standing upon the presumption alone, without any testimony whatever, than that the railroad company should be released from possible liability on the presumption alone, when in nearly every possible case the company has itself the completest and fullest knowledge of how the injury happened, and should produce it in exculpation of itself; and, second, that the danger suggested of a fraudulent employé's recovering, on a presumption alone, when he himself has in his power the production of the testimony showing how the injury happened, and that it happened in a way exculpating the defendant, is far more fanciful than real, because of the obvious fact that it would always be in the easy power of the defendant company to put the plaintiff himself on the stand and compel him under oath, through the testimony within his power, to show the real truth as

to how the injury happened. It will never do, in the practical administration of justice, to minimize or pare away <sup>302</sup> the power and value of this presumption, bottomed on a great public policy, wise and wholesome, by fanciful conjectures as to what might in some particular case possibly take place. It is to what will generally and usually and ordinarily happen, in the application of this presumption, that we should look, and not to the dimly possible occurrence of a fraudulent suit, such as suggested. Indeed, we dismiss this contention of appellant with the emphatic declaration that none of the difficulties in which the court has been involved, by the ill-considered announcements in *Chicago etc. Ry. Co. v. Trotter*, 60 Miss. 442, *Short v. New Orleans etc. Ry. Co.*, 69 Miss. 848, 13 South. 826, and *Yazoo etc. R. Co. v. Humphrey*, 83 Miss. 721, 36 South. 154, would ever have occurred if the court, disregarding the awkwardness of the language of the legislature in section 1808 of the Annotated Code of 1892, and looking, as it ought to have looked, to the spirit and purpose and scope of the section, had held, as we now hold, that the statute was intended to establish a rule of prima facie evidence of liability on the part of the company itself in favor of those named in the statute. It should have been interpreted precisely as if it had been written thus: "Proof of injury inflicted by the running of locomotives or cars of such company shall be prima facie evidence of liability on the part of the company." That was plainly the thought and the purpose dominating the statutes, and that purpose should have been given effect, and the awkwardness of the legislative language disregarded. To all which it may be added that, since the proof clearly shows the negligence of both the master and the engineer caused the injury, appellees were under no necessity of invoking this presumption at all.

The sixth contention of the learned counsel for the appellant is that the court should have given a peremptory instruction for the appellant. This, of course, is untenable.

The last and most serious contention of the learned counsel for the appellant, No. 4 in the order as assigned, is that the two causes were improperly consolidated. This contention rests <sup>363</sup> mainly upon the proposition that under section 193 of the constitution, and under section 3559 of the Annotated Code of 1892, which is a mere rescript of said section 193 of the constitution, no action could be brought on behalf of an employé who had been killed, except by his personal

representative—that is to say, his executor or administrator, as held in the case of *Illinois Cent. R. Co. v. Hunter*, 70 Miss. 471, 12 South. 482—and the argument of the learned counsel proceeds mainly upon the theory that the *Hunter* case is still the law. This is an entire misconception. The *Hunter* case was practically overruled in *Bussey v. Gulf etc. R. Co.*, 79 Miss. 597, 31 South. 212, and expressly overruled recently in the case of *Yazoo etc. R. R. Co. v. Washington*, 45 South. 614. In other words, it was perfectly competent, under section 193 of the constitution, and, of course, under section 3559 of Annotated Code of 1892, for the widow and children—that is to say, the legal representatives—of *Hicks* to have brought the suit which they did bring here to recover what he was worth to them as a breadwinner. It would also have been competent for *Mrs. Hicks* to have brought a suit as administratrix, under the same sections, to recover the damages sustained by *Hicks* himself, but for the provision for but one suit in chapter 65, page 82, Acts of 1898, as shown hereinafter. Learned counsel for the appellant admit in their second brief that if the two suits were unnecessary, and the administratrix could have sued for all damages claimed in both suits, or if the widow and children could have sued for all such damages, then they are willing to concede that they were not prejudiced by the consolidation. This concession ends the controversy on this point, for there are two views, on either of which it is clear that not only were two suits unnecessary, but that only one could be instituted.

Now, as to the first of these views: When this suit was instituted, chapter 65, page 82, of the Laws of 1898, now section 721 of Code of 1906, was in full force. That chapter was as follows:

“Section 1. Be it enacted by the Legislature of the state of Mississippi, that the act of the Legislature of said state, approved <sup>364</sup> March 23, 1896, being entitled ‘An act to amend § 633 of the Annotated Code of 1892, as to actions causing death, and exempting damages, recovered for personal injuries,’ be amended so as to read as follows:

“Chapter 86.—An act to amend § 663 of the Annotated Code of 1892, as to actions for causing death, and exempting damages recovered for personal injuries.

“Section 1. Be it enacted by the Legislature of the state of Mississippi, that § 663 of the Annotated Code of 1892 be so amended as to read as follows: Whenever the death of any person shall be caused by any real, wrongful or negligent act,



or omission, or by such unsafe machinery, way or appliances, as would, if death had not ensued, have entitled the party injured or damaged thereby to maintain an action and recover damages in respect thereof, and such deceased person shall have left a widow and children, or both, or husband, or mother, or sister, or brother, the person or corporation, or both, that would have been liable if death had not ensued, and the representative of such person shall be liable for damages, notwithstanding the death, and the fact that death is instantaneous shall, in no case, affect the right of recovery. The action for such damages may be brought in the name of the widow for the death of the husband, or by the husband for the death of the wife, or by a parent for the death of a child, or in the name of a child for the death of a parent, or by a brother for the death of a sister, or by a sister for the death of a brother, or by a sister for the death of a sister, or by a brother for the death of a brother, or all parties interested may join in the suit, and there shall be but one suit for the same death, which suit shall enure for the benefit of all parties concerned, but the determination of such suit shall not bar another action unless it be decided on its merits. In such action the party or parties suing shall recover such damages as the jury may, taking into consideration all damages of every kind to the decedent and all damages of every kind to any and <sup>and</sup> all parties interested in the suit. Executors or administrators shall not sue for damages for injury causing death except as below provided; but every such action shall be commenced within one year after the death of such deceased person.

"Sec. 2. This act shall apply to all personal injuries of servants or employes received in the service or business of the master or employer, where such injuries result in death.

"Sec. 3. Damages recovered under the provisions of this act shall not be subject to the payment of the debts or liabilities of the deceased, and such damages shall be distributed as follows: Damages for the injury and death of a married man shall be equally distributed to his wife and children, and if he has no children all shall go to his wife; damages for the injury and death of a married woman shall be equally distributed to the husband and children, and if she has no children all shall go to the husband; if the deceased has no husband nor wife, the damages shall be distributed equally to the children; if the deceased has no husband, nor wife, nor children, the damages shall be distributed equally to the father, mother, brothers and sisters, or to such of them as the

deceased may have living at his or her death. If the deceased have neither husband or wife, or children, or father, or mother, or sister, or brother, then the damages shall go to the legal representatives, subject to debts and general distribution, and the executor may sue for and recover such damages on the same terms as are prescribed for recovery by the next of kin in sec. 1 of this act, and the fact that deceased was instantly killed, shall not affect the right of the legal representatives to recover.

"Sec. 4. All suits pending in any court at the time of the approval of this act and which were also pending at the time said chapter went into effect, shall not be affected by any of its provisions; but all such suits shall be conducted and concluded under the laws in force prior to the time of the approval of said act, on March 23, 1896.

"Approved January 27, 1898."

<sup>see</sup> This chapter has been recently construed by us in the case of *Pickens v. Illinois C. R. R. Co.*, 45 South. 868, in a case in which the suit was brought to recover damages for the death of one not an employé; that is to say, under our statutory provisions embodying the doctrine of Lord Campbell's act, which had their final expression at that time, and when this present suit was brought, in said chapter 65, page 82, of the Laws of 1898. In that case we said: "It is apparent from the act cited that there can be but one cause of action for any injury producing the death of any party. This statute was enacted for the purpose of uniting in one suit all causes of action which might have heretofore existed for any injury whereby the death of the party was produced. Whatever may have been the common-law rule upon this subject, this is now the rule in this state under the act and section above quoted. The law expressly provides that, 'whenever the death of any person shall be caused by any real, wrongful or negligent act,' etc., 'as would, if death had not ensued, have entitled the party injured or damaged thereby to maintain an action and recover damages in respect thereof,' etc., and then proceeds to say that 'in such action'—that is to say, in an action for damage for the death of a person caused by a wrongful or negligent act, etc.—'the party or parties shall recover such damage as the jury may, taking into consideration all damage of every kind to the decedent and all damage of every kind to any and all parties interested in the suit.' This chapter provides expressly that there shall be one suit, and that in that suit there shall be but one recovery, and that recovery shall be for all damages of every kind to the dece-

dent and all damage of every kind to any and all parties interested in the suit."

That act further provided, we may now add, that there might also be an action brought by the personal representative—that is to say, the executor or administrator—of the deceased, not an employé, and authorizes the recovery of the personal representative to be for all the damages both to the decedent and to <sup>367</sup> the widow and children; that is to say, authorizes the personal representative to recover for the legal representatives. But it added two restrictions in respect to this suit by the personal representative: First, that suit could never be brought conjointly with the suit by the widow or other legal representatives, but could only be brought when there were no next of kin at all; and, secondly, the act provided that in that case the amount recovered by the personal representative should be subject to debts. In other words, the cause of action given to the personal representative, so far as recovery is concerned, is coextensive in all respects with that given to the legal representative; and that act further provided that the damage for injury and death, recovered, should be exempt to the wife and other legal representatives, and should be distributed as specified in the statute, and, finally—and this is a most important provision—the second section of the act provided expressly as follows: "This act shall apply to all personal injuries of servants or employés received in the service or business of the master or employer, where such injuries result in death." Now, the first view which we have above referred to is this: That this chapter 65, with all of its rights and remedies—the last expression, at the time of the institution of this suit, of the doctrine of Lord Campbell's act, intended for those not employés—is by section 193 of the constitution itself made directly applicable to and available by the employés empowered by said section 193 to recover in the states of case therein named. This view was first presented to this court by Messrs. Green & Green, attorneys of record for appellee, in a brief of surpassing ability which ought to be in the hands of every lawyer in the state. In the case of I. C. R. R. Co. v. Fannie Williams et al., recently pending here, but compromised, we gave the view presented by that brief the most careful consideration at that time, and would then have announced our concurrence in it had the case not been settled. We now quote from that brief the following clear statement of <sup>368</sup> this view, which we now adopt as the true construction of section 193:

“ ‘Every employé of a railroad corporation shall have the same rights and remedies for an injury suffered by him by the act or omission of said corporation or its employés as are allowed by law to other persons not employés’ in the specified cases. ‘Where death ensues for an injury to an employé, the legal or personal representatives of the person injured shall have the same right and remedies as are allowed by law to such representatives of other persons, . . . and this section shall not be construed to deprive an employé of a corporation, or his legal or personal representative, of any right or remedy that he now has by the law of the land. The legislature may extend the remedies herein provided for to any other class of employés.’ By the first paragraph injured fellow-servants, who live, in the specified cases, are to have the same rights and remedies as are allowed by law to persons not employés. This places fellow-servants, in the specified cases, in the same legal position as if they were not fellow-servants, but were other persons not employés. Their rights and remedies are to be the same ‘as are allowed by law.’ Not those now allowed by law only; but their rights and remedies are to follow and be governed by the rights and remedies by law applicable to such other persons. If the rights and remedies of other persons are extended or restricted by law, then those of fellow-servants in the specified cases, and in the same degree, are to be extended or restricted. The rights and remedies of both are to be such ‘as are allowed by law.’ There is no limitation in this language upon the power of the legislature to extend the rights and remedies of persons not employés. The legislative power is unrestrained in this regard. But if there is allowed by the legislature, by law, any other rights and remedies, then those of fellow-servants follow; for they are to ‘have the same rights and remedies as are allowed by law to persons not employés.’ The power of the legislature to extend the rights and remedies <sup>369</sup> of employés, even irrespective of other persons, was held to exist in *Bussey v. Gulf etc. R. Co.*, 79 Miss. 597, 31 South. 212. The classification of the rights and remedies of fellow-servants in the specified cases, and of other persons, for torts, is thus made the same; and after thus made the same by the constitution, it would be beyond the power of the legislature to create a new right or remedy for other persons, in this regard, that would not extend to fellow-servants in the specified cases. The legislature would have power, toties quoties, to change, by enlargement or restriction, the rights and remedies of persons not employés for injuries; and if it does change

them, then, as a constitutional sequence, those of fellow-servants in the specified cases are changed accordingly. Therefore, when the rights of other persons were changed by the enlargement of the rights under section 1510 (Lord Campbell's act), Code of 1880, by chapter 65, page 82, Laws of 1898, by the mandate of the constitution those of fellow-servants in the specified cases were enlarged accordingly. This would be true, whether the fellow-servants were referred to in the act or not; for the creation of a right or remedy for other persons not employés, by this self-executing provision of the constitution, ipso facto, extends to fellow-servants in the specified cases.

"But the legislature, mindful of this mandate, and to exclude a conclusion, enacted section 2, chapter 65, page 83, extending the act to employés of corporations. In this aspect it is immaterial that the legislature undertook to amend section 193 by chapter 66, page 84, Laws of 1898, and whether chapter 66, page 84, Laws of 1898, is constitutional as class legislation or not. Chapter 65, page 82, Laws of 1898, *proprio vigore*, became a part of the rights and remedies 'allowed by law' to other persons, and hence to fellow-servants in the specified cases; and chapter 66, page 84, so far as the rights and remedies allowed by chapter 65, page 82, and section 193, were concerned, was superfluous and unnecessary. The result of the constitution giving the same rights and remedies to fellow-servants in the specified cases as to persons not employés is that the common-law <sup>370</sup> remedies for injuries to persons not employés, as well as any legislative rights or remedies created in behalf of said other persons, would in the specified cases be extended to and be allowed to fellow-servants. 'As are allowed by law' means by common or statutory law. It is to be noted that it does not confine its beneficent effects (made necessary as constitutional legislation because of the many failures of the legislature to act: *Bussey v. Gulf etc. R. Co.*, 79 Miss. 597, 31 South. 212) to such rights and remedies as are now allowed by law to this class of persons not employés. To show that it was not intended to take away the rights and remedies of any employé then existing, but to extend the same, a subsequent provision of the section declares: 'And this section shall not be construed to deprive any employé of a corporation, or his legal or personal representative, of any right or remedy that he now has by the law of the land.' It was necessary to enact section 193, for the then settled construction of section 1510, Revised Code of 1880 (Lord Campbell's act), was that it did

not affect the fellow-servant rule: 8 Am. & Eng. Ency. of Law, 2d ed., 867.

"The next paragraph of section 193, after defining the specified cases in which the fellow-servant does not assume the risk of the negligence of fellow-servants, nor of defective machinery or appliances, provides: 'Where death ensues from an injury to an employé, the legal or personal representatives of the person injured shall have the same right and remedies as are allowed by law to such representatives of other persons.' Thus the legislation applicable to persons not employés, where death results from an injury, becomes extended to the legal or personal representatives of an employé. The first clause of section 193, *supra*, deals with the rights and remedies of employés where death ensues from the injury. At common law there was no cause of action for a death, and no survival of a cause of action for a tort resulting in death: *Illinois C. R. Co. v. Pendergrass*, 69 Miss. 425, 12 South. 954. The legislature, following Lord Campbell's act, had enacted sections 1510, 2078 and 2079, <sup>371</sup> Revised Code of 1880 (sections 663, 1916 and 1917, Annotated Codes of 1892), for 'other reasons,' and had unlimited power to make extensions or restrictions of legislation on this subject. The constitutional intent was that whatever legislation, whether it affected the rights or the remedies, might be enacted for other persons than employés, should be applicable to employés where death ensued. The constitutional convention, as said in the *Bussey* case, took this legislation in hand with a view to secure the legal or personal representative of employés of corporations the same rights and remedies for injuries resulting in death 'as are allowed by law to such representatives of other persons.' They were all to be classed alike, and the legislature was not allowed 'to make fish of one and fowl of another.' As stated *supra*, commenting on this identical language in the first clause, the legislature was not limited or restricted in its power to legislate on this subject as to other persons; but the mandate was that whatever right or remedy is allowed by law to the legal or personal representatives of persons not employés, where death ensues, shall extend to employés. This is a constitutional rider upon all legislation, present and future, on this subject-matter."

Section 193, we may now point out, did not define what the rights or what the remedies were which it provided for the particular employé if he lived, or for his personal or legal representatives if he was killed. The only attempt at defini-

tion of either these rights or these remedies is to be found in this phrase: "Every employé of a railroad corporation shall have the same rights and remedies . . . as are allowed by law to other persons not employés"—and further down in the said section in these words: "Legal or personal representatives of the person injured shall have the same rights and remedies as are allowed by law to such representatives of other persons." "The same rights and remedies," says the section, "as are allowed by law to persons not employés," and to the legal and personal representatives of persons not employés. "The same <sup>372</sup> rights and remedies." What rights and remedies? The same as are allowed by law to persons not employés, etc. In other words, when you come to ascertain what the rights and what the remedies precisely are, you are to look for the legislation which allows persons not employés to sue; and, having found that, section 193, proprio vigore, in self-executing fashion, ipso facto makes all such rights and remedies, then or thereafter, allowed by law, available to and usable by the particular employés empowered to sue by section 193 in the states of case therein named. Nor is there any well-founded objection against this view to be worked out of the last clause of section 193 of the constitution, which provides that "the legislature may extend the remedies herein provided for to any other class of employés," because, obviously, it is thereby meant that, when the legislature makes such extension to other classes of employés, the extension shall carry to such other class or classes of employés the rights and remedies secured by section 193 in the same manner and to the same extent precisely that section 193 itself gave the particular employés of railroad corporations named in it.

Nor is there any merit in the objection made by the learned counsel for the appellant that this view is in conflict with the case of *Bussey v. Gulf etc. R. R. Co.*, 79 Miss. 597, 31 South. 212. On the contrary, as said in the brief of Messrs. Green & Green, attorneys, from which we have so liberally quoted: "In all of its essential elements this interpretation is supported in the *Bussey* case and in the *Ballard* case (81 Miss. 507, 95 Am. St. Rep. 476, 34 South. 533, 62 L. R. A. 407). In *Yazoo etc. R. R. Co. v. Schraag*, 84 Miss. 125, 36 South. 193, there is favorable support found for this interpretation of chapter 65, page 82, Laws of 1898." This statement of the eminent counsel is strictly correct. The *Bussey* case was dealing with a wholly different phase of section 193 from that here involved. The specific object of that decision was to

discriminate carefully between the provisions of our law embodying the doctrine of Lord Campbell's act and the provisions of section 193, and the subsequent statutes seeking to carry out its purpose, which related <sup>373</sup> alone to the rights and remedies of the special employés of railroad corporations named in it. We held in that case that all the provisions of law, embodying Lord Campbell's act related to those not employés, and that section 193 and its consequent statutes related to certain particular employés named in said section. We carefully pointed out that these two schemes, one wholly statutory and the other constitutional and statutory, were wholly distinct from and independent of each other, so far as their origin, their history, and their purpose were concerned; but it does not at all logically follow from this pointing out of the difference between the two schemes that section 193 of the constitution could not, and did not, ipso facto, provide, without any legislation whatever, that all legislation affecting the rights and remedies of those not employés, whether enlarging or restricting those rights and remedies, should immediately upon the passage of such legislation, at the time of the adoption of the constitution or thereafter, by virtue alone of this very section of the constitution, inure to and become available by the class or classes of employés named in said section 193, or thereafter added, in pursuance of its last clause, by the legislature. The difference in the origin of the two schemes, the difference in their history, and the difference in the nature of the actions provided by them, respectively, in no sort of way prevented the constitution from providing that all the remedies and rights given to persons not employés should become instantly available by and inure to that class of employés embraced either in said section 193 itself or in any subsequent legislation extending the rights and remedies to other employés, as provided in the last clause of said section. It follows, inexorably, from the phrase "same rights and same remedies," that there never can be a time, while section 193 of the constitution is in force, when the rights and remedies given to those not employés shall be in any wise different from the rights and remedies conferred by section 193 of the constitution on the employés named therein. It must be clear from this analysis of <sup>374</sup> section 193 of the constitution that there is nothing in the point as to the impropriety of the consolidation of the two suits. It is simply to be said that the suit by the administratrix was entirely superfluous and improper, and the learned counsel for appellant very



properly admit that in this view they cannot claim that the consolidation prejudicially affected appellant in any wise.

We pass now to the second view, on which it is seen that only one suit could be instituted—that by the widow or the widow and children—and that that suit was to be instituted under and governed in all respects by this same chapter 65, page 82, Laws of 1898, and that view is this: That section 2 of said chapter 65 expressly declared that that act should apply to all personal injuries that servants or employés received in the service or business of the master or employer, where such injuries resulted in death. In other words, this section 2, chapter 65, page 83, which was in force when this suit was brought, entirely independently of section 193, attempted to confer expressly all the benefit of chapter 65 as to rights and as to remedies upon the employés of the master where the injuries, as here, resulted in death. We expressly pointed out in the Bussey case (79 Miss. 597, 31 South. 212), that the language of section 2 could not be read as blank paper, and held that it expressly applied the principle of Lord Campbell's act to employés where the injuries resulted in death. If, therefore, it could properly be said, as manifestly it cannot, that the construction we have given section 193 on this subject in the first view presented above was erroneous, then undoubtedly this section 2 expressly clothed this employé of this master with all the remedies and all the rights provided by chapter 65, page 82 of the Laws of 1898. If it be said that this was taking the last expression of the principles of Lord Campbell's act formulated in said chapter 65, page 82, relating to persons not employés, and clothing persons who were employés with the same rights and the same remedies, the answer is, "*Ita lex scripta est.*" Even thus section 2, chapter 65, page 83, is written and that is for us the end of the law on the subject. It is <sup>375</sup> doubtless true that the legislative dealing with these two different schemes—Lord Campbell's act for those not employés, and section 193 of the constitution and the statutes in pursuance thereof for certain employés named in section 193—has been characterized by the most absurd and irrational confusion of the two statutes one with the other. For example, section 663 of the Revised Code of 1892 was the expression in that code of Lord Campbell's act relating to persons not employés, and yet chapter 66, page 84, of the Laws of 1898, which related exclusively to the employés named in section 193 of the constitution, is a copy—an actual copy—of said section 663 of the Annotated Code of 1892, relating alone

to persons who were not employés. Again, this very chapter 66 of the Laws of 1898 contains the exact words, as we have said, of section 1510 of the Revised Code of 1880, (section 663 of the Annotated Code of 1892) as to the person in whose name the suit is to be brought, as to the measure of damages, and as to the distribution of the damages, and these words are interpolated in said chapter 66 between the words of section 3559, Annotated Code of 1892, as copied from section 193 of the constitution. Manifestly, the legislature had no proper conception of the subject matter of these two different schemes of legislation with which they were dealing, and it is no particular ground of criticism of the legislature, when the intricacy and difficulties of the subject are considered. But it must certainly be ground for great satisfaction that under the first view which we have above set out, the interpretation which makes section 193 self-executing, it will never be, whilst that section remains in force, within the power of the legislature, by any legislation as to employés, to affect in one way or the other their rights or their remedies, but that those rights and those remedies shall remain whilst that section of the constitution lasts the same exactly, whether restricted or enlarged, as the rights and remedies allowed by law to those not employés.

There is just one other criticism about the *Bussey case* (79 Miss. 597, 31 South. 212), made by Messrs. Green & Green in their masterly brief, hereinbefore <sup>376</sup> mentioned, which we care to notice, in order to point out the fallacy involved in the criticism. It is said by them in that brief that it was inaccurate to say, as we did in the *Bussey case*, that section 193 of the constitution created a new cause of action. We said this, not meaning thereby that there never had been a time in the history of our jurisprudence when the cause of action provided by section 193 had not existed; for, manifestly, it had existed at the common law and remained the rule until Lord Abinger, in 1837, invented, as counsel correctly say, the fellow-servant doctrine, in *Priestly v. Fowler*, 3 Mees. & W. 1, and in this country until that case was followed, in 1838, by *Murray v. South Carolina R. R. Co.*, 1 McMull. (S. C.) 385, 36 Am. Dec. 268; and in 1842 by *Farwell v. Boston R. R. Co.*, 4 Met. 49, 38 Am. Dec. 339; and in 1873 in this state by *New Orleans etc. R. R. Co. v. Hughes*, 49 Miss. 258. But during that long sweep of time from 1837 to 1890 the causes of action provided for in section 193 had been abolished, and did not exist at all in the jurisprudence of England or America; and what we meant

in saying that section 193 created these new causes of action was that they were, for the first time, by that section made causes of action, and it was proper enough to speak, therefore, of section 193 as creating these causes of action in that sense. Causes of action which had existed at the common law, and which had been abolished since 1837 in England and since 1838 in this country, and which had never had in the United States any existence since 1838, may certainly with all propriety, be spoken of as being created, or, if that term pleases better, re-created, by section 193 of the constitution.

We have given to this cause the most painstaking and protracted and profound consideration. It has engaged the solicitude of each member of the court because of the tremendous scope and sweep of the principles involved in its decision, and we are, after the fullest consideration, thoroughly satisfied of the correctness of all the views which we have in this opinion announced.

<sup>377</sup> It follows that the judgment of the court below was correct, and it is therefore affirmed.

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*Presumptions of Negligence* from the happening of accidents are discussed in the note to Cincinnati Traction Co. v. Holzenkamp, 113 Am. St. Rep. 986; and presumptions of the exercise of care are discussed in the note to Chicago etc. Ry. Co. v. Wilson, 116 Am. St. Rep. 108.

*On the Constitutionality of Statutes* making railroad and other corporations liable for injuries to their employes resulting from the negligence of coemployes, see Pittsburgh etc. Ry. Co. v. Montgomery, 152 Ind. 1, 71 Am. St. Rep. 301; Indianapolis etc. Rapid Transit Co. v. Foreman, 162 Ind. 85, 102 Am. St. Rep. 185; Ballard v. Mississippi Cotton Oil Co., 81 Miss. 507, 95 Am. St. Rep. 476; Callahan v. St. Louis etc. B. B. Co., 170 Mo. 473, 94 Am. St. Rep. 746.

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## CONITHAN v. ROYAL INSURANCE COMPANY.

[91 Miss. 386, 45 South. 361.]

**INSURANCE, FIRE**—Furniture in Bawdy-house.—A policy of fire insurance on the furniture used in a house of prostitution is not void upon the ground that it issued upon property used in an unlawful business. (p. 702.)

**INSURANCE, FIRE**—Unlawful Business.—If a contract of insurance is made in good faith, without any purpose to effect, advance or encourage acts in violation of law, the policy is not void. (p. 704.)

Pollard & Hammer and Lomax & Tyson, for the appellant.

McLaurin, Armistead & Brien and T. E. Cooper, for the appellee.

<sup>393</sup> MAYES, J. This suit was instituted by Florida Coni-  
than against the Royal Insurance Company for the purpose  
of recovering the value of household furniture belonging to  
her which had been destroyed by fire. The declaration al-  
leges that on the twenty-sixth day of March, 1906, in con-  
sideration of sixteen dollars premium paid to the insurance  
company by appellant, it executed and delivered to her a fire  
insurance policy for the sum of six hundred dollars, where-  
in the company insured and promised to protect the property  
named in the policy from all damage and loss by fire. This  
policy was to run for a period of three years from its date;  
that is to say, from March 26, 1906, to March 26, 1909, at  
noon. The declaration further alleges that on the seventh  
day of June, 1906, while the policy was in full force, the  
property insured was wholly destroyed by fire. The fact  
was communicated to the insurance company, and a request  
made for blanks to make proof of loss within the time pro-  
vided by the terms of the policy. The insurance company  
refused to furnish the blank proofs of loss as requested, and  
refused to pay the amount due her for the loss, whereupon  
she brought suit for the sum of six hundred dollars, the  
amount insured for under the policy. It may be conceded  
that on the trial of this case it was shown that the plaintiff  
was a keeper of a bawdy-house, and that the property insured  
was kept by her in this bawdy-house and used for purposes of  
prostitution. There is no stipulation in the policy which  
prohibits such use of this property as it was being put to  
at the time. After the proof was all in, the court gave a per-  
emptory instruction to find for the insurance company.

In our judgment, the only question presented by this record  
is whether or not this contract of insurance is void, as against  
public policy, because placed upon property and household  
furniture used by the insured in a bawdy-house. Was this  
contract in aid of an illegal and immoral business so directly  
as to make the contract void? It is impossible to lay down  
any exact rule by which it may always be determined whether  
<sup>394</sup> a contract is collateral to, and so disconnected from, an  
illegal and immoral business as to make it enforceable, when  
it would not be enforceable, if it was directly in aid of, or in  
the advancement or encouragement of, acts in violation of the

law. In 19 Cyclopaedia, page 722, it is stated: "If the direct purpose of the contract is to effect, advance or encourage acts in violation of law, it is settled that the policy is void. But it is equally well settled that a mere illegal use made of the premises, there being no provision of the policy applicable, and no design by means of insurance to promote an unlawful enterprise, does not affect the right of the insured to recover."

The main case relied upon by counsel for appellee is the case of *Pollard v. Phoenix Ins. Co.*, 63 Miss. 244, 56 Am. Rep. 805. We do not think that case can be relied upon as authority for holding the contract of insurance in this case as against public policy or as in violation of the law. In the *Pollard* case, the question arose under a statute of the state making provision for the collection of its revenue. One of the provisions of that statute was that a person exercising any of the privileges enumerated should pay a privilege tax. Mrs. Pollard was a merchant in Okolona, and entered into a contract of insurance against loss by fire with the insurance company. Subsequently her stock of goods was destroyed, and she made proof of loss and undertook to collect her insurance. The insurance company set up the defense that the contract was void because the plaintiff was doing business in violation of law. The section of the statute in reference to which privilege taxes were required to be paid provided that, if any person shall exercise any of the privileges enumerated in the chapter "without first paying the price and procuring a license as required, they shall, on conviction, be fined," etc., "or imprisoned," etc., "or both" etc., "and all contracts made with any person who shall violate this act in reference to the business carried on in disregard of this law shall be null and void so far only as such person shall base any claim upon them, and no suit shall be maintainable <sup>395</sup> in favor of such person on any such contract," etc. On these facts and under this statute the court held that a contract of insurance to protect the goods used in the business conducted in violation of the revenue laws was a contract "in reference to the business carried on in disregard of the law," and therefore void. We do not think the principle announced by this case can be invoked to defeat the contract of insurance in the case before the court. The two cases are quite distinct. The language of the statute in the *Pollard* case was broad, and it prohibited any rights to accrue to any person violating the privilege tax law, on any contract made in reference to the business carried on in disregard of the law. The court's decision in the *Pollard* case was based squarely on the language of the statute. The statute made

void all contracts, however remote they might be from the actual business in which the party was engaged, if the contract was made merely in reference to the business carried on in violation of the law. Had the statute not been so written, we dare say that the court would not have held, even in this case, that the contract of insurance on the stock of goods was void.

Where a contract of insurance is made in good faith and the premiums paid, and the purpose of the insurance is not to effect, advance or encourage acts in violation of the law, the policy is not void. This insurance contract was not necessary in order to enable appellant to conduct her bawdy-house. The contract of insurance did not in any way advance her interest in this business or encourage it. It did not promote the unlawful business, or help her to accomplish it in any way whatever. She could have conducted and carried on her bawdy-house as well without the insurance policy as she could with it. The only effect of the insurance policy was that, in case her property was lost by fire, she should have an indemnity for the loss of the property; but the contract did not even remotely aid or assist her in the conduct of this business. She did not receive by means of this insurance any aid to the conduct of her <sup>396</sup> business. The only thing she did do was to make an illegal use of the property which the provisions of the policy covered; but this did not invalidate the contract. This contract of insurance was perfectly good. The keeping of the bawdy-house was an independent, illegal transaction, which the insurance policy in no way aided or promoted. To defeat the action on the policy it is necessary to hold that the policy itself is an immoral contract, against public policy as tending to promote the business of maintaining a bawdy-house. The record in this case does not show that the contract of insurance was an immoral one and against public policy, nor is its tendency necessarily or even remotely the promotion of the business of maintaining a house of prostitution. The insurance of this property, although it may be illegally used, is a perfectly good insurance, unless the contract of insurance in some way promotes the business. This contract does not do this: *Phoenix Ins. Co. v. Clay*, 101 Ga. 331, 28 S. E. 853, 65 Am. St. Rep. 307; 3 *Joyce on Insurance*, secs. 2536, 2507; *Behler v. German Mutual Fire Ins. Co.*, 68 Ind. 347.

Reversed and remanded.

WHITEFIELD, C. J. I dissent in toto from the reasoning of the opinion and the judgment of the court in this case.

If the court had squarely overruled Pollard v. Phoenix Ins. Co., 63 Miss. 244, 56 Am. Rep. 805, and held that a fire insurance policy is not a contract which relates to or concerns the business of a merchant whose stock is insured against fire, within the meaning of the provision of our statute that, unless such merchant pays the proper privilege tax, he cannot enforce contracts relating to his business, there might have been some pretty solid ground for the court to stand on, since there are decisions, especially two by the United States supreme court (*Ocean Ins. Co. v. Polleys*, 38 U. S. 157, 10 L. ed. 105, and *Armstrong v. Toler*, 24 U. S. 258, 6 L. ed. 468, and note), referred to by the <sup>397</sup> learned counsel representing the insured in this case, which go far to show that the Pollard case was unsoundly decided in the particular indicated. But it is not logically possible to approve and stand by the Pollard case, and at the same time hold that the insured can recover in this case. It is not a possible thing, in reason, to draw any sound distinction between the Pollard case and this case. Indeed, the principles of the Pollard case apply more strongly to the facts of this case than to the facts of the Pollard case itself, just as much more strongly as prostitution is a greater outrage on public policy than the mere failure to pay a privilege tax. In the single respect that the fire insurance policy pertains to, or relates to, or concerns the business carried on, the two cases are absolutely identical.

Another plain reason why, if the Pollard case is sound, these plaintiffs cannot recover—for they are, indeed, far less able to recover on principle than Pollard was—is that in the Pollard case the only thing which made Pollard's fire insurance policy enforceable was the mere failure to pay a privilege tax, a thing *malum prohibitum*, not *malum in se*; whereas, here the thing which makes this contract unenforceable is not something *malum prohibitum* only, but something which is *malum in se* in every civilized community in the world, to wit, prostitution. In other words, if it was sound law to hold Pollard barred because of a failure to comply with the mere technical law, failure to pay a privilege tax, how can these plaintiffs recover who are engaged in a business far worse than one merely *malum prohibitum*—one that is abhorrent to the public policy of every civilized community?

I do not care to enlarge. I merely wish to put myself properly on record.

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*A Policy of Insurance* on a house leased by the owner to a lewd woman, with knowledge on his part that it is to be used by her for  
Am. St. Rep., Vol. 124—45

the purposes of prostitution, is not void so as to defeat a recovery in case of loss in the absence of any stipulation in the policy under which the immoral use of the house vacates the contract. In such case, the contract of insurance does not grow out of, nor is it connected with, the immoral and illegal use of the house; and it is clearly disconnected from the contract of rental for such use: *Phoenix Ins. Co. v. Clay*, 101 Ga. 331, 65 Am. St. Rep. 307.

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### MITCHELL v. HANCOCK COUNTY.

[91 Miss. 414, 45 South. 571.]

**CONTRACTS—Unconditional Covenants.**—An unconditional, express covenant to repair a bridge or keep it in repair is equivalent to a covenant to rebuild it. (p. 707.)

**CONTRACT—Act of God.**—While an act of God will excuse the nonperformance of a duty created by law, it will not excuse the performance of a duty created by contract. (p. 707.)

**CONTRACTS—Unconditional Covenant.**—An unconditional, express covenant to keep a bridge in good repair and that it shall remain safe for a stipulated period, is not excused because the bridge is washed away, or so damaged as to become unsafe. (p. 707.)

Napier & Huddleston, for the appellants.

W. J. Gex, for the appellee.

418 **WHITFIELD, C. J.** The condition of this obligation was as follows: "Said J. W. Mitchell by these presents insures and guarantees to keep said bridge in repair for a term of five years, . . . and if said bridge shall be removed from any cause, fire excepted, within the time of five years, he shall rebuild the same without additional cost to the county of Hancock." It is obvious that the obligor's attention was directed to exceptions which should be made, and that the only thing excepted against was loss by fire. Whilst making his exceptions, if he had intended to except against the act of God, he should have done so. A case on all-fours with this, except that this is a stronger case for liability than that, is the case of *Meriwether v. Lowndes County*, 89 Ala. 362, 7 South. 198. That case, like this, was a bridge case; the bridge having been destroyed, as here, by an extraordinary flood. The only covenant of that bond was to "keep the bridge in good repair and that it should remain safe for five years." The court said: "The main defense urged to the suit is that the bond imposed no duty on the obligor to rebuild the bridge, but only to keep it in repair so long as it stood, and that the structure was destroyed from no defect in



the work, but by an extraordinary and unprecedented flood, which was an act of God, not covered by the covenants of the bond. This defense was clearly not good. There is a long line of cases, both in England and this country, which settle the proposition that an unconditional express covenant to repair or keep in repair is equivalent to a covenant to rebuild, 'and <sup>419</sup> binds the covenantor to make good any injury which human power can remedy, even if caused by storm, flood, fire, inevitable accident, or the act of a stranger,' and that, while an act of God will excuse the nonperformance of a duty created by law, it will not excuse a duty created by contract: *Abby v. Billups*, 35 Miss. 618, 72 Am. Dec. 143, and note at page 148; *Ross v. Overton*, 3 Call (Va.), 309, 2 Am. Dec. 552; *Polack v. Pioche*, 35 Cal. 416, 95 Am. Dec. 115, note, 121, 122; *Hoy v. Holt*, 91 Pa. 88, 36 Am. Rep. 659; *Miller v. Morris*, 55 Tex. 412, 40 Am. Rep. 814; *School Dist. v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371; *Beach v. Crain*, 2 N. Y. 86, 49 Am. Dec. 369, note 374; *Van Wormer v. Crane*, 51 Mich. 363, 16 N. W. 686, 47 Am. Rep. 582; *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446; *Nave v. Berry*, 22 Ala. 382. The courts have no authority to relieve contracting parties from the hardships often occasioned by such contracts, as it is within the power of obligors to provide in advance, by excepting liability for casualties of this nature from the terms of their contracts, if they so elect. The contract, moreover, shows that the duty of keeping 'in good repair' is coupled with the covenant that the bridge shall 'remain safe' for the period stipulated. And the statute clearly contemplates that when such a bridge, constructed under such a contract, is 'washed away, or so damaged (in any manner) as to become unsafe to the public,' within the period covered by the bond, such accident shall be such a breach of the bond as to constitute a ground of action: Code 1906, sec. 4457. The second plea interposing this defense was bad, and the court did not err in sustaining the demurrer to it."

We think this states the doctrine correctly, and the judgment is affirmed.

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*The Meaning of the Word "Repair,"* as distinguished from or as synonymous with the word "rebuild" or "reconstruct," is discussed by the following authorities: *Vincent v. Frelich*, 50 La. Ann. 378, 69 Am. St. Rep. 436; *Wattles v. South Omaha I. & C. Co.*, 50 Neb. 251, 61 Am. St. Rep. 554; *Armstrong v. Maybee*, 17 Wash. 24, 61 Am. St. Rep. 898; *First Nat. Bank of Mt. Vernon v. Sarlls*, 129 Ind. 201, 28 Am. St. Rep. 185; *Western Paving etc. Co. v. Citizens' Street R. R. Co.*, 128 Ind. 525, 25 Am. St. Rep. 462; *State v. Corrigan Consolidated Street Ry. Co.*, 85 Mo. 263, 55 Am. Rep. 361; *Hoy v. Holt*, 91 Pa. 88, 36 Am. Rep. 659; *Polack v. Pioche*, 35 Cal. 416,

95 Am. Dec. 115; *Abby v. Billups*, 35 Miss. 618, 72 Am. Dec. 143; *Beach v. Crain*, 2 N. Y. 86, 49 Am. Dec. 369; *Ross v. Overton*, 3 Cal. 309, 2 Am. Dec. 552.

*An Act of God or Inevitable Accident* does not, as we understand, excuse the nonperformance of a contract, wherein there is no provision made for such contingencies, though it is otherwise as to a duty imposed upon one by law: See the note to *Huyett & Smith Mfg. Co. v. Chicago Edison Co.*, 59 Am. St. Rep. 281.

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### SHULER v. MURPHY.

[91 Miss. 518, 44 South. 810.]

**GARNISHMENT—Rights of Judgment Creditor.**—A judgment creditor stands in exactly the same attitude in relation to a garnished fund that the judgment debtor does. (p. 709.)

**JUDGMENTS IN PARTITION—Res Judicata.**—A pro confesso judgment taken against cotenants, by one of them ignoring a deed made by one of the defendants to another does not divest the title made by the deed, nor prevent the grantee from claiming his share of the proceeds of the sale. (p. 711.)

Luckett & Guyton, for the appellant.

Pratt & Reid, for the appellees.

523 **MAYES, J.** In May, 1893, D. W. T. Sanders recovered a judgment against Luke T. Murphy for the sum of two hundred and two dollars and fifty cents. Subsequently, Sanders having assigned the judgment to E. A. Shuler and the judgment being about to expire, suit was brought on the judgment for the purpose of renewing it, and a judgment rendered against Luke T. Murphy in favor of Mrs. M. A. Shuler, executrix of the estate of E. A. Shuler, for the sum of three hundred and fifty-four dollars. After this judgment was recovered it was suggested that J. W. Black, sheriff and commissioner of Attala county, was indebted to Luke T. Murphy, and a writ of garnishment was issued and served upon Black. In answer to this garnishment, Black stated that he had in his hands, as commissioner in the case of *Ann Simmons v. Luke Smith et al.*, the sum of one hundred and nine dollars and thirty-one cents, which by decree of the court he was ordered to pay Luke T. Murphy as his distributive share of the proceeds of certain real estate ordered to be sold under the decree of the chancery court in cause No. 2155, in which cause Murphy was a defendant. He further states that he has been notified that Miss Margaret Murphy and Ellen Murphy,

who were codefendants with Luke T. Murphy in the suit above referred to in the chancery court, claimed to be the owners of the sum in his hands. He then prays that the Misses Murphy be summoned to appear and interpose their claim in court, and that he be allowed to pay the said sum in court, and that Mrs. Shuler, executrix, and the Misses Murphy be required to contest their respective claims for same.

The record shows the following: On the fourteenth day of March, 1898, and prior thereto, Margaret Murphy, Ellen Murphy and <sup>524</sup> Luke T. Murphy, together with other tenants in common, were each entitled to one-eighth interest in certain real estate. On the fourteenth day of March, 1898, Luke T. Murphy conveyed his one-eighth interest to his two sisters, Margaret and Ellen Murphy. This deed was duly acknowledged on the fourteenth day of March and filed for record, as shown by the certificates of the clerk, on the fifteenth day of March, 1898. This deed was made prior to the date at which the judgment was recovered against Murphy, so that, before the time the judgment was recovered, Murphy had deeded all his interest, being a one-eighth interest, to his two sisters. In August, 1905, Mrs. Ann Simmons began a suit in the chancery court against Luke Smith and others, the purpose of which was to obtain a partition of this real estate among the cotenants. The bill alleged that Margaret Murphy, Ellen Murphy, Luke T. Murphy, and the other heirs were all entitled to a one-eighth interest each in the lands, describing them, and claiming that said lands descended from one John Murphy, father of the complainant and defendants. The bill prayed for a sale of the land for partition. All the parties were duly summoned, and a pro confesso taken against Margaret Murphy, Ellen Murphy, Luke T. Murphy, and the other defendants named in the bill; none of them having answered. Afterward a decree of partition for the sale of the property was ordered, the sale duly made by Black, commissioner, and reported to the court and duly confirmed.

The solitary question presented for decision is whether or not, under the facts in this case, the judgment creditor of Luke T. Murphy can claim the proceeds of this sale in the hands of the commissioner as to that part which the decree ordered paid Luke T. Murphy. The judgment creditor stands in exactly the same attitude in relation to the fund that the judgment debtor does. If Murphy cannot prevail in asserting his claim to the fund against his codefendants, Margaret and Ellen Murphy, then the judgment creditor must also fail: *Mississippi Valley Co. v. Chicago etc. Ry. Co.*, 58 Miss. 846;

**525** *Foute v. Fairman*, 48 Miss. 536. Appellant contends that under section 3112 of the Code of 1892 (Code of 1906, section 3536) the right of Luke T. Murphy to claim this sum in the hands of the commissioner was exclusively fixed by a decree of the court, and that no claim can now be asserted by his two sisters to this fund; they not having done so at the time of the partition. The section of the Code in question—that is to say, section 3112 of the Code of 1892 (Code of 1906, section 3526)—provides that “the final decree of the chancery court in partition proceedings shall ascertain and settle the rights of all parties; and it and the decree confirming the partition shall constitute an instrument in all questions as to the title of the lands which may be the subject of the decree in all courts, and shall be conclusive as to the rights of all parties to the suit, and subject to appeals and bills of review, as in other suits and to a repartition as provided.” This section of the Code never was intended to settle an issue foreign to the purpose of the original suit. In so far as the complainant is concerned, and in so far as the innocent parties may be concerned, the judgment of the court in partition proceedings, ascertaining and settling the rights of the parties, is conclusive; but where there has been no act of estoppel on the part of the defendants inter sese, and the rights of innocent parties are in no way prejudiced, there is nothing in this section which prevents them from afterward questioning rights as between themselves.

Authorities dealing with the subject matter of this suit are not numerous. In the nature of things, a question of this sort does not often arise, and the best case we have found is the case of *Finley v. Cathcart*, 149 Ind. 470, 63 Am. St. Rep. 292, 48 N. E. 586. The case cited above is so apt in its application to the case under discussion we may be pardoned for quoting its language, merely substituting the names of the parties in this case. Unless it can be said that the issue raised alone by the petition in the partition suit was sufficient to warrant the court in determining the question of title between **526** Ellen and Margaret Murphy and Luke T. Murphy, then there was no issue under which it could have been decided. The facts necessary to constitute a cause of action in a partition proceeding in favor of Ann Simmons, the complainant, and entitle her to a partition, were that she held and owned, in the lands described in her petition, a one-eighth interest as tenant in common with the defendants. This was the only issue which was tendered by the bill to the defendants. All such matters, and all others coming within the material issue in

the case, as between plaintiffs and defendants, must be held to have been settled by the judgment, and as to such matters it will not be open to collateral attack. But it cannot in reason be said that the issue so raised by the petition must be presumed and held to have conclusively settled all matters between the defendants. The record shows that none of the defendants filed a cross-bill, nor in any way appeared to the action; but a pro confesso was taken against them, and no issue was raised in any way by the defendants as between each other. It is evident, therefore, under such circumstances, that the court was not called upon nor was it relevant for it to examine into and determine matters of an adverse nature existing between any of the defendants. By their default the defendants, as between them and complainant, admitted all material and traversable averments constituting the cause of action; but while this is true, it would not justify the holding that the defendants, by their default, admitted that their codefendant was seised of a one-eighth interest in the property as alleged in the bill of complainant. In fact, we fail to recognize any features or provisions in the partition suit which can be said, on default of the defendants in the action instituted by Ann Simmons, complainant, to have put any issue, ipso facto, in title or interest, between any of said defendants, so as to warrant the court, by its judgment, to conclusively adjudicate same. It may be correctly said that the complainant, by her petition for a partition, challenged the defendants, one and all, to set up <sup>527</sup> and avail themselves of any title or matter which would defeat the complainant in her demand for partition, or which would diminish the interest which she claimed to have and hold in the real estate; but certainly it cannot be conclusively urged that the petition also required, or compelled, the defendants to present and litigate all matters, rights and title as between themselves, and having failed to do so, they must now, under the circumstances, be held to be precluded by the court's judgment. To affirm such a rule would not only, as we believe, operate mischievously, but would manifestly work an injustice in the case at bar. The bill of complaint filed by Ann Simmons did not put in issue between the defendant the title which Luke T. Murphy had previously conveyed to his two sisters, Margaret and Ellen Murphy, and therefore they are not precluded or estopped by the judgment from asserting their title as against him or his judgment creditor. We must not be understood as holding that if there had been a partition in kind, and each of the defendants had acquiesced in such

partition, they would not have been estopped by the judgment. Nor do we hold that, if this controversy involved the rights of any innocent party, this judgment in the partition proceeding would not be conclusive as against the rights of all defendants as well as complainants. These questions are not involved in this case, and therefore not decided.

The case of *Alsobrook v. Eggleston*, 69 Miss. 833, 13 South. 850, cited by counsel for appellant, has no application here. In the *Alsobrook* case, one Payne and *Alsobrook* purchased certain real estate, taking title in name of Payne. Subsequently, *Alsobrook* having died, Payne began a suit for partition, in which he set out the facts, alleging that the *Alsobrook* heirs were tenants in common with him, and asked for a sale for partition. *Eggleston* was at that time a stranger to the proceedings, with no interest in it whatever. The property was ordered to be sold for partition, and at this sale *Eggleston* bought the property; but the sale was never confirmed and *Eggleston* <sup>528</sup> never paid for the property. Afterward *Eggleston* bought Payne's interest, and when sued for partition by the *Alsobrook* heirs, undertook to deny their title, and the court said: "The effect of the decree made upon the petition of Payne against the heirs at law of *Alsobrook*, for sale of the lands for partition, was to conclusively settle the equitable right of *Alsobrook's* heirs to one-half of the lands therein described." In the *Alsobrook* case, *Eggleston* undertook to collaterally attack a judgment of the court, in the case where the issue was title merely, in a proceeding to which he was an entire stranger, and the court held that he could not do it. The facts make it a quite different case from the case we are considering. It may be stated as a general rule that a decree for the sale of land for partition, or for partition in kind, fixing the interest of the parties, is conclusive; but there are exceptions to this rule, and this case furnishes the exception. On the facts presented by the *Alsobrook* case, the decision of the court was eminently correct.

Let the judgment of the lower court be affirmed.

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**The Opinion in the Principal Case** is one of many illustrations of the difficulty of courts in understanding and obeying statutes providing for the partition of property, and the distribution of the proceeds of its sale, when such sale is found necessary and authorized by the court. The statute construed conflicts as clearly with the opinion of the court as anything we shall or could hereinafter say. That statute declares that the final decree "shall ascertain and settle the rights of all parties," and that the decree confirming the partition shall be "conclusive of the rights of all the parties

to the suit, and subject to appeals and bills of review as in other suits," etc. Notwithstanding this explicit language, the court declared that it was never intended to settle an issue foreign to the purpose of the original suit. This may be conceded without acquiescing in the conclusion reached by the court, for the purpose of the original suit, under statutes like that from which we are quoting, is to make a final disposition of the rights of the parties, and to award to each whatever he shall be entitled to as a result of the suit and the proceedings which may be taken therein. If, as in the principal case, the court declares, though upon a bill taken as confessed, that one of the parties is a tenant in common and has, as such, title to a specified moiety, this declaration is clearly one settling an issue and declaring the interest of all the parties thereto. Nevertheless, in the principal case it was held, and this in a collateral suit or proceeding, that the person thus declared to own the moiety did not in fact own it, but, on the contrary, that it was owned by another, and that the proceeds representing it might be garnished by his creditor. That a judgment in partition is not less exempt from collateral attack than a judgment or decree in any other action or suit must, we think, be accepted as settled: *Moring v. Tipton*, 126 Ala. 350, 28 South. 562; *King v. Dillon*, 66 Ga. 131; *Lane v. Bommelmann*, 17 Ill. 95; *Nichols v. Mitchell*, 70 Ill. 258; *Murphy v. Williamson*, 85 Ill. 149; *Thornton v. Houtze*, 91 Ill. 199; *Lang v. Clemens*, 107 Ill. 133; *Thompson v. Frew*, 107 Ill. 478; *Doe v. Smith*, 1 Ind. 451; *Waltz v. Borroway*, 25 Ind. 380; *Schee v. McQuilken*, 59 Ind. 269; *Eller v. Evans*, 128 Ind. 156, 27 N. E. 418; *State v. Rogers*, 131 Ind. 458, 31 N. E. 199; *Irvin v. Buckles*, 148 Ind. 389, 47 N. E. 822; *Wright v. Marsh*, 2 Greene, 94; *Brace v. Reid*, 3 Greene, 422; *Williams v. Westcott*, 77 Iowa, 332, 14 Am. St. Rep. 287, 24 N. W. 314; *Blauw v. Love*, 9 Kan. App. 55, 57 Pac. 258; *Havens v. Drake*, 43 Kan. 484, 23 Pac. 621; *Blackburn v. Blackburn*, 11 Ky. Law Rep. 161, 11 S. W. 712; *Gaines v. Johnston*, 12 Ky. Law Rep. 779, 15 S. W. 246; *Smith v. Norment*, 94 Ky. 624, 23 S. W. 370, 24 S. W. 433; *In re Routon*, 11 La. Ann. 621; *Fowler v. Gordon*, 21 La. Ann. 270; *Ventress v. Brown*, 30 La. Ann. 1012; *Bayhi v. Bayhi*, 35 La. Ann. 527; *Paul v. Lamothe*, 36 La. Ann. 318; *Zeigler v. Creditors*, 49 La. Ann. 144, 21 South. 666; *Scovell v. Levy*, 106 La. 18, 30 South. 322; *Friedrich v. Friedrich*, 111 La. 26, 35 South. 371; *Austin v. Charlestown Female Seminary*, 8 Met. 196, 41 Am. Dec. 497; *Foster v. Abbot*, 8 Met. 596; *Persinger v. Jubb*, 52 Mich. 304, 17 N. W. 851; *Sweatman v. Dean*, 86 Miss. 641, 38 South. 231; *Latrielle v. Dorleque*, 35 Mo. 233; *Yates v. Johnson*, 87 Mo. 213; *Cochran v. Thomas*, 131 Mo. 258, 33 S. W. 6; *Sparks v. Clay*, 185 Mo. 393, 84 S. W. 40; *Braker v. Devereaux*, 8 Paige, 513; *Herbert v. Smith*, 6 Lans. 493; *Fox v. Fee*, 24 App. Div. 314, 49 N. Y. Supp. 292; *Lenahan v. St. Francis Xavier College*, 51 App. Div. 535, 64 N. Y. Supp. 868; *Croghan v. Livingston*, 17 N. Y. 218; *Parish v. Parish*, 175 N. Y. 181, 67 N. E. 298; *Lindsay v. Beaman*, 128 N. C. 189, 38 S. E. 811; *Tabler v. Wiseman*, 1 Ohio Dec. 497; *Foster v. Dugan*, 8 Ohio, 87, 31 Am. Dec. 432; *Wilson v. Bull*, 10 Ohio, 250;

Bohart v. Atkinson, 14 Ohio, 228; Morrill v. Morrill, 20 Or. 96, 23 Am. St. Rep. 95, 25 Pac. 362, 11 L. R. A. 155; Ewing v. Houston, 4 Dall. 67, 1 L. ed. 744; Snevily v. Wagner, 8 Pa. 396; Lair v. Hunsicker, 28 Pa. 115; Vensel's Appeal, 77 Pa. 71; Reid v. Clendenning, 193 Pa. 406, 44 Atl. 500; Woodward v. Elliott, 27 S. C. 368, 3 S. E. 477; Elk Valley Coal etc. Co. v. Douglass (Tenn. Ch. App.), 48 S. W. 365; Robnett v. Howard (Tenn. Ch. App.), 61 S. W. 1082; Beldsoe v. Wiley, 7 Humph. 507; Bigley v. Watson, 98 Tenn. 353, 39 S. W. 525, 38 L. R. A. 379; Williams v. Howard, 10 Tex. Civ. App. 527, 31 S. W. 835; Bassett v. Sherrod, 13 Tex. Civ. App. 327, 35 S. W. 312; Blagge v. Shaw (Tex. Civ. App.), 41 S. W. 756; Hall v. Reese, 24 Tex. Civ. App. 221, 58 S. W. 974; Grassmeyer v. Beeson, 13 Tex. 753, 70 Am. Dec. 309; Davis v. Wells, 37 Tex. 606; Moore v. Blagge, 91 Tex. 151, 38 S. W. 979, 41 S. W. 465; Carter v. Carter, 5 Munf. 108; Wilson v. Smith, 22 Gratt. 493; Mootry v. Grayson, 104 Fed. 613, 44 C. C. A. 83; Jenking v. Jenking, 11 Ont. App. 92; notwithstanding a few ill-considered or inadvertent declarations to the contrary: Turpin v. Dennis, 139 Ill. 274, 28 N. E. 1065; Clay v. Moseley, 1 A. K. Marsh. 360; Craig v. Barker, 4 Dana, 600; Smith v. Moore, 6 Dana, 417; Guyton v. Shane, 7 Dana, 498; Stallings v. Stallings, 22 Md. 41; Jenks v. Howland, 3 Gray, 536; Thayer v. Thayer, 7 Pick. 209; Newhall v. Sadler, 16 Mass. 122; Jackson v. Tibbitts, 9 Cow. 241; Schuyler v. Marsh, 37 Barb. 350; Jackson v. Myers, 14 Johns. 354.

If the question involved in the principal case may be regarded as not that of whether a collateral attack upon a judgment in partition may be entertained, but rather as a question involving the effect of such a judgment as *res judicata*, nevertheless it is contrary to the weight of authority. Though partition was at the common law merely a possessory action: Kennedy v. Rainey, 145 Ala. 572, 39 South. 813; Wade v. Deray, 50 Cal. 376; Mound City etc. Land Assn. v. Philip, 64 Cal. 493, 2 Pac. 270; Christy v. Spring Valley Water Works, 68 Cal. 73, 8 Pac. 849; McBrown v. Dalton, 70 Cal. 89, 11 Pac. 583; Avery v. Akins, 74 Ind. 283; Utterback v. Terhune, 75 Ind. 363; Kenney v. Phillippy, 91 Ind. 511; Fleenor v. Driskill, 97 Ind. 27; Finley v. Cathcart, 149 Ind. 470, 63 Am. St. Rep. 292, 48 N. E. 586; Thompson v. Henry, 153 Ind. 56, 54 N. E. 109; Forde v. Lloyd, 27 Ind. App. 414, 60 N. E. 367; Pierce v. Oliver, 13 Mass. 211; Nash v. Cutler, 16 Pick. 491; Haddon v. Hemingway, 39 Mich. 615; Whittsett v. Wamack, 159 Mo. 14, 81 Am. St. Rep. 339, 59 S. W. 961; Richman v. Baldwin, 21 N. J. L. 395; Pomeroy v. Pomeroy, 55 N. J. Eq. 568, 37 Atl. 754; Bradshaw v. Callaghan, 5 Johns. 80; McBain v. McBain, 15 Ohio St. 337, 86 Am. Dec. 478; Goundie v. Northampton Water Co., 7 Pa. 233; McClure v. McClure, 14 Pa. 134; Harlan v. Langham, 69 Pa. 235; Nicely v. Boyles, 4 Humph. 177, 40 Am. Dec. 638; Wade v. Johnson, 5 Humph. 117, 42 Am. Dec. 422; Whillock v. Hale, 10 Humph. 64; Cottrell v. Griffiths, 108 Tenn. 191, 91 Am. St. Rep. 748, 65 S. W. 397, 57 L. R. A. 332; Bolling v. Teel, 76 Va. 487; Traver v. Baker, 8 Saw. 535, 15 Fed. 186; Mallett v. Foxcroft, 1 Story, 474; Fed. Cas. No. 8939;



yet under modern statutes this is not usually the case, and ought never to be regarded as the case under a statute like that quoted in the opinion in the principal case. That statute manifestly puts the title, as well as the possession, in issue in suits in partition, and where such a statute is in force, the judgment must be accepted as final as to every fact stated in it, expressly or by necessary implication: See 30 Cyc. 309-312.

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### MONETTE v. STATE.

[91 Miss. 662, 44 South. 989.]

**PUBLIC OFFICER—Who is.**—A policeman is a public officer, and hence must be appointed for some specified time under a constitution providing that the term of all offices shall be for some specified period. (p. 715.)

**CONSTITUTIONAL LAW—Public Officer—When cannot Hold During Good Behavior.**—Under a constitutional provision that an officer must be appointed for some specified time, a law or ordinance which provides for the appointment of an officer during good behavior is void. (p. 716.)

**CONSTITUTIONAL LAW—Amendment of Statutes—Special Act.**—If a constitution requires that all amendments of city charters shall be made by general laws, a special law attempting to amend the charter of a city is void. (p. 716.)

Williamson & Gilbert, for the appellants.

J. H. Currie and Neville & Wilbourn, for the appellees.

670 **MAYES, J.** We have no hesitancy in declaring that a policeman is an "officer," within the meaning of section 20 of the constitution of the state of Mississippi, and must be appointed for some specified time. Any law or ordinance which provides for the appointment of such an officer during good behavior is in violation of this section and void. In the case of *Shelby v. Alcorn*, 36 Miss. 273, on page 289, 72 Am. Dec. 169, this court held "that a public officer is one who has some duty to perform concerning the public; and he is not the less a public officer when his duty is confined to narrow limits, because it is the duty, and the nature of that duty, which makes him a public officer, and not the extent of his authority": *Shelby v. Alcorn*, 36 Miss. 273, 72 Am. Dec. 169; *Kierskey v. Kelly*, 80 Miss. 803, 31 South. 901; *Johnson v. State*, 132 Ala. 43, 31 South. 493. The section of the constitution referred to above contemplates all persons who have any duty to perform concerning the public under any law of

this state, whether it be under an act of the legislature, the constitution of the state, or a municipal ordinance. The ordinance in question not providing for a specified term of service for the policemen of the city, but authorizing the appointment during good behavior, is void.

Chapter 134, page 173, of the Laws of 1900, amending the charter of the city of Meridian, is itself unconstitutional, in that it violates section 88 of the constitution of the state, which provides that "the legislature shall pass general laws, under which local and private interests shall be provided for and protected, and under which cities and towns may be chartered and their <sup>671</sup> charters amended," etc. Acting under this section of the constitution, which is mandatory, the legislature has provided by general law, in section 3039 of the Annotated Code of 1892, as amended by Laws of 1900, page 79, chapter 69, the way in which municipalities may amend their charters. This was the only way that the charter of the city of Meridian could be amended, and the special act referred to above is in violation of the constitution.

It follows from what has been said above that the ordinance is void because it violates section 20 of the constitution, in that it prescribes no definite term of service, and chapter 134, page 173, Laws of 1900, is void for the reason that it is attempted by the legislature by special law to amend the charter of the city of Meridian, when the constitution requires that all such amendments shall be made by general law.

The case is affirmed.

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*Policemen may Properly be Regarded as public officers rather than mere employes:* Brown v. Russell, 166 Mass. 14, 55 Am. St. Rep. 357; Woodhull v. New York, 150 N. Y. 450, 44 N. E. 1038; Proctor v. Blackburn, 28 Tex. Civ. 351, 67 S. W. 548.

*Public Office* is distinguished from employment in the notes to State v. Hocker, 63 Am. St. Rep. 181; Shelby v. Alcorn, 72 Am. Dec. 179. An office is a public position created by the constitution or law, continuing during the pleasure of the appointing power or for a fixed term, with a successor elected or appointed. An employment is an agency for a temporary purpose, ceasing when that purpose is accomplished: Patton v. Board of Health of San Francisco, 127 Cal. 388, 78 Am. St. Rep. 66.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**MISSOURI.**

**CALDWELL v. RYAN.**  
[210 Mo. 17, 108 S. W. 533.]

**REPLEVIN—Failure to Assess Value—Conversion Pending Suit.**—A judgment in replevin in favor of the defendant for the return of the goods, and not in the alternative for their value, is good as far as it goes, so that if the plaintiff has sold them pending the suit, he is guilty of conversion and liable for their value. (p. 720.)

**EXEMPTION—Pleading and Judgment.**—Where a plaintiff's cause of action is not based on an infringement of his rights under the exemption statute, a plea that the judgment sought should, when recovered, be adjudged exempt from execution, has no place in the office of pleading. (p. 721.)

**SETOFF—Claims Resting in Contract and in Tort.**—A debt cannot be set off against a demand for damages arising in tort. Therefore, where a plaintiff sues for conversion, the defendant cannot plead as a setoff prior judgments recovered by him. (p. 722.)

**SETOFF—Whether a Positive Statutory Right.**—The right of setoff in Missouri is not given or withheld as the conscience of the chancellor in a given case may dictate. It is a positive legal right given by statute. (pp. 723, 724.)

**SETOFF—Nature of Right.**—The right of setoff was in the beginning a creature of equity jurisprudence and was unknown to the common law; but in Missouri the right is given by statute, and the procedure for enforcing it is also prescribed by statute, the courts having authority to enforce the law only as it is written. (pp. 723, 724.)

**EXEMPTION—Setoff of One Judgment Against Another.**—Where one sues for the conversion of exempt property, and the defendant has previously recovered judgments against the plaintiff larger in amount than the judgment asked by the latter, the proper procedure, when the plaintiff has reduced his claim to judgment and mutual executions have come into the hands of the sheriff, is for the latter to set off one execution against the other, satisfying the smaller by applying the amount thereof as far as it will go to satisfy the larger, and then levying the balance and indorsing the fact of setoff on both writs in his returns. (p. 724.)

**STATUTORY CONSTRUCTION.**—*Expressum Facit Cessare Tacitum* may be translated: "Where a lawgiver sets down plainly his whole meaning, we are prevented from making him mean what we please ourselves." (p. 725.)

**SETOFF—Right to Hold Property Exempt.**—The right of a plaintiff to hold property exempt from execution does not impair the right of the defendant to set off a debt the plaintiff owes him against a debt he owes the plaintiff; the meaning of the statute of setoff is that the defendant is not to be adjudged indebted to the plaintiff unless it is in a sum beyond the amount which the plaintiff is found indebted to him, and then the judgment goes only for the excess. (p. 725.)

**SETOFF—Claim of Exemption Subordinate to Setoff.**—A plaintiff in conversion cannot plead in his reply that as the head of a family he is entitled to hold the judgment he seeks to recover exempt from execution, and that therefore the defendant had no right in his answer to set off judgments previously recovered by him and amounting to more than the judgment prayed for by the plaintiff. (pp. 725, 726.)

**EXEMPTION—Purpose and Construction of Statute.**—The statute of exemption was conceived in mercy for the unfortunate debtor, and is to be construed in that spirit, but it is not to be construed to give him what in common honesty does not belong to him. The statute was made to cover, as with a shield, what the unfortunate debtor has in his possession when the officer comes with a writ to take it from him; it was not made to arm him, as with a sword, to levy contribution on his neighbor. (p. 726.)

**SETOFF—Whether Subordinate to Exemption.**—The right of setoff is not subordinate to the right of exemption from execution. (p. 726.)

Wilson & Clapp, for the appellant.

Wattenbarger & Bingham, for the respondent.

**20 VALLIANT, J.** This is a suit to recover the value of two mules which plaintiff avers belonged to him and were unlawfully converted by defendant.

Prior to this suit, the defendant, Ryan, had brought an action of replevin against the plaintiff, Caldwell, for the possession of the mules, and having given bond according to the statute, the mules were by the constable taken from Caldwell and delivered to Ryan. Pending that replevin suit Ryan caused the mules to be sold under a chattel mortgage which he held. The replevin suit resulted in a judgment in favor of Caldwell for the return of the mules, but there was no assessment of their value, hence no judgment in the alternative against Ryan for their value. When the replevin suit ended and the mules were not forthcoming to satisfy the judgment, and Caldwell having no judgment therein for their value, he brought this suit to recover two hundred dollars as for their conversion. The defendant's answer was a general denial, and a "setoff and counterclaim," consisting of two judgments previously rendered in his favor against the plaintiff, amounting, with interest, to seven hundred and eighteen dollars and ninety-two cents.

Plaintiff in his reply alleged that he was the head of a family, and as such was entitled to hold the judgment <sup>21</sup> he was seeking to recover against the defendant exempt from execution under section 3159, Revised Statutes of 1899, he having no other property, and therefore the defendant had no right to set off his judgments against it.

The trial resulted in a judgment for the plaintiff for one hundred and eighty-nine dollars and seventy cents on his demand, and in favor of defendant for seven hundred and eighteen dollars and ninety-two cents on his counterclaim, but it was adjudged that the defendant was not entitled to offset the judgment against him by his judgment against the plaintiff. Therefore, execution was awarded in plaintiff's favor for one hundred and eighty-nine dollars and seventy cents and costs, and also judgment in favor of defendant on his counterclaim, for seven hundred and eighteen dollars and ninety-two cents and costs, and execution awarded. From the judgment in favor of the plaintiff the defendant has appealed. The appeal was taken to the Kansas City court of appeals, where the judgment was affirmed, but one of the judges of that court being of the opinion that the decision was in conflict with the law as declared by this court in *Garrett v. Wagner*, 125 Mo. 450, 28 S. W. 762, and by the St. Louis court of appeals in *Weinrich v. Koelling*, 21 Mo. App. 133, the cause was transferred to this court.

Defendant's assignment of errors cover three points:

1. That the plaintiff having failed to have the value of the mules assessed in the replevin suit is precluded now from recovering their value in a suit for conversion.

2. That the court erred in including in the assessment of plaintiff's damages an item of twenty-five dollars expenses he incurred in the former suit.

3. That the court erred in refusing to allow the defendant to offset his counterclaim against the plaintiff's demand.

After the judgment was rendered the plaintiff entered a remittitur as to the disputed item of twenty-five dollars; therefore that assignment is out of the case.

<sup>22</sup> 1. The result of the replevin suit was a judgment that the mules belonged to Caldwell, the plaintiff in this suit, and that he was entitled to the possession; the verdict should have gone further and assessed the value of the mules, and the judgment should have followed the verdict and have given Caldwell the choice to take the mules or their value: Rev. Stats. 1899, secs. 3921, 4473, 4474. But in point of fact the only thing adjudged was that they were Caldwell's mules.

Defendant Ryan now thinks that because the plaintiff acquiesced in the judgment as it was, he has no right to call him to account for the value of the mules wrongfully disposed of while the replevin suit was pending. The Kansas City court of appeals ruled that point against defendant and correctly so. The purpose of this statute was to settle in the one suit all questions that might arise out of the alleged unlawful taking or detention of the property. The assessment of the value was for the benefit of the party found to be entitled to the possession of the property, and the law gave him the right to elect which he would take—the property or its value. If his choice was the property, not its money value, and if the property was forthcoming to satisfy the judgment, the assessment would be of no consequence to him. His acquiescence in a judgment for the possession when there was no assessment of value would place him in the same condition that he would have been placed by his election to take the property instead of the assessed value if there had been an assessment. Defendant relies on *White v. Van Houten*, 51 Mo. 577, wherein the court said: "The law surely contemplated that when the case was prosecuted to final judgment, all questions of value, damages and costs should be disposed of in the same proceeding." And the court held that the plaintiff in that case could not in an action on the replevin bond recover damages for the detention of the property when none had been <sup>23</sup> assessed by the jury in the replevin suit. But there was a material difference between that replevin suit and the one we are now discussing; there, as here, the plaintiff had sued in replevin before a justice of the peace, had given bond, and the property had been delivered to him; on the trial the judgment was against him, but there was an assessment of the value of the property, but none of damages for detention, whereupon he delivered the property to the defendant and paid the costs. The subsequent suit was on the replevin bond to recover damages for detention, and it was held that the suit could not be maintained.

In the case at bar we hold that the judgment in the replevin suit was good as far as it went, that it established the right of Caldwell to the possession of the mules, and we further hold that Ryan's disposal of the mules while that suit was pending amounted to a conversion of them to his own use, and he was liable to the plaintiff for their value.

2. The defendant in his answer calls his demand a "setoff and counterclaim." There is a difference between a setoff

and a counterclaim; each is the creature of a separate statute: *McAdow v. Ross*, 53 Mo. 199. The law of counterclaim comes under the Code of Civil Procedure, but the statute of setoff was in our books long before the code was adopted (Rev. Stats. 1825, p. 738; Rev. Stats. 1835, p. 579), and is substantially now as it was in 1835: Rev. Stats. 1899, sec. 4487. A counterclaim and setoff are different in some respects though they bear close resemblance in some other features. But there is no occasion now to discuss the points of difference and those of resemblance between a counterclaim and a setoff, because in this case both parties and the trial court construed the defendant's answer as intended to plead a setoff, and that was doubtless correct. The defendant was insisting on having his debts, for which he already had two judgments, set off against <sup>24</sup> whatever judgment the plaintiff might obtain against him, while the plaintiff was insisting that the setoff should not be allowed because the judgment that he hoped to recover would, when recovered, be exempt from execution.

The plaintiff's reply to the defendant's answer—that is, so much of it as stated facts intended to make out a case of exemption from execution—was foreign to the office of pleadings. Pleadings relate to the cause of action, either to support or to defeat it; they have nothing to do with the enforcement of the judgment after it is obtained. The office of the petition is to state facts constituting the cause of action; the office of the answer, to deny the statements or to state other facts to avoid the cause of action, and the office of the reply is to deny the new matter in the answer or to state other facts which go to show that the plaintiff should not be precluded in his recovery by reason of the new facts stated in the answer. There is no place in the pleadings for the claim of exemption from execution, except, of course, where the cause of action or defense arises out of the exemption statute, as, for example, where the plaintiff's exempt property has been wrongfully seized, or where the attempt is to take from a defendant property which the statute of exemption allows him to hold. But where the plaintiff's cause of action is not based on an infringement of rights under the exemption statute, a plea that the judgment sought to be recovered should, when recovered, be adjudged as exempt from execution has no place in the office of pleading. That, however, was the plea in the plaintiff's reply in this case, and it was sustained by the trial court.

The plaintiff's sole contention, in reference to the setoff, in the trial court was that because he was the head of a family and had no other property he was entitled to hold as exempt from execution the money <sup>25</sup> that he was seeking to recover in this suit, and ergo, the defendant could not set off against it the amount he owed defendant. The court rightly held that the setoff could not be allowed, but erroneously based the holding on the plea of the statute of exemption. The ground on which the setoff should have been denied is that the defendant's claim is in contract—that is, in judgment—while the plaintiff's claim is in tort.

The statute relating to setoff is section 4487, Revised Statutes of 1899: "If any two or more persons are mutually indebted in any manner whatsoever, and one of them commence an action against the other, one debt may be set off against the other, although such debts are of a different nature."

Under this statute, when the parties are mutually indebted, one debt may be set off against the other, though they differ in character—that is, though the mutual debts may be simple contract, covenant or judgment—but the demands must come under the classification of debts, the parties must be "mutually indebted." A demand of damages for a tort is not a debt and is not embraced in the statute of setoff: *State v. Modrell*, 15 Mo. 421.

In the case just cited the court said: "There must be a debt on the part of the plaintiff, as well as on the part of the defendant, to authorize a setoff. The test given by Chief Justice Kent is, that the indebtedness for which the action is brought must be such that if the plaintiff were sued by the defendant upon the setoff claimed, he could claim his cause of action in that suit as a setoff: *Gordon v. Bowne*, 2 Johns. 150." Applying that test, if the defendant had sued the plaintiff on these two judgments, could the plaintiff have pleaded his claim of damages for the conversion of the mules as a setoff? The ruling in that case has been followed in other cases: *Johnson v. Jones*, 16 Mo. 494; <sup>26</sup> *Mahan v. Ross*, 18 Mo. 121; *Pratt v. Menkens*, 18 Mo. 158; *State v. Eldridge*, 65 Mo. 584.

The trial court in this case, therefore, was right in holding that the defendant could not set off the debt due him against the plaintiff's demand, and the court would have been justified in striking out the plea of setoff entirely, on the ground that a debt could not be set off against a demand for damages arising in a tort. And if the court had gone no further than to render judgment for the plaintiff for the value of



the mules in the face of the defendant's plea of setoff, the judgment could not be disturbed, because the presumption would be that the court so ruled on the ground that it was not a case of mutual indebtedness; therefore, not a case for setoff. If the court had stopped at that point it would have left the plaintiff with his judgment and the defendant with his, and each entitled to sue out execution. Then when the executions were in the hands of the sheriff, the rights of the parties would be adjusted as prescribed in sections 4496 and 4497, Revised Statutes of 1899. But the court did not stop there; it went on in its judgment to say that the plaintiff was a married man, head of a family, and entitled to claim the judgment in his favor as exempt by law. That would doubtless be construed by the sheriff as a direction to him that he was not to execute the writs in the manner prescribed in the two sections of the statute just quoted, but was to levy the plaintiff's execution on defendant's property, and leave the defendant without recourse for the debt due him, which would have been to violate the statute.

The plaintiff's proposition is that because he is the head of a family and would be entitled to hold the amount of this judgment, if he had it in hand, against any execution or attachment that might come against him, therefore, not having it in hand, he is entitled to levy it of defendant's goods, although he is justly indebted <sup>27</sup> to the defendant for a larger sum—he must have his debt and the defendant must go unsatisfied for what the plaintiff owes him. That is what the court decided, and it is in accordance with the decision of the Kansas City court of appeals in *Wagner v. J. H. North Furniture & C. Co.*, 63 Mo. App. 206, although there were circumstances in that case which would distinguish it from this case, if the right of setoff in this state now depended on the ancient equitable doctrine of setoff to be administered as it might seem right to the chancellor *ex aequo et bono*. But the right of setoff in Missouri is not given or withheld as the conscience of the chancellor in a given case may dictate; it is a positive legal right given by statute. The Kansas City court of appeals in the case above named relied chiefly on certain Indiana cases, the first of which, and which is referred to as the authority of the later cases on that subject in that state, is *Puett v. Beard*, 86 Ind. 172, 44 Am. Rep. 280. But in that case the Indiana court said: "The right to set off one judgment against another is purely equitable, and allowed only where good conscience requires it." And again on page 178, the court said: "The practice in a proceeding to

set off one judgment against another is not prescribed by any statute, nor is the right to order it done conferred upon the courts by any legislative enactment; but courts possess the authority, as they do many other powers, in virtue of their general equitable authority over officers and suitors, and as one of the inherent judicial powers which are necessary to the existence of a court." These quotations show the difference between the right of setoff in Indiana and that right in Missouri.

The Indiana court was right in saying that setoff was in the beginning a creature of equity jurisprudence, and that it was not known to the common law: Waterman on Setoff, 2d ed., pp. 18, 383. It is a doctrine so absolutely necessary to the administration <sup>as</sup> of justice that a court of equity could not fail to supply it when the common law omitted it. And if, as the Indiana court said, there was no statute in that state directing the practice in proceedings to set off one judgment against another, the jurisdiction to do so was inherent in the court exercising equity jurisdiction, or in a court of law administering justice according to the equitable principle. But in Missouri the right of setoff is given by statute and the procedure to enforce it is also prescribed by statute, and the courts have authority only to enforce the law as it is written. The following are our statutes on this subject:

"Sec. 4493. A setoff shall be pleaded in the manner provided by law, and if the amount of setoff be equal to the plaintiff's demand, the plaintiff shall recover nothing by his action; if it be less than the plaintiff's demand, he shall have judgment for the residue only.

"Sec. 4494. If there be found a balance due from the plaintiff to the defendant, judgment shall be rendered for the defendant for the amount thereof, together with costs."

If a plaintiff's cause of action and a defendant's setoff are in the character of mutual indebtedness, sections 4493 and 4494 prescribe how they shall be pleaded and how adjusted in the judgment of the court. But if, as in the case at bar, the claim of one of the parties is founded in tort and the other in contract, then the case is not one of mutual indebtedness and the setoff will not be allowed in the judgment. When, however, as in the case at bar, the plaintiff has reduced his claim to a judgment, then he may sue out execution on his judgment and the defendant may likewise have execution on his, and both executions coming into the hands of the sheriff, the statute prescribes in unequivocal

terms how the sheriff shall proceed to execute the writs. Section 4497 directs the sheriff, in such case, <sup>29</sup> how to proceed to set off one execution against the other, satisfying the smaller by applying the amount as far as it will go to the satisfaction of the larger, then levying the balance and indorsing the fact of setoff on both writs in his returns. Then section 4498, immediately following, specifies certain exceptions, and gives explicit directions that in certain cases set-off shall not be allowed. *Expressum facit cessare tacitum*, which a celebrated English writer of the eighteenth century has said may be freely translated: "Where a law-giver sets down plainly his whole meaning, we are prevented from making him mean what we please ourselves." Here the law-giver has plainly set down the general rule and has as plainly set down the exceptions. It could not have been intended by the legislature to clothe the sheriff with judicial power to adjust the rights of the parties on principles of equity; the statute lays down for him a plain executive duty to perform. If, in this case, the defendant had not attempted to plead his judgments as a setoff, but had waited until the plaintiff had sued out an execution on his judgment, and had then sued out executions on his own, the case would have been simplified.

When, in this case, the execution on the plaintiff's judgment against the defendant and the executions on the defendant's judgments against the plaintiff come into the sheriff's hands, that officer will find all the directions he needs in sections 4497 and 4498; he will have nothing to do with the statute of exemptions until he undertakes to levy the balance due defendant out of plaintiff's property; then, if the officer should undertake to seize property of plaintiff which is exempt from execution, the plaintiff may claim his exemption.

The right of a plaintiff to hold property exempt from execution does not impair the right of a defendant to set off a debt the plaintiff owes him against a debt he owes the plaintiff. The meaning of the statute of <sup>30</sup> setoff is that the defendant is not to be adjudged indebted to the plaintiff unless it be in a sum beyond the amount in which the plaintiff is found to be indebted to him and then the judgment goes only for the excess. That is not only what the statute expressly says but it is what common honesty dictates. To the extent that the plaintiff is indebted to the defendant there is nothing owing to him from the defendant; the defendant

has nothing in his hands belonging to the plaintiff either to be reached by execution or set apart to him as exempt.

The statute creating exemptions of personal property is found in the Revised Statutes only in the chapter on "Executions," and the directions for securing its benefit to the debtor are also found only in that chapter. It has been held by this court and the St. Louis court of appeals that a claim for exemption can arise only when the officer comes with the writ: *Garrett v. Wagner*, 125 Mo. 450, 28 S. W. 762; *Weinrich v. Koelling*, 21 Mo. App. 133.

If a court could ever be justified in holding that a plaintiff may seize and sell a defendant's property to pay a debt which the defendant owes the plaintiff, while at the same time the court finds that the plaintiff owes the defendant an equal or larger debt for which he can have no reciprocal satisfaction, it would be only when the General Assembly had so written the law in terms too plain for construction.

The statutes of exemption were conceived in mercy for the unfortunate debtor, and are to be construed in that spirit, but they are not to be construed to give him what in common honesty does not belong to him. A debtor has no right to hold as exempt anything that is not his own; that is not his own of which he neither has possession nor the right now or in the future to reduce to possession. The statute of exemption was made to cover as with a shield what the unfortunate <sup>31</sup> debtor has in his possession when the officer comes with a writ to take it from him; it was not made to arm him as with a sword to levy contribution on his neighbor.

We hold that the right of setoff is not subordinate to the right of exemption from execution, and therefore, to the extent that the following cases hold the contrary, they are hereby overruled, viz.: *Wagner v. J. H. North Furniture & C. Co.*, 63 Mo. App. 206; *Lewis v. Gill*, 76 Mo. App. 504; *State v. Hudson*, 86 Mo. App. 501; *Bowen v. City of Holden*, 95 Mo. App. 1, 75 S. W. 686.

The judgment of the circuit court is reversed and the cause remanded to that court, with directions to dismiss without prejudice so much of the defendant's answer as affirmatively pleads his two judgments as setoffs, or suffer him to dismiss it, and to render judgment for the plaintiff for one hundred and sixty-four dollars and seventy cents, being what the court found to be the value of the mules, one hundred and fifty dollars, plus fourteen dollars and seventy cents, interest up to the date of that finding, and the costs in that court.

Gantt, C. J., Burgess, Fox and Woodson JJ., concur.

**Justices Lamm and Graves Dissented** from the majority of the justices, and the former delivered an opinion concurred in by the latter in which he in part said: "I agree to the first paragraph of my brother's opinion and to so much of the second paragraph as holds that the two judgments Ryan held against Caldwell could not be pleaded by answer as a setoff against Caldwell's claim for unliquidated damages sounding in tort for the wrongful conversion of his two mules. But in so far as the opinion in terms and by name overrules *Wagner v. J. H. North Furniture Co.*, 63 Mo. App. 206, *Lewis v. Gill*, 76 Mo. App. 504, *State v. Hudson*, 86 Mo. App. 501, *Bowen v. City of Holden*, 95 Mo. App. 1, 75 S. W. 686; and in so far as it, in effect, holds that the letter of the setoff statute overrides the spirit of the exemption statute, and in so far as it is warrant of authority to the sheriff to set off Caldwell's smaller judgment against Ryan's two larger judgments when mutual executions come into his hands, I dissent." In support of his conclusion Justice Lamm cited and reviewed the following cases: *Wilson v. McElroy*, 32 Pa. 82; *Thall's Appeal*, 119 Pa. 425, 13 Atl. 466; *Beckman v. Manlove*, 18 Cal. 388; *Duff v. Wells*, 7 Heisk. 17; *Collier v. Murphy*, 90 Tenn. 300, 25 Am. St. Rep. 698, 16 S. W. 465; *Collett v. Jones*, 7 B. Mon. 586; *Ex parte Hunt*, 62 Ala. 1; *Treat v. Wilson*, 65 Kan. 729, 70 Pac. 893; *Reynolds v. Haines*, 83 Iowa, 342, 32 Am. St. Rep. 311, 49 N. W. 851, 13 L. R. A. 719; *Atkinson v. Pittman*, 47 Ark. 464, 2 S. W. 114; *Curlee v. Thomas*, 74 N. C. 51; *Elder v. Frevert*, 18 Nev. 446, 5 Pac. 69; *Deering & Co. v. Buffner*, 32 Neb. 845, 29 Am. St. Rep. 473, 49 N. W. 771; *Millton v. Laurer*, 89 Iowa, 322, 48 Am. St. Rep. 385, 56 N. W. 533; *Stagg's Heirs v. Piland*, 31 Tex. Civ. App. 245, 71 S. W. 762; *Craddock v. Goodwin*, 54 Tex. 578; *Bauer v. Teasdale*, 25 Mo. App. 25; *Wait v. Atchinson etc. R. R. Co.*, 204 Mo. 491, 103 S. W. 66; *Mutual R. Life Ins. Co. v. Roth*, 122 Fed. 853, 59 C. C. A. 63.

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*Setoff as Matter of Right did not Exist* at common law, but it is a mere creature of statute, which cannot be construed to meet cases not specially included in its terms: *Drennen v. Gilmore*, 132 Ala. 246, 90 Am. St. Rep. 902.

*Statutes Giving Defendants a Right to Assert Counterclaims* should be liberally construed: *McHard v. Williams*, 8 S. D. 381, 59 Am. St. Rep. 766; *First Nat. Bank of Snohomish v. Parker*, 28 Wash. 234, 92 Am. St. Rep. 828. Compare, however, *Bradley v. Smith's Sons*, 98 Mich. 449, 39 Am. St. Rep. 565.

*The Right to a Setoff in Cases Where an Exemption Statute is involved* will be found discussed in *Collier v. Murphy*, 90 Tenn. 300, 25 Am. St. Rep. 698; *Millington v. Laurer*, 89 Iowa, 322, 48 Am. St. Rep. 385.

*The Setting Off of One Judgment Against Another* is the subject of a note to *Coonan v. Loewenthal*, 109 Am. St. Rep. 137.

*Exemption Statutes are Construed Liberally* with a view to the protection of the debtors: See the note to *Tabb v. Mallette*, 102 Am. St. Rep. 102.

**TABOR v. ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.**

[210 Mo. 385, 109 S. W. 764.]

**MASTER AND SERVANT—Failure of Trainman to Slacken Speed at Switch.**—When a railway conductor and engineer have been notified that a crippled car is on the main track at a certain station, and that they must pass this point on a switch or passing track, it is negligence for them to run the train into an open switch at that station at a speed of fifty miles an hour, in consequence of which the train is wrecked and a master-mechanic of the company thereon is killed. (p. 734.)

**FELLOW-SERVANTS—Conductor, Engineer and Master-mechanic.**—A master-mechanic in the employ of a railroad company is not, while riding on an engine for the purpose of discovering defects therein, a fellow-servant with the conductor and engineer. Therefore, if he is killed through their negligence in failing to slow down as they approach an open switch, an action therefor lies against the railroad company. (pp. 738, 739.)

Benecke & Benecke and Kinley & Kinley, for the appellants.

J. A. Collet and H. J. West, for the respondents.

387 **GANTT, J.** This is an action commenced in the circuit court of Jefferson county July 19, 1904, for five thousand dollars damages, on account of the alleged negligent killing of plaintiff's husband by the defendant. As the recovery in the circuit court was on the first count, it will suffice to state that much of the petition.

It is alleged, first, that the defendant is, and was at all times mentioned, a railway corporation organized under the laws of this state, and owned and operated a line of steam railroad in this state. "Plaintiff states that on the thirtieth day of April, 1904, she was the lawful wife of A. E. Tabor, and that at said time the said A. E. Tabor was employed by the defendant as master-mechanic, and that as such master-mechanic it was the duty of said A. E. Tabor to pass over defendant's railroad and to ride on its engines and trains. That 388 on the day aforesaid said A. E. Tabor, acting in the line of his duties, was riding over defendant's road on an engine which was in charge of the defendant's servants and agents, and attached to one of defendant's passenger trains, and that the agents and servants of defendant in charge of the defendant's said engine and train acting in the line of their duties negligently and carelessly ran said engine and train at a high rate of speed into an open switch on the line of defendant's road near Wicks station, whereby

said engine and train were wrecked and thrown from the track, and that said A. E. Tabor sustained injuries thereby from which he died on the day aforesaid, and without any negligence on his part contributing thereto. Plaintiff states that she is the widow of said A. E. Tabor, deceased, and her said husband was killed because of the negligence of the defendant's agents and servants aforesaid. That plaintiff was dependent on her deceased husband for her support, and that she has suffered great pecuniary loss and has been otherwise greatly injured by the death of her said husband to her damage in the sum of five thousand dollars, for which she prays judgment with costs of suit."

Defendant filed an answer which consists, first, of a general denial, except that the defendant was a railroad corporation as alleged; second, a plea of contributory negligence on the part of the deceased. The reply was a denial of the new matter alleged.

The case was tried at the January term, 1905, of the Jefferson county circuit court, and resulted in a verdict for the plaintiff for five thousand dollars. On the trial the following facts appeared in evidence:

The plaintiff is the widow of A. E. Tabor, and at the time of his death Mr. Tabor was the master-mechanic of the defendant on the Missouri division of the St. Louis, Iron Mountain and Southern Railway, with his headquarters at De Soto, Missouri, and had been <sup>389</sup> so employed for about eight months. On the morning of the 30th of April, 1904, A. E. Tabor got on the engine that was pulling train No. 18 on defendant's road at De Soto, stating to his wife that something was the matter with the engine and he was going to ride on it. Mrs. Tabor also got on the same train in one of the passenger-coaches. J. C. Austin was the conductor in charge of said train No. 18, which was on its way north that morning to St. Louis. He testified that his train left De Soto about 7 o'clock on the morning of April 30th; that John Bailey was the engineer in charge of the train. He received the following order at De Soto:

"De Soto, 4—30, 1904.

"Train 31,

Order No. 4.

"To all northbound passenger trains: There is a car broken down on main track between passing track switches at Wicks. All trains will use Wicks passing track for main line. Run carefully passing Meramec spur.

"J. W. D."

The conductor testified that he delivered a copy of this order to the engineer and compared it with his clearance card, and the engineer read the order to him; that this all occurred while they were standing at the scale-house at De Soto and while the engine was standing at that point; that thirty or forty seconds after giving this order to the engineer the train pulled out. Wicks passing track is about twenty-three miles north of De Soto and the train was running between fifty and sixty miles an hour when it reached this passing track, and the engine, two coaches and three sleepers were derailed. The conductor testified that when near the switch he got up to go to the platform to signal the engineer, when the train ran into the switch and <sup>390</sup> was derailed; that the switch was open—that is, thrown for the side track or passing track—and that this was the track which they had the order to go through. The conductor testified that Mr. Tabor, the deceased, was standing by him at the time he read the order to the engineer. He further stated that the train had lost time between Piedmont and Bismarck, because there was something the matter with the engine—it would not make steam. He testified, further, that a person on the right side of the engine going north could see the south end of the Wicks switch for about three-fourths of a mile before reaching it; that the engineer sat on the right-hand side of the cab and the fireman on the left. The witness had no conversation with Mr. Tabor that morning. The conductor also testified that the master-mechanic had nothing to do with the giving of orders and directing the running of the train; that the directions in regard to running the train were received from the train-master, J. W. Daniels. That the master-mechanic, Mr. Tabor, had nothing whatever to do with giving directions or giving the order in question; that the engineer received his orders from the same source that the conductor received his, and was not under the control of the master-mechanic, as to the matter of running trains. Witness did not know until he met Mr. Tabor that morning at De Soto that he was going to get on the engine. Tabor asked witness what was the matter with Bailey, and what was the reason he was not making time, and why he asked for a helper over Hogan Mountain, and then said: "I am going to ride that engine, and I am going to find out what is the trouble." The master-mechanic is the boss of the engineer as to the machinery part of the engine. Witness further stated that it was broad-day light when his train left De Soto for St. Louis that morning.



Charles A. Castile testified that he was section foreman in charge of the Wicks portion of the railroad, <sup>391</sup> and was working on the defective car on the main track north of the Wicks switch; that the switch at the time of the accident was in good condition, and had been opened for the purpose of allowing trains to use the passing track instead of the main track; that the switch stand could be seen from the south about one-half mile; that witness got to the wreck about ten minutes after it occurred and found several cars down in the dump. In his opinion, the wreck was caused by running too fast into the open switch.

Albert Gumpert testified that he was fireman that morning on train No. 18, going north, having taken the train at Poplar Bluff to run that day to St. Louis; that the engine was not steaming good, and that some time was lost on the road between Poplar Bluff and De Soto; that Tabor got on the engine at De Soto, and took his seat on the fireman's side—that is, the left side of the cab. He did not hear anything said between Tabor and Bailey between De Soto and Riverside. That they passed a freight train at Riverside and Mr. Tabor looked over to see who was running the engine on that train; after that he heard Mr. Tabor remark that the engine pounded pretty hard, but that if the wedges were set up and brasses filed it would be all right. This was said about six miles south of the Wicks switch. That as the train passed Sulphur Springs witness remarked to Tabor that he could not fire the engine properly, and Tabor said: "When we get to St. Louis I will have them [the grates] replaced." That when the engine struck the switch it was going about fifty miles an hour and witness was putting in coal—had the shovel in his hand; Tabor looked at Bailey and then at him, and at that moment witness started to jump but went over with the engine. Bailey was running the engine at the time.

Charles Montgomery testified for the plaintiff that he was a traveling engineer for the defendant and had <sup>392</sup> been in the railroad service about twenty-five years, and knew Mr. A. E. Tabor during the time he was master-mechanic at De Soto, about eight months. Mr. Tabor had full charge of the mechanical and car departments—that is, of all the machinery, consisting of locomotives and such as that—in the division to which he was assigned. His office was adjacent to the repair shops at De Soto. The master-mechanic is under the superintendent of motive power. He testified that when an engine goes on to the road—that is, when the train is

made up and started out on the road—the conductor and the engineer get their directions in regard to the moving of their train from the train-dispatcher. The master-mechanic has no control whatever over the train-dispatcher or the train-dispatcher over the master-mechanic. The master-mechanic is supposed to see that his engines are in good shape and that they are in working order, and in order to do this he rides on the engine and train to watch its work. When an engine gets out of order, it is the duty of the engineer to report it defective to the roundhouse foreman at the terminal. The roundhouse foreman is under the master-mechanic. Witness had seen Mr. Tabor ride over the road on engines sometimes about three times a week to see how they were operating; when he did so he had nothing to do with the management of the train—that was controlled by the conductor. In such a case the master-mechanic had no control over the engineer so far as the movement of the train was concerned. The master-mechanic has the right to go on an engine to see how it is working, whether there is anything wrong with it or not, but when he is on the engine, he had no control over the running of the train—that was governed by the orders given by the train-dispatcher.

E. D. Mercer also testified that he was a traveling engineer and had been in the railroad service for forty-two <sup>393</sup> years; had been connected with the master-mechanic's department for thirty-six years. He corroborated Mr. Montgomery in saying that the master-mechanic has nothing whatever to do with the running of the train; that is controlled by the superintendent and train-master, who give their orders to the conductor.

Rules Nos. 408, 409 and 436 of the defendant company were read in evidence. These rules in substance place the engineer in all matters pertaining to the movement of trains or the discipline of the service under the authority of the superintendent and division superintendent, and he is required to obey the orders of the train-master. In all matters relating to mechanical questions, they are under the authority of the master-mechanic.

At the close of the plaintiff's evidence the defendant requested the court to sustain a demurrer to the evidence, which the court refused to do. Thereupon the defendant called J. W. Hopkins, who testified that he was the chief dispatcher of the defendant at De Soto, Missouri, and the territory under his jurisdiction reached from St. Louis to Piedmont, and from Bismarck to Belmont. He testified that

when a master-mechanic goes on an engine to investigate it, he has authority over the engineer, and if he discovers that the speed is too great, he has the right to tell the engineer about it, or if he was running at an excessive rate, he had the right to say to the engineer, "Reduce your speed." That it was the custom of Mr. Tabor, the master-mechanic, to ride on the engine over the road at his pleasure, and this was known to the division superintendent. He testified, further, that the engineer controlled the speed of the train and that there was no speed limit to a passenger train, the engineer being the judge of the speed; that sixty miles an hour, if the track was in good condition, would not be considered <sup>394</sup> an excessive rate of speed. He stated that the master-mechanic's department was entirely separate from the train-master's department, and that when the work that the master-mechanic had to do with the engine ended, the dispatcher's department began. That the master-mechanic had nothing to do with directing the movements of a train on the road—not even if he was on the train.

Ed. Metz testified that he was car-inspector for the defendant company, and learned on the morning of April 30, 1904, that there was a crippled car on the main line near Wicks, and that a slow order had been issued in consequence. He heard that order read by conductor Austin to engineer Bailey, Mr. Tabor standing beside them at the time. There was nothing to prevent Tabor hearing the order read.

Plaintiff in rebuttal read rule 332 as follows: "332. Passenger conductors should never lose sight of the fact that their duties are of the most delicate and responsible character. That they have entire charge of the trains to which they may be assigned, and of all persons employed thereon, and will be held responsible, when on the road, for the proper care and comfort of the passengers, for the collection of tickets and fares, and for the safe and prompt movement of their trains; and from the time they go on duty until the train is set off the main track at a terminal station, unless regularly relieved, they will be responsible for the protection of their trains, and for the conduct of the trainmen."

"Rule 334. They must be familiar with the duties of the enginemen, firemen, baggagemen and brakemen, enforce the rules applicable to them upon their trains, and report any insubordination, neglect of duty or misconduct."

The defendant at the close of all of the evidence requested the court to instruct the jury that the plaintiff <sup>395</sup> was not entitled to recover, which instruction the court refused and

the defendant excepted. The court thereupon instructed the jury at length.

1. It is not contended that the two employes, to wit, the conductor and the engineer, who were charged with the safety of the passengers and the other employes on the train of defendant, were observing due and proper care when they ran the train at the rate of fifty or sixty miles an hour into the open switch at Wicks station. Both the conductor and engineer were warned by the order of the train-dispatcher at De Soto that there was a crippled car on the main track at Wicks, and that they must pass this point on a switch or passing track, and yet the whole evidence discloses that the train was moving at least fifty miles an hour when it struck the south point of the switch. The conductor testified that his order required him to go slower at this place, and he had omitted any signal to the engineer to slow up, but was just starting to do so when the derailment of the train occurred, and the engineer had the same order, knew the conditions ahead of him, and it was broad-day light and the open switch in plain view for from a half to three-quarters of a mile before he reached it, and yet he did not slacken his train, but ran it at a rate of fifty to sixty miles an hour into the open switch, in consequence of which the entire train was wrecked and the master-mechanic, Tabor, who was in the engine cab to discover what the defects of the engine were, was killed. This appeal is bottomed upon the proposition that the master-mechanic was a fellow-servant with the conductor and engineer, whose negligence caused his death, and if so, that the act of 1897 gives no right of recovery to his widow.

It was abundantly shown that it was the right and duty of the master-mechanic to ride on the engine <sup>396</sup> to observe its mechanical working, and on this occasion he had been advised the engine was not working right before it reached De Soto from the south, and he expressed his intention of going on this particular engine to discover what was the matter, and in so doing he was strictly within the line of his duty as master-mechanic in riding thereon from De Soto to St. Louis. The fireman told him that he could not fire the engine properly because it had a bad set of grates, and Mr. Tabor replied he would have them replaced when they reached St. Louis, and also said, "If her wedges were set up and her brasses filed, he thought she would be all right." It was also established by the printed rules of the defendant, as well as the oral evidence of the conductor and the other en-

gineers, that while the master-mechanic, Tabor, was the superior of the engineer as to any mechanical defect or change or treatment of the engine, he had absolutely no authority over the engineer as to the movement of his train, but that when a train is started on the road, the engineer and conductor are subject to the orders of the train-master alone, and not to the master-mechanic, even though he is on the engine with him. While the insistence here is that the deceased master-mechanic was a fellow-servant of the engineer, the testimony offered by defendant tended to prove that he was the superior of the engineer, and that the latter was subject to his orders even as to the movement of the train, and the evidence for the plaintiff was to the effect that as to the movement of the train the master-mechanic had no authority whatever, and was the superior of the engineer only in the sense that the engineer would be bound by the master-mechanic's judgment as to any defect in the machinery of the engine and what should be done to remove the same, and he was on the engine solely to observe its working and to discover, if he could, why it did not make steam properly and why the engineer <sup>387</sup> could not make time. They were not in any sense, from either point of view, fellow-servants of the same grade engaged in a common service, the engineer being, according to defendant's contention, an inferior in all respects, and, according to plaintiff's, the master-mechanic was a superior servant as to the mechanism of the engine and its need of repairs, if any, and as to the movement of the train, with no function whatever to perform and no authority to exercise over the engineer.

If this were a case in which the engineer had been injured or lost his life by reason of the defendant's negligence in not furnishing him a reasonably safe engine to run, and it had appeared, as it does here, that the defendant had employed the master-mechanic to see that the engine was a reasonably safe one when sent out on the road, no doubt can exist under the decisions of this court that the master-mechanic would be held to be the vice-principal of the defendant, and not a fellow-servant. Judge Thompson, in his *Commentaries on the Law of Negligence*, volume 4, section 4976, says: "Is the master-machinist of a railway company a fellow-servant with a fireman or brakeman? The better opinion is, that he is not. If this is not so, the rule which charges the master with responsibility to the servant for defective machinery falls wholly to the ground in the case of corporations; for, since a corporation can act only through

its agents, if the agent or servant who has charge of the construction and repairs of its machinery is a fellow-servant with him who is employed in running it, it follows that corporations will be exempt, in all cases, from the obligation of furnishing their servants with safe machinery which attaches to other proprietors. Such a servant, then, is fairly deemed a vice-principal of the master, and his negligence is the master's negligence to all intents and purposes, the same as though the master was present, <sup>398</sup> performing his duties in person. Another way of stating what seems to be the correct rule is, that the mechanics having charge of the construction and repairs of the master's machinery are not fellow-servants engaged in the same common employment with the servants who are engaged in operating it": *Tabler v. Hannibal & S. J. R. R. Co.*, 93 Mo. 79, 5 S. W. 810; *Moore v. Wabash St. L. & P. R. R. Co.*, 85 Mo. 588; *Lewis v. St. Louis & I. U. R. R. Co.*, 59 Mo. 495, 21 Am. Rep. 385; *Brothers v. Cartter*, 52 Mo. 372, 14 Am. Rep. 424; *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240, 14 Am. Rep. 598; *Cooper v. Pittsburgh, C. etc. R. R. Co.*, 24 W. Va. 37; *Shanney v. Andros-coggin Mills*, 66 Me. 420; *Cumberland & P. R. R. Co. v. State*, 45 Md. 229; *Mullan v. Philadelphia & S. Steamship Co.*, 78 Pa. 25; *Houston & T. C. R. R. Co. v. Dunham*, 49 Tex. 181; *Brabbitts v. Chicago & N. W. R. R. Co.*, 38 Wis. 298.

But in this case the disaster to the train in no manner resulted from any defect in the engine or any want of care on the part of the master-mechanic, but was attributable altogether to the negligence of the conductor and engineer in failing to slow down as they approached the open switch. On this point the conductor testified as follows:

"Q. It was your duty to signal the engineer? A. Yes, sir; I had started to walk to the end of the car.

"Q. You were bearing in mind your orders? A. Yes, sir.

"Q. You had started to signal when the crash came? A. Yes, sir."

Rule 332 promulgated by defendant for the government of its employes reads: "Passenger conductors should never lose sight of the fact that their duties are of the most delicate and responsible character. That they have entire charge of the trains to which they may be assigned and of all persons employed thereon and will be held responsible, when on the road, for the proper care and comfort of the passengers, for the collection of tickets and fares, and for the safe and prompt movement of their trains; and from the time they go

on duty until the train is set off the main track at a terminal station, unless regularly relieved, they will be held responsible <sup>399</sup> for the protection of their trains and for the conduct of the trainmen." Judge Thompson, in his Commentaries on the Law of Negligence, volume 4, section 5030, states the relation of the conductor to the master and the other trainmen in these words: "The conductor of a railway train is the master of the train, in the same sense in which the captain of a ship at sea is master of the ship. With respect to those measures which are necessary for the safety of the persons on board the train, he wields the whole power of the railway company, except in so far as those powers have been specially committed to the engineer or to other servants. The better view, therefore, ascribes to him the status and authority of a vice-principal of the railway company, so as to render it liable for his negligence resulting in injury to its subordinate servants upon the same train." Section 2874, Revised Statutes 1899, in full force and effect when this action accrued, provides: "That all persons engaged in the service of any such railroad corporation doing business in this state, who are intrusted by any such corporation with the authority of superintendence, control or command of other persons in the employ or service of such corporation, or with the authority to direct any other servant in the performance of any duty of such servant, or with the duty of inspection or other duty owing by the master to the servant, are vice-principals of such corporation, and are not fellow-servants with such employés." When rule 332 of the defendant is read in the light of this section, it seems too clear for cavil or dispute that the conductor of train 18 was not a fellow-servant with the master-mechanic, but had been intrusted by the defendant with the control and entire charge of the train and of all persons employed thereon, and pro hac vice he was vice-principal over the master-mechanic as well as all the trainmen. The evidence clearly discloses that the master-mechanic <sup>400</sup> had nothing to do with the movement of the train and no right to interfere with the engineer as to its speed. Moreover, his duties did not bring him in contact with the engineer or conductor except casually when observing the mechanical working of the engine. Their duties were wholly dissimilar. The master-mechanic was employed and engaged in the construction and repair department of the defendant company, whereas the conductor and engineer were engaged in the operating department, the moving of the trains

under the direction and control of the train-dispatcher, to whom they were required to look for their orders, and for their negligence in the running, conducting and managing said train the defendant was and is responsible to the widow of the deceased master-mechanic, Tabor, under section 2864, Revised Statutes of 1899.

We are aware that the decision of the supreme court of the United States in *Chicago etc. R. R. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184, 28 L. ed. 787, was modified by the subsequent ruling in *Baltimore etc. R. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. Rep. 914, 37 L. ed. 772, in which it was held that an engineer and fireman were fellow-servants when in charge of an engine running alone, although a rule of the company provided that, "Whenever a train or engine is run without a conductor, the engineman thereof will be regarded as conductor and will act accordingly." But Mr. Justice Brewer, after stating the real ground upon which the *Ross* case stood, said: "So, oftentimes, there is in the affairs of such corporation what may be called a manufacturing or repair department, and another strictly operating department; these two departments are, in their relation to each other, as distinct and separate as though the work of each was carried on by a separate corporation." That language is appropriate to the conditions before us. Here the whole testimony construed demonstrates that <sup>401</sup> Mr. Tabor, as master-mechanic, was the chief of the repair department of defendant at De Soto, with no connection with the operating department save to provide it proper engines and cars for the movement of its trains, and, on the other hand, the train-dispatcher was the head of the department for the movement of trains, and the conductors and engineers were subject to his orders only, and he stood as vice-principal to them. So that while the *Baugh* case does restrict the general language of the *Ross* case, it recognizes that the members of absolutely distinct branches of the service cannot, with reason or justice, be said to be fellow-servants in a common employment. In *Northern P. R. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. Rep. 590, 29 L. ed. 755, Mr. Justice Field, speaking of the distinction between the providing of safe machinery and the business of handling and moving it, said: "The two kinds of business are as distinct as the making and repairing of a carriage is from the running of it." In *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240, it was said: "The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on,



to be regarded as fellow-servants of those who are engaged in operating it. They are charged with a master's duty to his servant. They are employed in distinct and separate departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each as the convenience of the employer may require."

Accordingly, in our opinion, the circuit court committed no error in overruling the demurrer to the evidence, either at the close of the plaintiff's case or at the end of all the testimony, and in refusing to hold that the deceased, Tabor, was a fellow-servant with the conductor or engineer, and it follows that the contention that the widow's right to sue depended upon the <sup>402</sup> act of 1897, giving a right of action to a fellow-servant only and not to his widow, is not in the case.

The judgment of the circuit court is affirmed.

All concur.

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*The Question Whether Employés of a Railroad Company on the same train are fellow-servants is discussed in the note to Mast v. Kern, 75 Am. St. Rep. 608. It has been affirmed that the conductor on a passenger train and the brakeman on a freight train are fellow-servants: Louisville etc. R. R. Co. v. Dillard, 114 Tenn. 240, 108 Am. St. Rep. 894. But a car inspector and a freight-car conductor are not fellow-servants: McDonald v. Michigan Central R. R. Co., 132 Mich. 372, 102 Am. St. Rep. 426. And a locomotive engineer on the main track is not a fellow-servant with employés intrusted with the duty of preventing loose cars from escaping from the side track to the main track: Jones v. Kansas City etc. R. R. Co., 178 Mo. 528, 101 Am. St. Rep. 434.*

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## TURNER v. EDMONSTON.

[210 Mo. 411, 109 S. W. 33.]

**WRIT OF ERROR—Whether a New Suit.**—The suing out of a writ of error is practically the commencement of a new action. (p. 742.)

**LIS PENDENS—Purchaser Bound by Judgment.**—A lis pendens, prosecuted in good faith, is notice to any and all purchasers so as to affect and bind by the decree any interest in the property which they may acquire by reason of their purchase. (p. 743.)

**LIS PENDENS—Purchaser from Attorney Pending Writ of Error.**—Where a judgment is made a lien on the land of the defendant, and the plaintiff purchases at the execution sale thereof and then conveys to his attorney who tried the case, and thereafter the defendant sues out a writ of error, and while the writ is pending in the supreme court the attorney conveys the land to his brother, the

latter is a *lis pendens* purchaser, and takes subject to the result of the suit, although at the time the attorney purchased he no longer represented the plaintiff. (p. 743.)

**QUITCLAIM DEED.**—The Grantor Under a Quitclaim Deed occupies the same position that his grantor did. (p. 744.)

**VENDOR AND VENDEE.**—Where a Deed Under Which One Claims title recites facts which, if followed up, would give him actual notice of trust relations, he cannot claim to be a purchaser without notice. (p. 744.)

**VENDOR AND VENDEE.**—Notice of Trust Relations.—One who purchases trust property with notice of such facts as are sufficient to put him on inquiry holds the property in trust for the beneficiaries, who may follow the property into his hands. (p. 744.)

**ESTOPPEL IN PAIS.**—Necessity of Pleading.—An estoppel in pais, in order to be available, must be pleaded. (p. 749.)

**LACHES.**—Necessity of Pleading.—Laches relied upon as an estoppel must be pleaded in order to be available. (p. 749.)

F. R. Jesse and Robertson & Robertson, for the appellants.

P. H. Cullen and Allen Stallings, for the respondents.

**416** **BURGESS, J.** This is an action of ejectment for the possession of lot 31 of Mrs. Sparks' Southern Addition to the city of Mexico, Missouri, the purpose of the suit being to enforce the restitution of said property which was sold under execution issued upon a judgment rendered in the case of *Roden v. Helm et al.* which judgment was, on writ of error, reversed in division two of this court, the case being reported in 192 Mo. 71.

The petition is in the usual form; the answer, a general denial; ouster laid March —, 1904; damages claimed, six hundred dollars.

The cause was tried by the court sitting as a jury, the trial resulting in a judgment for the defendants, **417** from which judgment, after an unavailing motion for a new trial, plaintiffs appeal.

The facts briefly stated, are as follows: On March 21, 1899, Thomas F. Roden obtained a judgment against Thomas Helm, Anna S. Helm, Elizabeth Helm (now Mrs. Matthews) and A. G. Turner for fourteen hundred and ninety-five dollars and ten cents, and the same was declared a lien upon the lot in controversy and some farm land in which the said Helms had an interest, the said real estate having been deeded to said A. G. Turner, as trustee for their use and benefit. The sale, under execution, was made on the sixteenth day of June, 1899, and Thomas F. Roden, the judgment creditor, became the purchaser of said lands. Afterward, on the twenty-ninth day of July, 1899, Thomas Roden, by quitclaim deed, conveyed said lands to his attorney, W. A. Edmonston,

brother of the defendant herein, the consideration being seventeen hundred and eighty dollars. Thereafter, on August 11, 1899, W. A. Edmonston instituted two suits in ejectment for the possession of the lands described in said judgment, and obtained judgment in each case, and on March 17, 1904, said cases coming on for hearing in the supreme court, division No. 1, the judgments of the lower court were affirmed, the causes being styled Edmonston v. Carter et al. and Edmonston v. Helm et al., 180 Mo. 515.

On August 28, 1900, the defendants in the case of Roden v. Helm et al. sued out a writ of error, but gave no bond nor asked for nor obtained a supersedeas in said case. Due notice of the issuing of said writ was served upon W. A. Edmonston, attorney for Roden, and holder of said quitclaim deed from Roden. The case was submitted in the supreme court on October 18, 1903, and afterward, on March 23, 1904, the judgment of the lower court was affirmed. Immediately thereafter the plaintiffs in error filed motion for a rehearing, which motion was sustained and a rehearing granted on the tenth day of May, 1904. The case <sup>418</sup> was again set down for argument in division No. 2 of this court on October 14, 1905, and thereafter, on the twenty-fifth day of October, 1905, a decision was rendered, reversing the judgment of the court below and remanding the cause.

By deed, dated March 21, 1904, and recorded July 22, 1904, said W. A. Edmonston conveyed said lands to his brother, J. O. Edmonston, the defendant herein. W. A. Edmonston was the attorney of record of Thomas Roden from the inception of the litigation, and attended the sale under execution and did the bidding for Roden. By reason of his connection with said litigation and his investigation of the records prior to the trial he became acquainted with the facts concerning the title to said lands, and with the origin and nature of the trust fund and of the deeds under which the Helms held title by their trustee, A. G. Turner.

In addition to the notice, as hereinafter pointed out, which J. O. Edmonston had of the pendency of the case of Roden v. Helm et al. in the supreme court, this deed of his brother to him contains the following recitals:

"All lot thirty-one (31) in Mrs. Sparks' Addition to the city of Mexico, being the same lot of realty conveyed by J. B. Miller and Maggie Miller to A. G. Turner, trustee for Thomas Helm and Anna Helm, his wife, and children of said Thomas and Anna Helm, which deed is recorded in Audrain county, Missouri, and the same lot of realty conveyed by M. N. Nelson,

sheriff of Audrain county, Missouri, by Harry Atchison, deputy sheriff, to Thomas F. Roden, and recorded in Audrain county, Missouri, July 13, 1899, in Book 53, page 542, and the same lot or realty as conveyed by Thomas F. Roden and Maggie Roden, his wife, to W. A. Edmonston by deed on July 29, 1899, which deed is recorded in Audrain county, Missouri."

When the decisions in *Edmonston v. Carter et al.* <sup>419</sup> and *Edmonston v. Helm et al.* were rendered in Division No. 1 of this court at the March term, 1904, W. A. Edmonston was in the state of Colorado, and J. O. Edmonston went with the sheriff and took possession of these lands as the agent of his absent brother, W. A. Edmonston. It appears also that J. O. Edmonston carried on a correspondence with his brother in Colorado with a view to purchasing these lands from him, and called at the office of P. H. Cullen, attorney for W. A. Edmonston, and there either read or had read to him the decisions in the *Edmonston* cases alluded to.

The vital question in this case is whether J. O. Edmonston was a *lis pendens* purchaser of the land from his brother, W. A. Edmonston, or, in other words, did he purchase the property with knowledge of the fact that the case of *Roden v. Helm et al.* was pending in the supreme court at the time of the purchase?

It clearly appears from the record that at the time the defendant purchased the land from his brother, W. A. Edmonston, on the twenty-first day of March, 1904, the case of *Roden v. Helm et al.* was pending in the supreme court; and it is immaterial in this case that it was there upon writ of error. The general rule, however, is that the suing out of a writ of error is practically the commencement of a new action, and such it is regarded in this state: *Macklin v. Allenberg*, 100 Mo. 337, 13 S. W. 350. See, also, 2 *Tidd's Practice*, 3 Am. ed., 1141; *Ripley v. Morris*, 7 Ill. 381; *Allen v. Mayor*, etc., 9 Ga. 286; *Robinson v. Magarity*, 28 Ill. 423; *Eldridge v. Walker*, 80 Ill. 270; *International Bank v. Jenkins*, 104 Ill. 143; *Pierce v. Stinde*, 11 Mo. App. 364.

Treating the suing out of the writ of error on the thirty first day of July, 1904, as the beginning of a new suit, notice thereof had been served upon W. A. Edmonston, attorney for Roden, and he appeared in the case <sup>420</sup> when it was first heard in the supreme court, and the case was still pending for rehearing when the defendant, J. O. Edmonston, purchased the lot from W. A. Edmonston. That the defendant was, therefore, a *lis pendens* purchaser, and took the

land subject to the result of that suit, is beyond controversy: *Bailey v. Winn*, 113 Mo. 155, 20 S. W. 21. In *O'Reilly v. Nicholson*, 45 Mo. 160, it is ruled that the deed of a party pendente lite is void, and that even an innocent purchaser is bound by the decree that may be made against the person from whom he derives title; either directly or indirectly: *Turner v. Babb*, 60 Mo. 342.

Even though the defendant had not actual knowledge of the pendency of the suit of *Roden v. Helm et al.* in this court at the time he purchased the property, he is, nevertheless, chargeable with legal or constructive notice so as to render his title subject to the result of said suit. The well-settled rule is that a lis pendens, prosecuted in good faith, is notice to any and all purchasers so as to affect and bind by the decree any interest in the property which they may acquire by reason of their purchase.

In *Burnham v. Smith*, 82 Mo. App. 35, it is said: "In pendente lite neither party to the litigation can alienate the property in dispute so as to affect his opponent. The necessities of mankind require that the decision of the court in the suit shall be binding, not only on the litigants, but also on those who derive title under them by alienation made pending the suit, whether such alienee had not notice of the proceedings." To the same effect, see *Murray v. Ballou*, 1 Johns. Ch. 565.

While W. A. Edmonston testified that he was not the attorney of Roden at the time of the purchase of the land and judgment from Roden, he had been his attorney during the entire litigation, and was familiar with all its details and the interests of all parties in <sup>421</sup> the land. Moreover, he took the land under a quitclaim deed from Roden, and occupied just the same position that his client did.

In *Gott v. Powell*, 41 Mo. 416, it is said: "The restitution to which the party is entitled upon the reversal of an erroneous judgment is everything which is still in the possession of his adversary. Where a man recovers land in a real action, and takes possession or acquires title to land or goods by sale under execution, and the judgment is afterward reversed, so far as he is concerned his title is at an end, and the land or goods must be restored in specie—not the value of them, but the things themselves. There is an exception where the sale is to a stranger bona fide, or where a third person has bona fide acquired some collateral right before the reversal: *Bacon's Abridgment*, tit. "Error," M. 13; *Dater v. Troy et c.* R. R. Co., 2 Hill, 629; *Lovett v. German Ref. Church*, 12 Barb.

67; *McJilton v. Love*, 13 Ill. 486, 54 Am. Dec. 449; *Bank of United States v. Bank of Washington*, 6 Pet. 8, 8 L. ed. 299; *Clark v. Pinney*, 6 Cow. 297; *Hubbel v. Broadwell's Admrs.*, 8 Ohio, 120; *Green v. Stone*, 1 Har. & J. (Md.) 405; *St. John's College v. Murcott*, 77 Term Rep. 259."

In *Hannibal etc. R. R. Co. v. Brown*, 43 Mo. 294, the court said: "When the judgment in the case of *Brown v. Hannibal etc. R. R. Co.*, 37 Mo. 298, was reversed in this court, all of the proceedings had in pursuance of that judgment were vacated, and the defendant was entitled to be restored to the condition in which it stood previous to the judgment, and to restitution of everything that it had lost and which remained in the hands of the adverse party, his agents, attorneys or privies. Lander was the attorney who gave direction to the whole matter, he was cognizant of all the facts, and is therefore chargeable in the same manner as Brown himself": *Board of Trustees v. Fry*, 192 Mo. 552, 91 S. W. 472.

W. A. Edmonston was the attorney who obtained <sup>423</sup> the judgment for Roden, and who gave direction to the whole matter. He was cognizant of all the facts, and, therefore, chargeable with notice in the same manner as Roden himself; and the fact that he may not have been the attorney for Roden at the time he purchased the lot and judgment from him does not alter the situation or absolve him from the effect of the notice with which the law had already charged him; nor does the defendant occupy any different or better position than his grantor. Moreover, the deed under which the defendant claims title by its recitals put him upon notice as to the nature of his grantor's title, and that the property was trust property not only for Thomas and Anna Helm, but for all of their children, including Mamie and Richard, not parties to the action of *Roden v. Helm et al.*, and, under such circumstances, he cannot claim to be a purchaser without notice, for such information, if followed up, would have given him actual knowledge of the trust: *Condit v. Maxwell*, 142 Mo. 266, 44 S. W. 467. Having acquired possession of this trust property by purchase with notice, or, at any rate, with notice of such facts as were sufficient to put him upon inquiry, he holds the property in trust for the beneficiaries (*Coffee's Admx. v. Crouch*, 28 Mo. 106); and it being trust property, it may be followed into his hands, he having taken it with notice of the true relation (*Darling v. Potts*, 118 Mo. 506; 24 S. W. 461); or, what is in effect the same thing, with notice of such facts as should put him upon his inquiry as to the trust relation. To say the least, the defendant, by the

recitals in his deed, was put upon inquiry as to who the children of Thomas and Anna Helm were, what interest they had in the lot, and whether they were made parties to the proceeding the purpose of which was to divest them of their interest in the land, as well, also, as to the validity to the judgment under which the defendant, by mesne conveyances, acquired title.

<sup>423</sup> It appears from the record that the defendant, at the time of taking possession of the lot as agent for his brother, had a conversation with one of the defendants in the case of Roden v. Helm et al. This was Mrs. Elizabeth Matthews, daughter of Thomas Helm. That in this conversation Mrs. Matthews, in the presence of the sheriff, objected to her removal from the premises and giving up possession, stating to the defendant that the case of Roden v. Helm was still pending in the supreme court, and that defendant said that when the court gave permission he would willingly give back the possession; that in this conversation the defendant also stated that he was acting as agent for his brother, W. A. Edmonston. Upon this evidence the plaintiffs asked the court to declare the law to be that "if the defendant went to the said premises as the agent of W. A. Edmonston to take possession of said premises for his brother, and there met Mrs. Matthews, who told him of the pending suit of Roden v. Helm et al. in the supreme court, or gave him such information as would put him on inquiry as to the title to the same, then the verdict will be for the plaintiffs." The court refused to so declare the law. This requested declaration presented sharply one of the vital questions in the case, that is, whether the defendant knew or was at the time of his purchase in possession of such facts as would put an ordinarily prudent man upon inquiry as to the title to the lot.

The defendant obtained the deed to the lot from his brother on the twenty-first day of March, 1904, just two days before the opinion in Roden v. Helm was filed in this court affirming the judgment of the trial court in that case.

Quincy James, sheriff of Audrain county, testified for plaintiffs that he was at the Helm place when possession of the property was turned over by him to the defendant, and that he there heard a conversation <sup>424</sup> between defendant and Mrs. Matthews, in which she stated that she did not want to give up possession of the place, as there was a case pending in the courts and that it was not settled.

W. A. Edmonston testified in behalf of defendants that after he procured the deed to the property from Roden he pre-

sented it to Thomas Helm and demanded possession of the property, which he refused to give; that he then instituted two suits for possession, one against Helm for possession of the town property, and one against Carter et al. for the farm property, and prosecuted the suits to final judgment in the supreme court; that after the judgments in the circuit court in his favor, and about September 1, 1901, he went to Colorado. As to the circumstances under which he sold the property to his brother, the defendant, witness testified as follows:

"He offered me twenty-five hundred dollars, provided my ejectment suits were affirmed. I told him, provided they were affirmed, I would take three thousand dollars, and he then wrote me again he would split the difference with me if they were affirmed, and I told him I would not do it, and then when they were affirmed, he said he would take the Helm property at three thousand dollars. He paid me by giving me credit on a note I owed him. He then went into possession of the place. With reference to the date when the trade was finally consummated, I don't remember exactly. It seems to me I sent him the deed when we agreed upon the price, provided I won. I wrote him that I sent him the deed, and told him if it was affirmed to put the deed on record, and if it was not affirmed, or if reversed, he could send the deed back to me. I think as soon as he got possession he wrote me he had possession of the property. I told him it was my place to put him in possession of his place, and just demand possession, and I think as soon as he got possession of it the deal was consummated. <sup>425</sup> I never received any notice of this writ of error. I investigated the title to the property before I bought from Roden. I got Mr. Cullen's opinion and examined into it well myself; there being no appeal taken, or writ of error, or stay, I considered the title was good and bought it that way. There has not been anything paid to me on either of the judgments."

On cross-examination, witness W. A. Edmonston further testified that he had talked with Mr. Jesse, and he said they were not going to take an appeal. "Mr. Jesse, every time I heard him express himself, said I could not take trust property. He seemed to think, because it was trust property, it could not be sold. He never used the words that the judgment was void; he always said that they could not take trust property. I spoke to him several times about paying it and avoiding the sale, and he said they could not sell trust property, but the words 'void judgment' were never used. It



is only considered an erroneous judgment. I went to Mr. Turner, trying to collect the debt before we brought suit, and Mr. Turner told me it was held in trust, and Mr. Helm only got the rents and profits and that all the rents and profits had been used up. He told me it was in trust, but I have no recollection of reading the deeds.

"Q. Didn't you ask him to see the deeds and see the prior deeds under which the original trust was created? A. I do not remember about that.

"Q. And didn't he show them all to you? A. I don't remember about that; I don't think he did, because I was not caring about that. He said it ought to be paid, but he had nothing to pay it with.

"Q. And you also learned, in connection with it, there were two minor children? A. I think I knew that."

Defendant J. O. Edmonston testified in his own behalf that he took possession of the place in April, <sup>426</sup> 1904; that immediately after the supreme court handed down its decision he wrote his brother that the case was supposed to be ended, and to consider the deal closed; that he paid his brother three thousand dollars for the place by giving him credit for that amount on a note which he held against him, and that he thought the credit was of date March 18th; that he took possession of the property for his brother and in his name. He further testified as follows:

"I know I considered the deal closed, but I did not want any trouble with it, and would have nothing to do with it until the supreme court handed down its decision. I had not heard of the case pending between Roden and the Helms at the time I bought the place, and I knew nothing about such a case being in court. I remember having a conversation with Mrs. Matthews the day when I accompanied Mr. James, the sheriff, out to take possession of the property. I had very little conversation with Mrs. Matthews. I think the most definite thing she said was that the case had been badly managed. I said to her I had nothing to do with it, but, if I recollect right, I think she said, 'Your brother did,' and she went into the house and I remained there at the gate. Now, after she had been in there some time, Mr. James came to the front door and beckoned to me to come in. I went into the hall. Mr. and Mrs. Matthews were standing there, and Mr. James made this statement to me: 'These people will agree to vacate the house, you giving them reasonable time. They say they will vacate the house and move their goods out and turn the matter over to you as soon as they can.' I

said, 'That is all right.' Now, Mrs. Matthews made a statement, as well as I recollect, and that was, 'We go out under protest; we have been advised to protest the vacation.' "

On cross-examination, the defendant further testified:

427 "I corresponded with my brother with a view of buying the land in the event he won the case in the supreme court, and as soon as I got possession under these writs of ejectment of Edmonston v. Carter, and Edmonston v. Helm, I considered the deal closed just as I had written him. I was told of the opinion of the supreme court. I couldn't say definitely whether Mr. Cullen showed me the decision or whether I read it or not. I know that he told me the decision had been rendered. I know that Mr. Carter told me that the court had affirmed the decision.

"Q. Mr. Cullen had a copy of the opinion there in his office, didn't he? A. I suppose he did.

"Q. And you either read it or he read it to you? A. Well, now, I could not say whether he read it, or whether I read it; I don't know about that.

"Q. Well, anyhow, you had recollection that the opinion was sustained and you got knowledge of its contents? A. I know I didn't make any demand for written representations or a written statement of it.

"Q. What I want to know is, if you saw that opinion or heard it read? A. Why, I think Mr. Cullen read it; I think that is my recollection."

This evidence fully warranted the declaration of law asked by plaintiffs, and the court should have given the same. The evidence tended to show that the defendant, before his purchase of the property from his brother, knew that the case of Roden v. Helm et al. was pending in the supreme court, or that he was in possession of information sufficient to put an ordinarily prudent man upon inquiry as to the title to the property. He admitted in his own testimony that he read or heard read the opinions in the cases of Edmonston v. Carter and Edmonston v. Helm, wherein the case pending upon the writ of error was referred to. From the facts recited in his deed, he must have known that the property was trust property, and he 428 was put upon inquiry as to who the children of Thomas and Anna Helm were and what their interest was in the property. By referring to the judgment under which his grantors acquired title, and which was alluded to in his deed, he could have discovered that two of the children were infants and were not made parties to the suit of Roden v. Helm et al., by which suit it was sought to divest them of

their beneficial interest in the land. Under these circumstances, it cannot be held that the defendant was an innocent purchaser, without notice: *Condit v. Maxwell*, 142 Mo. 266, 44 S. W. 467.

The conclusion reached renders it unnecessary to pass upon the points raised by the defendant in his brief, with the exception, perhaps, of the question of estoppel and laches.

Upon the question whether plaintiffs were estopped to ask relief, it is only necessary to say that estoppel in pais, in order to be available, must be pleaded, which was not done in this case: *Central Nat. Bank v. Doran*, 109 Mo. 40, 18 S. W. 836; *Throckmorton v. Pence*, 121 Mo. 50, 25 S. W. 843; *Thompson v. Cohen*, 127 Mo. 215, 28 S. W. 984, 29 S. W. 885; *Cockrill v. Hutchinson*, 135 Mo. 67, 58 Am. St. Rep. 564, 36 S. W. 375; *State v. East Fifth St. R. R. Co.*, 140 Mo. 539, 62 Am. St. Rep. 742, 41 S. W. 955, 38 L. R. A. 218. Nor, if pleaded, do the facts in evidence contain the necessary essentials of estoppel in pais. Neither will laches relied upon as an estoppel be available unless pleaded: *Vanderline v. Smith*, 18 Mo. App. 55.

Our conclusion is that the judgment should be reversed and the cause remanded. It is so ordered.

All concur.

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*The Law of Lis Pendens* is the subject of a note to *Stout v. Philippi Mfg. Co.*, 56 Am. St. Rep. 853. The prime object of the rule of *lis pendens* is to preserve the property which is the subject of litigation in order to make it possible for a court to execute final judgment: *Wingfield v. Neall*, 60 W. Va. 106, 116 Am. St. Rep. 882.

*A Purchaser of Real Property Pendente Lite* takes subject to any title or interest adverse to his grantor ultimately recognized in the pending litigation: *Cheever v. Minton*, 12 Colo. 557, 13 Am. St. Rep. 258; *Harding v. American Glucose Co.*, 182 Ill. 551, 74 Am. St. Rep. 189; *Goff v. McLain*, 48 W. Va. 445, 86 Am. St. Rep. 64; *Neff v. Elder*, 84 Ark. 277, 120 Am. St. Rep. 67; *McCord v. Akeley*, 132 Wis. 195, 122 Am. St. Rep. 956. But the rule of *lis pendens* has no application to independent titles not derived from any of the parties to the suit nor in succession to them: *Merrill v. Wright*, 65 Neb. 794, 101 Am. St. Rep. 645; *Harrod v. Burke*, 76 Kan. 909, 123 Am. St. Rep. 179. And the title of a *pendente lite* purchaser is not affected, if the suit is dismissed without a trial on the merits: *Bristow v. Thackston*, 187 Mo. 332, 106 Am. St. Rep. 472.

*The Effect of the Reversal of a Judgment* is the subject of a monographic note to *Cowdery v. London etc. Bank*, 96 Am. St. Rep. 124-126.

## CITY OF ST. LOUIS v. GLONER.

[210 Mo. 502, 109 S. W. 30.]

**CRIMINAL LAW—Municipal Ordinances—Loafing on Street.**—Lounging, standing and loafing around street corners and other public places, unaccompanied by disorderly conduct or interference with the use of the streets, cannot be declared a public offense by ordinance. (p. 752.)

**PICKETING BY STRIKERS—Whether a Crime.**—A person who stands two hours each day at a certain place in the public streets of a great city doing "picket duty" during a strike, but conducting himself in an orderly manner, disturbing no one and committing no overt acts, is within his lawful rights and cannot be convicted under an ordinance which declares that any person who lounges, stands or loafs around streets or public places shall be guilty of a misdemeanor, for such ordinance is unconstitutional as an interference with personal liberty. (p. 754.)

Charles W. Bates and Charles P. Williams, for the plaintiff in error.

C. J. Anderson, for the defendant in error.

**506** **BURGESS, J.** This was a prosecution under section 1460 of the Municipal Code of the city of St. Louis, which reads as follows:

"Any person who shall, on Sunday or any other day of the week, disturb the peace by any noisy, riotous or disorderly conduct in any park, street, alley, highway, thoroughfare or other public place or public resort for pleasure or amusement or other purposes, or any person or persons who shall lounge, stand or loaf around or about or at street corners or other public places, in the day or night time, or who shall use indecent, loud or profane language on the public street or other public place or who shall purchase or otherwise obtain any beer, wine or spirituous or malt liquors by the measure or in quantities greater than one-half pint, and drink the same upon the public streets, alleys, parks, or other public thoroughfares or places **507** in the city, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, before either of the police justices, shall be fined in the sum of not less than five or more than fifty dollars. The above provision not to apply to workingmen drinking beer at lunch or dinner at their places of work."

The information substantially charges that the defendant violated said ordinance on the fourth day of August, 1904, and on divers other days and times prior thereto, by unlawfully lounging, standing and loafing around and about and at certain public street corners and other public places, to

wit, Eleventh street and Washington avenue, in the day and night time, in the city of St. Louis.

This case was first tried in one of the police courts of said city, whence an appeal was taken to the St. Louis court of criminal correction.

The testimony tends to show that on August 4, 1904, there was a strike of the employés of the Harris Bros. Clothing Company, whose place of business was at 1128 Washington avenue, in the city of St. Louis, and that defendant and three other strikers were doing what is termed "picket duty" at the corner of Eleventh street and Washington avenue, near the business place of said clothing company

Officer Pierson, who arrested defendant on said August 4th, testified that he had seen defendant at the corner of Eleventh street and Washington avenue the morning he arrested him, and had seen him there on prior mornings and evenings. The police officer further testified as follows:

"Q. Was he doing anything but standing on the corner?

A. No, sir.

"Q. Was he blocking the corner? A. No, sir.

"Q. How wide is the sidewalk there? A. Ten or twelve feet.

"Q. He was standing on the sidewalk on the corner, and you told him to move on? A. Yes, sir.

"Q. He wasn't talking to anyone? A. No, sir.

"Q. There was a strike on, and these men were simply doing what is called picket duty? A. Yes, sir.

"Q. As I understand, picket duty consists in standing around corners and requesting men not to take strikers' places. A. Yes, sir.

"Q. That was what this man was doing as they came from work in the evening? A. Yes, sir.

"Q. In other words, during this time there was nothing in his action that you as a police officer deemed it necessary to arrest him for? A. I watched him for two or three days.

"Q. You made the arrest not because he was obstructing the sidewalk, but because he was doing picket duty? A. Because he was doing picket duty, and I was informed that they must stop it."

The witness further testified that he saw the defendant stop and talk to some of the employés of the company against which the strike was directed. Three other witnesses, employés of the said company, testified to seeing the defendant standing on the street corner several mornings and evenings before the day he was arrested.

At the close of the city's case the defendant moved the court to discharge him, on the ground that the evidence introduced by the city was insufficient to support a conviction, which motion was sustained, and the court rendered judgment discharging the defendant.

Plaintiff filed motion for a new trial, which was overruled by the court. The case is before this court upon a writ of error.

While the city of St. Louis is given power by the second clause of section 26, article 3, of its charter, to regulate the use of its streets, the question here presented is as to whether it had the right, under the provisions <sup>500</sup> of its charter, to pass the ordinance upon which this prosecution is based, and which makes it a misdemeanor, punishable by fine, for any person to lounge, stand or loaf around or about or at street corners or other public places, in the day or night time.

There is no pretense that defendant was at the time of this arrest in any way obstructing the street, or interfering with the rights of any other person, or conducting himself in a disorderly manner; the only charge against him being that he violated said ordinance on the fourth day of August, 1904, and on divers other days and times prior thereto, by unlawfully lounging, standing and loafing around and about and at certain public street corners and other public places, to wit, Eleventh street and Washington avenue, in the day and night time. While the city has the undoubted right, under its charter, to regulate the use of its streets, it has no right to do so in a way that interferes with the personal liberty of the citizen as guaranteed to him by our constitution and laws. Under this ordinance it is just as much an offense to stand or loaf around upon the corner of one of the streets in the city for five minutes as for two hours or more, time not being an ingredient of the offense, and this, too, regardless of the fact that the offender may not during that time impede the passage of other pedestrians or otherwise interfere with the rights of others. The defendant had the unquestioned right to go where he pleased and to stop and remain upon the corner of any street that he might desire, so long as he conducted himself in a decent and orderly manner, disturbing no one, nor interfering with anyone's right to the use of the street. Is the ordinance in question, then, restrictive of, or in violation of, the right of personal liberty guaranteed to every citizen by section 4, article 2, of the constitution of this state?

In *St. Louis v. Roche*, 128 Mo. 541, 31 S. W. 915, a city ordinance <sup>510</sup> making it an offense for anyone to knowingly associate with persons having the reputation of being thieves, gamblers, etc., for the purpose of aiding and abetting such persons in their unlawful acts, was held invalid because an invasion of personal liberty. That case was followed in *Ex parte Smith*, 135 Mo. 223, 58 Am. St. Rep. 576, 36 S. W. 628, 33 L. R. A. 606.

In the case of *Pinkerton v. Verberg*, 78 Mich. 573, 18 Am. St. Rep. 473, 44 N. W. 579, 7 L. R. A. 507, it is said: "Personal liberty, which is guaranteed to every citizen under our constitution and laws, consists of the right of locomotion,—to go where one pleases, and when, and to do that which may lead to one's business or pleasure, only so far restrained as the rights of others may make it necessary for the welfare of all other citizens. One may travel along the public highways or in public places; and while conducting themselves in a decent and orderly manner, disturbing no other, and interfering with the rights of no other citizens there, they will be protected under the law, not only in their persons, but in their safe conduct. The constitution and the laws are framed for the public good, and the protection of all citizens, from the highest to the lowest; and no one may be restrained of his liberty unless he has transgressed some law. Any law which would place the keeping and safe conduct of another in the hands of even a conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony, would be most oppressive and unjust, and destroy all the rights which our constitution guarantees. These are rights which existed long before our constitution, and we have taken just pride in their maintenance, making them a part of the fundamental law of the land."

It is, however, said for the city that "John Smith, a member of the public, has no right for his own private purposes, whatever they may be, to take his stand for a period of two hours every day upon a particular portion of the public street in a great and populous <sup>511</sup> city." That he has such right there can, in our opinion, be no question, providing he conducts himself in a peaceful, orderly manner, disturbs no one, and commits no overt act. In this case, according to the testimony of the officer who made the arrest, he arrested the defendant for the purpose of preventing him from doing "picket duty," which, as explained by the court, consisted in requesting men not to take the places of strikers.

In the case of *Marx & Haas Jeans Clothing Co. v. Watson*, 168 Mo. 133, 90 Am. St. Rep. 440, 67 S. W. 391, 56 L. R. A. 951, Judge Sherwood, speaking for the court, said: "If these defendants are not permitted to tell the story of their wrongs, or, if you please, their supposed wrongs, by word of mouth or with pen or print, and to endeavor to persuade others to aid them by all peaceable means, in securing redress of such wrongs, what becomes of free speech, and what of personal liberty? The fact that in exercising that freedom they thereby do plaintiff an actionable injury, such fact does not go a hair toward a diminution of their right of free speech, etc., for the exercise of which, if resulting in such injury, the constitution makes them expressly responsible."

In passing upon a similar question in the case of *Hamilton-Brown Shoe Co. v. Saxey*, 131 Mo. 212, 52 Am. St. Rep. 622, 32 S. W. 1106, this court said: "They are free men, and have a right to quit the employ of plaintiffs whenever they see fit to do so, and no one can prevent them; and whether their act of quitting is wise or unwise, just or unjust, it is nobody's business but their own, and they have a right to use fair persuasion to induce others to join them in their quitting."

In *Beaton v. Tarrant*, 102 Ill. App. 124, it was held that workmen may use the streets and highways in a manner not inconsistent with public travel, for the purpose of entreaty, inducement and peaceable persuasion in good faith. The same rule practically is announced <sup>512</sup> in *Karges Furniture Co. v. Amalgamated Woodworkers Local Union*, 165 Ind. 421, 75 N. E. 877, 2 L. R. A., N. S., 788, in which it is said: "Argument and peaceable persuasion are lawful means to prevent laborers from working for an employer against whom the labor union has ordered a strike."

Our conclusion is that the ordinance is unconstitutional and invalid because it infringes upon the right of personal liberty, and is unreasonable and oppressive. The judgment is affirmed.

All concur.

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*The Power of a Municipal Corporation to regulate and forbid the use of its streets for parades, public meetings and the like has been recognized in a number of cases: Commonwealth v. Davis*, 162 Mass. 510, 44 Am. St. Rep. 389; *Fitts v. Atlanta*, 121 Ga. 567, 104 Am. St. Rep. 167, and cases cited in the cross-reference note thereto. A municipal ordinance providing that it "shall be unlawful for any woman to go in and out of a building where a saloon is kept for the sale of liquor, or to frequent, loaf, or stand around said building within fifty feet thereof," and also providing for the punishment of any saloon-keeper who permits a violation of such ordinance, is unconstitutional as an unreasonable and unnecessary interference with



individual liberty: *Gastenuau v. Commonwealth*, 108 Ky. 473, 94 Am. St. Rep. 386.

*Acts Which the Legislature may Declare Criminal* are discussed in the note to *Booth v. People*, 78 Am. St. Rep. 235.

"*Picketing*" by *Strikers, as Ordinarily Conducted*, is unlawful, and a court of equity has jurisdiction to enjoin it: *Goldberg etc. Co. v. Stablemen's Union*, 149 Cal. 429, 117 Am. St. Rep. 145; and see authorities cited in the cross-reference note thereto; *Wilson v. Hay*, 232 Ill. 389, 122 Am. St. Rep. 119.

*Boycotting is Discussed Generally* in the note to *Gray v. Building Trades Council*, 103 Am. St. Rep. 488; and strikes and strikers are discussed in the note to *O'Neill v. Behanna*, 61 Am. St. Rep. 706.

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### REIGER v. MULLINS.

[210 Mo. 563, 109 S. W. 26.]

**PROCESS—Conclusiveness of Sheriff's Return.**—A suit will not lie for equitable relief from a judgment on the ground that the defendant was not served with process, for the sheriff's return of service is conclusive and the defendant has an adequate legal remedy. (p. 756.)

Geo. H. English, Jr., for the appellant.

Johnson & Lucas, for the respondents.

**565** **BURGESS, J.** The petition in this case alleges, in substance, that the defendant Mullins, though in possession of certain lands and with knowledge that plaintiff made no claim to it, fraudulently brought ejectment against plaintiff and took judgment for possession and three hundred and fifty dollars damages, **566** and is about to sell other land actually belonging to plaintiff to satisfy the judgment; that plaintiff was never served with process in the original suit, and that the sheriff's return of service was false. The petition further alleges: "That all the proceedings in said case, after the filing of the petition, were and are a fraud upon your Honor's court and a fraud upon plaintiff, and contrary to good conscience and good faith; that at all times mentioned in the petition, the defendant herein, John R. Mullins, was, by his tenant, one Howard Davidson, in possession of the property described in said petition, and that said petition was not filed in good faith, but was devised as a means of getting money from this plaintiff, and that this plaintiff at no time had any notice of said proceedings, and at no time had or claimed any right or title in the property, and at no time was in possession of

the same, and that all of these facts were well known to defendant John R. Mullins, or might have been discovered by him by inquiry from this plaintiff; and that plaintiff is without remedy at law, but can only obtain relief by a court of equity."

The petition concludes with a prayer for an injunction against Mullins and the defendant sheriff to restrain the sale, for the vacation of the judgment, and for equitable relief.

Attached to the petition were affidavits tending to sustain the allegations therein contained.

The defendant Mullins filed answer, denying all allegations in the petition.

When the case came on for trial, the defendant objected to the introduction of any testimony under the petition upon the ground that the petition failed to state a cause of action, in that the sheriff's return was conclusive, and that plaintiff, had an adequate remedy at law. The objection was sustained by the court, and plaintiff at the time duly excepted. In due time plaintiff <sup>567</sup> filed motion for a new trial, which was overruled, to which ruling he saved an exception, and appeals.

It is conceded by plaintiff that if the case of Smoot v. Judd, 184 Mo. 508, 83 S. W. 481, is to be followed as decisive of the case at bar, the trial court was right, because this case falls within the principle there decided, except as distinguished in his brief upon the question of fraud; but it is insisted that that decision is not in line with the weight of authority, and should be reconsidered and overruled. That case was well considered, and met with the approval of the entire court in bank, with one exception. We see no reason whatever for reconsidering or overruling it, and must, with due respect to counsel for plaintiff, decline to so do.

The judgment should be affirmed. It is so ordered.

All concur.

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### CONCLUSIVENESS OF SHERIFF'S RETURN OF SERVICE OF SUMMONS, AND REMEDIES OF PERSONS INJURED THEREBY.

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### I. Scope of Note.

The limitation of our discussion in this note is fully indicated by the title. The question of equitable relief from a judgment based on the false return of an officer of service of process is treated on pages 243, 244, 245 and 246 of the extended note appended to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 218, likewise on page 117 of the note appended to *Morrill v. Morrill*, 23 Am. St. Rep. 103; and also in the note appended to *Taylor v. Lewis*, 19 Am. Dec. 137. This note may therefore be considered as supplementary to the notes mentioned, and will bring the discussion up to date. The conclusiveness of an officer's return of process which is irregular or defective only will be found fully discussed in the note appended to *Sanford v. Edwards*, 61 Am. St. Rep. 485; while abuse of process, with the remedies relating thereto, is the subject of discussion in the note appended to *Bradshaw v. Frazier*, 86 Am. St. Rep. 397.

### II. Preliminary Observations.

The conclusiveness of an officer's return of service of summons, and what remedy one injured by a false return may have, either at law or in equity, are questions which have been carefully considered by the courts for a great many years, with the result of an irreconcilable difference of judicial opinion. Some of our courts lean strongly to the old common-law doctrine that the judgment of a court of general jurisdiction imports absolute verity, and that as the return of an officer of the court is a part of the record upon which a judgment is founded, where the sheriff's return shows regular service of summons, it is conclusive upon the parties and privies, both before and after judgment. This doctrine was carried so far in England under the common law that, notwithstanding the jurisdiction of the court depended upon the false return of an officer to the service of process, still the party injured by a judgment thus obtained had no relief except to bring an action for damages against the officer for a false return, after first satisfying the judgment. The injustice, however, of thus permitting a party to be deprived of his property without an opportunity to be heard finally led to the courts of chancery taking jurisdiction in such cases, and enjoining the collection of judgments thus obtained, but even then the prohibition of the enforcement of

the judgment was placed upon the ground that if the true facts had appeared on the trial, the judgment would not have been rendered, and hence the judgment itself was not impeached or reversed, but merely its enforcement enjoined. But the courts of law in England have never looked with favor upon this intervention of equity, and it has always met with strong opposition by those who zealously adhere to the doctrine that the judgment of a court of general jurisdiction imports absolute verity, and ought not to be made ineffective by a court of equity upon evidence dehors the record. Nor has this opposition been confined to the courts of England, for the conflict of opinion among the courts of this country is, as we shall see, irreconcilable.

### III. Conclusiveness as Between Parties to the Action.

#### a. When Relief is Sought Before Judgment.

1. **In General.**—There are many cases which hold that, when an officer's return of service of summons is regular on its face, the truthfulness of the return cannot be controverted by the defendant in the same action by answer or otherwise. This rule was broadly asserted by the supreme court of Missouri in two early cases, *Hallowell v. Page*, 24 Mo. 590, and *Delinger's Admr. v. Higgins*, 26 Mo. 180, and has been followed by that court in the later cases of *Newcomb v. New York Central Ry. Co.*, 182 Mo. 687, 81 S. W. 1069; *Regent Realty Co. v. Armour Packing Co.*, 112 Mo. App. 271, 86 S. W. 880. In the last case the sheriff returned the writ as served on the manager of the defendant corporation. Defendant made special appearance only for the purpose of moving to quash the return, and based its motion on the ground that the return was untrue in fact. Said the court: "The return of an officer to process, whether the service be personal or constructive, is conclusive on the parties to the record, and as to all proceedings in the same cause, . . . evidence dehors the record is not admissible to contradict the return except in an action against an officer for a false return." The rule thus announced is also found in a good many of the older cases in other states: *Brown v. Turner*, 11 Ala. 752; *Brown v. Way*, 28 Ga. 531; *Johnson Harvester Co. v. Bartley*, 81 Ind. 406; *Stinson v. Snow*, 10 Me. 263, 25 Am. Dec. 238; *Slayton v. Inhabitants of Chester*, 4 Mass. 478; *Bolles v. Bowen*, 45 N. H. 124; *Columbia Ins. Co. v. Force*, 8 How. Pr. 353; *Angell v. Bowler*, 3 R. I. 77; *Trimble v. Erie Electric Motor Co.*, 89 Fed. 51.

But there are other cases which hold, and it seems to us upon the better reasoning, that while good reasons can be given why an official return should not be permitted to be contradicted after judgment, when rights had accrued or vested, that a rule which prohibits a defendant from disproving the return before any rights have accrued, is unreasonable and creative of litigation: *Barbour v. Newkirk*, 83 Ky. 529. But it seems that in those jurisdictions where the defendant is allowed to contradict the officer's return in the same action before judgment is rendered, he must proceed by motion or plea in

abatement before pleading to the merits: *Mineral Point R. Co. v. Keep*, 22 Ill. 9, 74 Am. Dec. 124; and in Georgia a defendant wishing to contradict an official return of service of summons must traverse the entry of service at the first term after notice of such entry and before pleading to the merits: *Dozier v. Lamb*, 59 Ga. 461. In *Boynton v. Keeseville Electric Light & P. Co.*, 5 Misc. Rep. 118, 25 N. Y. Supp. 741, it was held that an officer's return of service of summons is only *prima facie* sufficient to give the court jurisdiction, and not conclusive of the facts stated therein, and that on the return day, and before any other steps are taken in the action, the defendant can challenge the right of the plaintiff to proceed upon the ground that the return is false, and that the summons in fact has not been served.

**2. In Case of Error as to Matters Presumptively Unknown to Officer.**—The rule which makes an officer's return conclusive between the parties to the action before judgment has been often modified when the recital in the return related to facts not presumptively within the officer's own knowledge, but upon which he must act from information obtained from others, and hence about which he was liable to be misinformed, such as pertain to a defendant's place of business, residence, time of service, names, etc.

**3. In Case of Error as to Place of Defendant's Residence.**—It was held in *Walker v. Lutz*, 14 Neb. 274, 15 N. W. 352, that the return of a sheriff on a summons that he served it by leaving a copy at the defendant's usual place of residence, did not prevent the defendant from showing that the place where the copy was left was not his residence, on motion directed to the jurisdiction; and this doctrine is recognized in the later case of *Walker v. Stevens*, 52 Neb. 653, 72 N. W. 1038; and in other jurisdictions: *Bond v. Wilson*, 8 Kan. 228, 12 Am. Rep. 466. In *Tilden v. Johnson*, 60 Mass. (6 Cush.) 354, it was held that where a sheriff's return on a summons shows that a defendant had no last and usual place of abode within his precinct, the defendant may show, in order to abate the writ, that he has such last and usual place of abode. And in *Grady v. Gosline*, 48 Ohio St. 665, 29 N. E. 768, it was held that if the summons is served by leaving a copy at the wrong place, the defendants may, before pleading to the merits, be allowed to disprove the officer's return, on a motion to set aside the service. So, also, an officer's return of service of summons at "the place of business" of defendant is not conclusive that such place is a regular and established place of business within the meaning of the act of March 3, 1897 (29 Stat. 695), which makes the jurisdiction of a circuit court of a suit for infringement of a patent, where the defendant is not an inhabitant of the district, dependent on the defendant having a regular and established place of business therein; and on motion such service can be vacated and set aside: *Waterman Co. v. Parker Pen Co.*, 100 Fed. 544.

**4. In Case of Error as to Date of Service.**—In *McComb v. Council Bluff Ins. Co.*, 83 Iowa, 247, 48 N. W. 1038, plaintiff was permitted

to show on the trial that the date of the service of summons, as it appeared on the return of the officer, was not true. In this case, however, the return had been altered, and the ruling was based largely, if not altogether, on the fact that, as altered, it was not the return of the officer at all; hence this case cannot be said to hold that the return of an officer as to the date of service is not conclusive between the parties to the action before judgment.

**5. In Case of Error as to Name of Defendant.**—Where the officer's return of service is erroneous, or ambiguous as to the name of the defendant who should have been served, it is held that the return is not conclusive, and that the real defendant is not precluded from contradicting the return and showing by parol that he in fact had never been served. Thus where process is returned served on "R. E. Morgan," a defendant whose name is "Robert E. Morgan" is not precluded, as contradicting the return, from showing by parol that the process was served on a "Rufus E. Morgan," residing in the same county as himself, since such evidence merely shows to what person the return applies: *Slingluff v. Gainer*, 49 W. Va. 7, 37 S. E. 771. And where a summons is directed against a person by a certain name, and two individuals are known in the community by that name, the officer serving the writ may point out in court, in giving testimony, the person he served, and such testimony does not contradict his return: *Reid v. Mercurio*, 91 Mo. App. 673. In *Cheshire v. Milburn Wagon Co.*, 89 Ga. 249, 15 S. E. 311, the process described the defendants as "C. & McC.," while the declaration described them as "N. S. & C. and ——— McC.," partners doing business under the firm name and style of "C. & McC." The sheriff returned the summons, "served the defendant N. S. C. of the firm of C. & McC. with a copy of the within personally; the defendant ——— McC. not to be found in F. County." It was held that the middle initial "S" in the return should be treated as a clerical error, and until traversed or falsified, the return is conclusive that defendant N. H. C. of the firm of C. & McC. was served.

**b. When Relief is Sought After Judgment.**

**1. Rule that Return is Conclusive.**—The same conflict of opinion existing among the courts as to the conclusiveness of an officer's return, between the parties to an action before judgment, is found also, as to its conclusiveness after judgment, where the defendant seeks relief at law. Thus in *Warren v. Wilner*, 61 Kan. 719, 60 Pac. 745, it was held that a sheriff's return of personal service of a summons included in the record of a judgment is conclusive between the parties, and this doctrine was later affirmed by the same court in *Orchard v. Peake*, 69 Kan. 510, 77 Pac. 281. In *Tillman v. Davis*, 28 Ga. 494, 73 Am. Dec. 786, one who was surety on a note sought to have the judgment set aside by motion, upon the ground that no service of summons had been made on his principal, until after the court had passed to which the writ was sued. On appeal from an order denying the motion, Judge Lumpkin said: "Upon examination,

it will be found that the conclusiveness of the sheriff's return, both upon mesne and final process, is assumed as one of the axiomatic truths of the law." In *Ramsburg v. Kline*, 96 Va. 465, 31 S. E. 608, it was held, in a motion to vacate a judgment, that evidence tending to falsify and contradict the return of an officer showing that a summons had been duly executed is inadmissible, unless such false return was induced or procured by the plaintiff; and in similar proceedings it was said in *McClung v. McWhorter*, 47 W. Va. 150, 81 Am. St. Rep. 785, 34 S. E. 740, that an officer's return on judicial process cannot be contradicted by the parties or their privies as to such facts stated in it as the law requires to be stated, unless the party colluded with the officer to make a false return. In *Ex parte St. Louis I. M. & S. Ry. Co.*, 40 Ark. 141, it was held that an officer's return of service of summons is conclusive in the action, nor can it be reviewed by certiorari, and to the same effect is *Fitzgerald v. Kimball*, 86 Ill. 396; *McAnaney v. Quigley*, 105 Ill. App. 611.

In a suit to set aside a default judgment, it has been held that the sheriff's return of summons in the former action cannot be questioned: *Nichols v. Nichols*, 96 Ind. 433; *Long Branch Pier Co. v. Crossley*, 40 Misc. Rep. 249, 81 N. Y. Supp. 905.

Nor can a return of service indorsed on the summons by the officer be contradicted by parol or a petition to supersede execution: *Home Ins. Co. v. Webb*, 106 Tenn. 191, 61 S. W. 79; and though an affidavit of illegality, on the ground that defendant had not been served, and a traverse filed to the entry of service of the sheriff, were tried together, it was error to allow defendant to testify that the entry of service was untrue, where the sheriff had not been made a party to the traverse: *Parker v. Medlock*, 117 Ga. 813, 45 S. E. 61.

In *Thomas v. Owen*, 58 Kan. 313, 49 Pac. 73, it was held that the judgment of a federal court is to be treated in the state courts as a domestic judgment, and the return of the marshal of personal service of a subpoena in chancery in the action in which the judgment is rendered is conclusive on the parties to the same extent as the return of a sheriff of a summons issued from a state court.

The general rule that an officer's return of service of summons is conclusive between the parties to an action and privies after judgment is rendered, and cannot be contradicted on motion or other proceedings in the same cause to set the judgment aside, also finds support in *Johnson v. Patterson*, 59 Ind. 237; *Stewart v. Stringer*, 41 Mo. 401, 97 Am. Dec. 278; *Witherell v. Goss*, 26 Vt. 748; *Carr v. Commercial Bank*, 16 Wis. 50; and in *Frazier v. Williams*, 15 Minn. 288 (Gil. 219), judgment was rendered against defendant by default. The answer was filed on the same day, but after the judgment was rendered. On motion to open the judgment, defendant offered to show that the return of the sheriff as to the time of service of summons was false, and that the answer was filed in time and the judgment by default was prematurely entered. It was held that the return of the officer as to the time of service was conclusive.

2. **Rule that Return is not Conclusive.**—But the rule sustained by the foregoing cases is not universal. There is good authority upon the proposition that a sheriff's return of service of summons is not conclusive between the parties in the same proceeding after judgment is rendered, but that defendant on motion to set the judgment aside can prove the falsity of the return. A thoroughly considered case, which upholds the right of a defendant to vacate by motion a judgment which has been rendered against him without notice of the suit, is found in *Du Bois v. Clark*, 12 Colo. App. 220, 55 Pac. 750. In that case the action was against two defendants. The return of the sheriff recited personal service of summons on both. An appearance was made by attorney for both defendants, and an answer filed. The trial resulted in a judgment for the plaintiff, from which an appeal was taken, and the judgment reversed and the cause remanded for a new trial. On the second trial judgment was again rendered against defendants, the record showing the appearance of both defendants by the same attorney as before. Six months afterward one of the defendants moved the court to vacate the judgment, as against him, and to recall the execution which had been issued, on the grounds that no summons was served upon him in the action, and that he had no knowledge or notice of the action, and that he had never appeared or authorized any appearance in his behalf in the suit, and that the return of service of summons upon him and the appearance of attorneys for him in the action were unknown to him until after execution had been issued. The motion was denied by the trial judge, but his ruling was reversed on appeal, the court saying: "The first question with which we are confronted is whether, if the return of the sheriff was false, and was not the result of any misconduct of the plaintiff, its falsity may be shown by the party injured, in a proceeding to vacate the judgment. . . . A party cannot be deprived of his property without service of process in the manner provided by law. . . . We concede the force of precedents, and the respect which is due to them; but where gross injustice may follow adherence to a precedent, we do not conceive that it is binding upon the courts, at least unless it is more generally concurred in than this, that the return by the sheriff of personal service of summons is conclusive upon the parties. . . . The next question is whether relief can be obtained by a motion entitled in the cause, and addressed to the court which rendered the judgment, or whether the party complaining must resort to a bill in equity to set aside the judgment; . . . it is held that a judgment rendered without jurisdiction of the person may be impeached in equity, especially where a showing is made that injustice would result from the enforcement of the judgment. . . . But because equity will not decline jurisdiction, it does not follow that the same purpose may not be accomplished by motion. . . . And there is no reason in sight why the questions of fact involved in a proceeding to set aside a judgment may not be tried and determined as well and satisfactorily upon motion as upon bill. . . . In view of the considera-



tion that a complete investigation can be had on motion, there is no valid reason why the complaining party, who has commenced by motion, should be driven to a proceeding in equity. The remedies are concurrent, and either may be selected."

In *Cooke v. Haungs*, 113 Ill. App. 501, it was held that while the officer's return cannot be contradicted so as to defeat jurisdiction, yet it might be done so as to excuse a default, and the court accordingly reversed an order of the lower court denying a motion to vacate a judgment obtained by default, where it appeared from affidavits of the defendants that the person with whom a copy of the summons was left for her was not a member of her family, nor was it left at her usual place of abode, although so stated in the return of the sheriff.

In *Flowers v. King*, 145 N. C. 234, 122 Am. St. Rep. 444, 58 S. E. 1074, a judgment had been obtained by default. The officer's return was regular and showed personal service on the defendant, but the service had in fact been made on another person by the same name as defendant. The defendant had never entered any appearance, and had no knowledge of the pending action until after judgment was rendered. Said the court: "On these facts it is well established with us that the judgment against the defendant is absolutely void, and may be set aside on motion of defendant or treated as a nullity when and wherever the entire lack of jurisdiction is made to appear. It is urged that the judgment should not be set aside because the affidavits have failed to disclose any facts which would enable the defendant to make a valid defense against the plaintiff's demand. This is usually required before a court will disturb an irregular judgment. . . . But no such requirement exists where the judgment is void by reason of an entire lack of jurisdiction of the party. In that case the judgment is a nullity, and the party affected is entitled to have same set aside, whenever such fact is made to appear, and without proof or suggestion of merits."

In *Godwin v. Monds*, 106 N. C. 448, 10 S. E. 1044, an order vacating a judgment on motion was held to have been proper, where it appeared that the summons had been served by the sheriff while out of his county, and returned as duly served. It further appeared on the hearing of the motion to set aside the judgment that the defendants had told the officer that they had been expecting the suit, and would appear, and did employ counsel to represent them, but their counsel failed to file any answer, and the defendants, who were ignorant and had relied entirely on their counsel, received no notice of the judgment until some three months after its rendition. Said Chief Justice Merriman: "To say the least, the judgment set aside in this action was irregular and voidable. . . . The return of the sheriff by his deputy that he had served the summons was not conclusive. It was competent for the defendants to show, as they did, that there had not been lawful service." This case goes further, perhaps, than any others in upholding the right of a defendant, after judgment to contradict by motion an official return of service, for

here the defendants not only had knowledge of the action, but had authorized an attorney to appear for them.

In *Browning v. Gosnell*, 91 Iowa, 448, 59 N. W. 340, it was held that on a motion to vacate a judgment by default the officer's return that original notice was duly served could be overthrown by evidence that while the original notice required the defendant to appear in court on the 5th of the month, the copy served required him to appear on the 25th. Nor is the recital in an officer's return that service was had on defendant in a certain county by leaving a copy of the summons with a party of suitable age and discretion at defendant's place of abode conclusive of the fact that the place of service was defendant's place of abode: *Krutz v. Isaacs*, 25 Wash. 566, 66 Pac. 141.

#### IV. Relief in Equity from Judgment or Decree.

a. *In Case of False or Fraudulent Return in General*.—We have seen that when want of jurisdiction arises from a false return of an officer of service of summons, that there is a strong tendency among the courts of law to treat the return as conclusive, except in an action against the officer for a false return. This remedy is often wholly inadequate, and a party injured by a judgment obtained by means of an officer's false return of service must look to equity for substantial relief. Undoubtedly, as a general rule, courts of equity will relieve against a judgment rendered by a court without jurisdiction, yet in the particular question whether an officer's return of service of process can be contradicted, we find great difference of judicial opinion. One line of cases holds that the return of an officer to a writ is only prima facie evidence of the facts therein stated, and that when a judgment has been obtained by means of a false return and without any notice to the defendant, equity will grant relief.

The justice of this doctrine is ably sustained in the well-seasoned case of *Owens v. Ranstead*, 22 Ill. 161: "Suppose A brings an action against B, and the process is actually served on C, but returned as served on B, their resemblance being so great as to deceive the officer. A judgment having passed against B by default in a court of law, and the term having expired before he was informed of it, cannot B seek and obtain relief in equity by averring and proving that the process was not in fact served upon him, but upon C? Or suppose that it could be shown that it was physically impossible for the officer to make the service at the time stated in his return, by reason of the fact that B, at the time of issuing the process, and up to and after its return by the officer, was in a foreign and distant state, and so not within the reach of the officer. Would it not be just and equitable that a judgment by default obtained under such circumstances, and no chance to move in the court of law to set it aside, should be relieved against? . . . But the defendant answers, the remedy in such case is by an action against the officer for a false return. Granted such a remedy is at hand, but is it a complete remedy, as full as a court of equity can give? Is it any satisfaction

to the person thus situated, whose estate is swept from him by the execution issued on such a judgment, that he may sue the officer, and recover damages, and run the risk of being beaten on the execution finally? There is this remedy at law, but it is wholly inadequate, and in such case the powers of a court of equity ought to be successfully invoked. Courts of equity refusing to entertain such a case would be the reproach, as they are now the admiration, of mankind. . . . A judgment obtained without notice, and without appearance, is an injury to the rights of a party, for which he should have adequate remedy. If it does not exist at law, it must in equity. That a court of law cannot afford such a remedy is certain. . . . No relief can be had by writ of error, for the record on its face shows no error—none by *audita querela*, for if in use, it would be inapplicable. . . . Nor is there any efficacy in the writ of error *coram nobis*, because at law no averment can be made in the same action against the officer's return. The fact, then, being that a court of law can afford no adequate remedy, is the strongest of all reasons, and the very reason why an application should be made to a court of chancery. . . . We think, in all cases, if a sheriff or other officer, by fraud and collusion with a party, or by mistake, makes a false return, a court of equity has full power and jurisdiction to interpose and give the appropriate relief, and to permit the party injured, so that the remedy may be effective, to aver against the truth of the return, and show it to be false, although it is a matter of record."

The rule above announced is supported by the following cases: *National Metal Co. v. Greene Consol. Copper Co.* (Ariz.), 89 Pac. 535; *Harper v. Mangel*, 98 Ill. App. 526; *Kochman v. O'Neill*, 102 Ill. App. 475; affirmed 202 Ill. 110, 66 N. E. 1047; *Buck v. Hawley*, 129 Iowa, 406, 105 N. W. 688; *Wilcke v. Duross*, 144 Mich. 243, 115 Am. St. Rep. 394, 107 N. W. 907; *Patterson v. Yancey*, 97 Mo. App. 681, 71 S. W. 845; *Campbell P. P. & M. Co. v. Marder, Luse & Co.*, 50 Neb. 283, 61 Am. St. Rep. 573, 69 N. W. 774; *Goble v. Brenneman*, 73 Neb. 309, 121 Am. St. Rep. 813, 106 N. W. 440; *Huntington v. Crouter*, 33 Or. 408, 72 Am. St. Rep. 726, 54 Pac. 208; *Hamblin v. Wright*, 81 Tex. 351, 26 Am. St. Rep. 818, and note, 16 S. W. 1082. In the last case it was held that one against whom a judgment had been rendered without notice may obtain relief from it by injunction, notwithstanding it may appear, from an official return or by the recitals in the final judgment, that he had been duly served, or had voluntarily appeared, either in person or by an attorney. It is said in this case, however, that such relief would "not be administered when the party has an adequate remedy at law, nor, as a general rule, when he has an opportunity to make a motion for a new trial at the term at which the judgment was rendered." In *Buck v. Hawley* (Iowa), 105 N. W. 688, it was held that where summons was returned as served on two defendants, evidence that it was never served on one of them is admissible, in a suit to enjoin collection of the judgment, to show the falsity of the return as a whole.

b. **In Case of Absence of Meritorious Defense.**—For older cases holding that equity will grant relief against a judgment where juris-

diction depended upon the false return of service by an officer, see pages 244 and 245 of the note appended to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 218, and page 138 of the note appended to *Taylor v. Davis*, 19 Am. Dec. 137. But while these cases establish the rule that courts of equity will take jurisdiction, and grant relief in a proper case made, against a judgment obtained on an officer's false return of process, and they perhaps also may be said to hold that the legal remedy by action for damages against the sheriff is not an adequate remedy at law, still it is not in every instance that a court of equity will interfere to relieve against a judgment where jurisdiction was obtained by a false return of the officer. It is generally held, for example, that before equity will interfere to enjoin or set aside a judgment at law, even when there has been no service of summons, it is essential that the defendant has a meritorious defense to the cause of action in which such judgment was rendered.

This rule is based on the maxim of equity that it will not do a useless thing, and that it would be useless to set aside a judgment at law unless it was shown there would be a different result upon another trial at law. A long line of cases sustaining this doctrine will be found on page 222 of the note appended to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 218; and the more recent cases are *McDonald v. Cawhorn* (Ala.), 44 South. 395; *Rogan v. Eads*, 101 Ill. App. 509; *Meyer v. Wilson*, 166 Ind. 651, 76 N. E. 748; *Young v. Deneen*, 220 Ill. 350, 77 N. E. 193; *Bankers' Life Ins. Co. v. Robbins*, 53 Neb. 44, 73 N. W. 269; *McClung v. McWhorter*, 47 W. Va. 150, 81 Am. St. Rep. 785, 34 S. E. 740.

c. **In Case Facts are Presumptively Unknown to Officer.**—There are also some cases which hold that a sheriff's return of service may be impeached so far as it states jurisdictional facts, only when the facts stated are not within the personal knowledge of the officer, but as to all other matters in his return which are within the officer's personal knowledge, the return is conclusive between the parties, and equity will not grant relief: *Chambers v. King Wrought Iron Bridge Manufactory*, 16 Kan. 270; *Goddard v. Harbour*, 56 Kan. 744, 54 Am. St. Rep. 608, 44 Pac. 1055; *Easterwood v. Carter*, 9 Kan. App. 471, 61 Pac. 510.

But the distinction thus made as between matters presumptively within the personal knowledge of the officer and those not presumptively within his personal knowledge does not seem to us based on sound principle. Whether a false return recites that a defendant was served personally, or by leaving a copy of the summons at his usual place of abode with a member of his family over a certain age, the effect of the return upon the proceedings and the parties is precisely the same. The cases holding that a return as to matters presumptively within the officer's personal knowledge is conclusive, while as to matters not so presumptively in his personal knowledge can be proven untrue, say that personal service is a matter within the officer's personal knowledge, while a return that summons was left at

a defendant's usual place of abode, or with a member of his family of suitable age, could not be matter within his personal knowledge. Just why there should be a conclusive presumption in the one case and not in the other we cannot clearly see.

It seems to us that it might not infrequently happen that the officer did not know the defendant personally, any more than he did his usual place of abode, and that the information from others upon which he would thus have to rely might be as uncertain in the one case as in the other; or an officer might through mistaken identity serve the summons on the wrong person, especially if there were two persons of the same name or of the same initials. The only cases where this distinction between conclusive presumptions seem to have been made are in the Kansas decisions above cited, and from the language therein, it is clear that the mind of the court leans strongly to the old common-law doctrine that an officer's return of process should be conclusive in all matters, though in its rulings that doctrine is modified to the extent stated.

**d. In Case Plaintiff did not Induce False Return.**—But there are many cases which hold broadly that a sheriff's return of service is conclusive, and that equity will not grant relief, unless the false return was induced by the party against whom the relief is sought, or that he was cognizant of it, and permitted it, or unless it is shown that actual fraud had been perpetrated. These cases proceed upon the theory that where the plaintiff in law is not in fault, redress can be had only in the court of law where the record was made, and that if relief cannot be had there, the party injured can seek his remedy against the officer only in an action for damages for the false return. In other words, he has an adequate remedy at law. The earlier cases supporting this doctrine will be found in the note appended to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 218, and on page 117 of the note appended to *Morrill v. Morrill*, 23 Am. St. Rep. 103. Later cases are *Emerson v. Gray* (Del.), 63 Atl. 768; *Meyer v. Wilson*, 166 Ind. 651, 76 N. E. 748; *Smoot v. Judd*, 184 Mo. 508, 83 S. W. 481; *Strobel v. Clark*, 128 Mo. App. 48, 106 S. W. 585; *Reiger v. Mullins*, 210 Mo. 563, ante, p. 755, 109 S. W. 26; *Dowell v. Godwin*, 22 R. I. 287, 84 Am. St. Rep. 842, 47 Atl. 693, 51 L. R. A. 873; *Preston v. Kindrick*, 94 Va. 760, 64 Am. St. Rep. 777, 27 S. E. 588.

But the rule followed in these cases is very strongly opposed by the court of civil appeals of Texas in *Kempner v. Jordan*, 7 Tex. Civ. App. 275, 26 S. W. 870, where the court, after stating that good authority existed for the doctrine asserted in the above cases, continued: "On the one hand, there is a public policy to be observed that would uphold judgments; and, on the other, it shocks the conscience that a man should be deprived of valuable rights by the judgment of a court in a suit of which he had no notice. It can make little difference with the person who had no notice of the suit against him whether the plaintiff can be connected with the false return or not, if the return is in fact false, and an unjust judgment has been

obtained against him. Where a person has not been served with process in a suit, and has had no notice thereof, and a judgment has been rendered against him when he had a good defense by reason of a false return of service, he ought to be permitted to impeach the sheriff's return without being required to show that the plaintiff connived at or procured such return. It should not be necessary to allege or prove that the plaintiff had any connection therewith, or that it was fraudulently made by the sheriff. It should be sufficient that the return is not true in fact, and that there is a good defense."

#### V. Collateral Attack upon Judgment Because of False Return of Service.

When an attack on a judgment is direct and when collateral is a question not entirely free from difficulty, but it will be found fully discussed in the note appended to *Morrill v. Morrill*, 23 Am. St. Rep. 103. We have seen that in a proper case equity will generally relieve from a judgment where the jurisdiction depended on the false return of the officer of service of summons. Yet a suit in equity to enjoin a judgment at law is not generally regarded as a direct, but as a collateral, attack; but though collateral, it is clear that the rules applicable to collateral attack are not always applicable to it. The great weight of authority is to the effect that as between parties; and privies, the truthfulness of the recitals in an officer's return of service of process cannot be contradicted in a collateral proceeding to avoid the judgment: *Rose v. Ford*, 2 Ark. 26; *Bennett v. Wilson*, 133 Cal. 379, 85 Am. St. Rep. 207, 65 Pac. 880; *Harrison v. Hart*, 21 Ill. App. 348; *Bermudez Asphalt Pav. Co. v. Gibson*, 106 Ill. App. 6; *Tyler v. Davis*, 37 Ind. App. 557, 75 N. E. 3; *Day v. Goodwin*, 104 Iowa, 374, 65 Am. St. Rep. 465, 73 N. W. 864; *Thomas v. Ireland*, 88 Ky. 581, 21 Am. St. Rep. 356, and note, 11 S. W. 653; *Claryville G. L. & B. T. Co. v. Commonwealth*, 32 Ky. Law Rep. 861, 1157, 107 S. W. 327; *Johnson v. Mead*, 73 Mich. 326, 41 N. W. 487; *Allured v. Voller*, 112 Mich. 357, 70 N. W. 1037; *Burke v. Interstate Savings etc. Assn.*, 25 Mont. 315, 87 Am. St. Rep. 416, 64 Pac. 879; *Black v. Black*, 4 Brad. Sur. (N. Y.) 174; *Stearns v. Wright*, 13 S. D. 544, 83 N. W. 587; *Noedlinger v. Huff*, 31 Wash. 360, 72 Pac. 73.

In *Lancaster v. Snow*, 184 Ill. 534, 56 N. E. 813, it is held that the return of the sheriff on the summons in a foreclosure suit could not be impeached in collateral proceedings, where the interest of third persons have attached; and in *Rickards v. Ladd*, Fed. Cas. No. 11,804, 6 Saw. 40, it was held that an amended return of service of summons, as between the parties to the action and their privies, cannot be questioned by them collaterally. For other cases sustaining the general principle above stated, see the notes to *Morrill v. Morrill*, 23 Am. St. Rep. 103. In the case of *Bennett v. Wilson*, 133 Cal. 379, 85 Am. St. Rep. 207, 65 Pac. 880, however, it is said that there is an exception to the rule if the sheriff's return is forged, for in such case the judgment would not be in fact the judgment of the court.

But while there is no doubt that it is settled by the great weight of authority that in an ordinary collateral attack it is not permissible to impeach official returns of service of original process, still on this, as on every other question relating to the conclusiveness of such returns, there is lack of judicial harmony. Thus in *Newman v. Greely State Bank*, 92 Ill. App. 639, an action in debt was brought upon a judgment rendered by a court in the state of Nebraska. The record showed regular return of summons by the sheriff, reciting service by leaving a copy at the usual place of abode of the defendant. It was held that the return was only *prima facie* evidence of service, and that the defendant could show that the return was false, and that the court rendering the judgment acquired no jurisdiction. A similar ruling is found in *Kingsborough v. Fousley*, 56 Ohio, 450, 47 N. E. 541, the court saying in this case, however, that such an action was to be considered as a direct and not a collateral attack. True, in both of these cases the attack was made upon foreign judgments, but in *Campbell Printing Press Mfg. Co. v. Marder, Luse & Co.*, 50 Neb. 283, 61 Am. St. Rep. 573, 69 N. W. 774, a domestic judgment was involved, and it was explicitly held that extrinsic evidence is permissible in a collateral proceeding to impeach an officer's return of service of summons. The court in this case, however, draws a distinction between mere irregularities in the manner of service and a total want of service; in the former case, the judgment would not be open to collateral attack, while in the latter it would, because the judgment would be void. "If an attempt at service is made, and actually reaches the defendant, although it be not made or returned in the form and manner required by law, there is presented a case where jurisdiction attaches so far as to render a judgment good against collateral attack. But when the attempted service does not reach the defendant at all, there is no service and the proceedings are void"; and the right to impeach the false return of an officer in a collateral proceeding is clearly established by other decisions in this state: *Wilson v. Shipman*, 34 Neb. 573, 33 Am. St. Rep. 660, 52 N. W. 576; *Unangst v. Southwick* (Neb.), 113 N. W. 969.

In *Vaule v. Miller*, 69 Minn. 440, 72 N. W. 452, the action was by the assignee of a judgment to recover upon the judgment. The defendant in his answer attacked the validity of the judgment upon the ground that the court rendering it had no jurisdiction of his person because he had never been served with a summons in the action, though the officer's return recited service. It was held that the return could be impeached. The ruling in this case, however, was placed upon the ground that the answer was in effect an action to set aside the judgment, and was to be considered as a direct and not a collateral attack, although the plaintiff's action to recover upon the judgment was clearly a collateral proceeding. In *Ferguson v. Crawford*, 70 N. Y. 253, 26 Am. Rep. 589, and *Dutton v. Smith*, 42 N. Y. Supp. 8, 10 App. Div. 566, it was distinctly held that a

judgment may be collaterally attacked by a defendant, on the ground that he had not been served with process in the action in which it was rendered; but the report of these cases does not disclose whether or not the return of service upon which the attack was made was an official return, and consequently we cannot tell how far these cases may be in point on the particular question now under consideration.

#### VI. Sufficiency of Evidence to Impeach Return.

a. **Rule that Evidence must be Clear and Cogent.**—Whatever may be the difference of opinion among the courts as to the conclusiveness of an officer's return of summons and of the remedies open to a party injured by a false return, the authorities are all agreed that the truthfulness of an official return of process can be overcome only by proof that is positive, clear and convincing: *Kochman v. O'Neill*, 102 Ill. App. 475; *Osman v. Wisted*, 78 Minn. 295, 80 N. W. 1127; *Wilson v. Shipman*, 34 Neb. 573, 33 Am. St. Rep. 660, 52 N. W. 516; *Unangst v. Southwick* (Neb.), 113 N. W. 989, 116 N. W. 864; *St. Paul Harvester Co. v. Faulhaber* (Neb.), 117 N. W. 702; *Huntington v. Crouter*, 33 Or. 408, 72 Am. St. Rep. 726, 54 Pac. 208.

b. **Illustrations of this Rule.**—Thus, the return of an officer that he served the notice on a married woman by leaving a copy at the residence of and with her husband, that being her usual place of residence, is not overcome by the testimony of a witness given seventeen years thereafter on his unaided recollection, that her husband was not then at the place where he and his family usually resided, but at the house of a neighbor: *Galvin v. Dailey*, 109 Iowa, 332, 80 N. W. 420.

But the positive testimony of one against whom a decree was rendered by default in foreclosure proceedings that no service of notice was ever served upon him, and the testimony of the sheriff who made the service and the return that he did not remember making the service, though he would have been likely to remember it if he had made it, was, in the absence of the return, sufficient to overcome the presumption of service arising from recitals of personal service contained in the decree, supported alone by entries of such service in the appearance docket and fee-book: *Shehan v. Stuart*, 117 Iowa, 207, 90 N. W. 614; but it will be noticed that the return itself was not produced in this case, and hence the decision refers only to the conclusiveness of the recitals in the decree and not of the return, itself, and the court said that these were "by no means equivalent in weight to the return itself." In *Bowden v. Hadley* (Iowa), 116 N. W. 689, it was held that the sworn return of the proper officer in proper form in foreclosure proceedings, showing service of notice to the property owner, is not overcome by the testimony of the property owner, who in his original petition to set aside the sale alleged such service, and whose testimony was equivocal, in that he admitted the officer called on him with the avowed purpose of serving a notice, but that the notice was not in fact served because he induced the officer to believe that the indebtedness had been paid.



The return of an officer, and his testimony that he summoned W. and his wife, is not overcome by her testimony admitting that she was summoned, but alleging that the officer returned in a few minutes and said that he had summoned the wrong party, and that she would not have to pay any attention to it, that he had made a mistake and would have to go and find the right party, the officer denying such conversation: *Taylor v. Welsloger*, 90 Md. 409, 45 Atl. 476. And in an action on a judgment rendered ten years previously which was regular on its face, and of which the defendant had knowledge within a month after its rendition, testimony of the defendant that the summons was never served on him, and the further testimony of two members of his family that it was not left with them, was held insufficient to impeach the officer's return: *Vaule v. Miller*, 69 Minn. 440, 72 N. W. 452.

In *Utter, Adams & Allen v. Smith*, 25 Ky. Law Rep. 2272, 80 S. W. 447, it was held that in a suit to set aside a judgment for want of service, after the death of the officer who made the same, evidence that such officer drank to excess at times, together with the testimony of defendant's attorney with reference to a conversation he had with such officer in his lifetime concerning his return of this summons, and also his recollection of the testimony of such officer in another case with reference to a return on a summons in that case, were clearly incompetent, but even if competent were not sufficient to overcome the return. On motion to set aside a judgment against a corporation where the sheriff's return showed personal service on the local agent in the original action, and there was evidence corroborating the return, allegations of the want of service of summons were of no effect as against the return and corroborative evidence: *National Metal Co. v. Green Consol. Copper Co. (Ariz.)*, 80 Pac. 397. In *United States v. Gayle*, 45 Fed. 107, it was held that the contradiction of an officer's return of summons made by the defendant eighteen years afterward is not sufficient to overthrow the verity of the return. But where service is made by a deputy sheriff and the return signed by the sheriff, an affidavit of the defendant that the paper delivered to him as a copy of the original notice was the one made an exhibit, which did not show that the original notice was signed by plaintiff or his attorney, as it was in fact, is sufficient to overcome a recital in the return that a true copy of the original notice was delivered to the defendant: *Hoitt v. Skinner*, 99 Iowa, 360, 68 N. W. 788.

**c. Uncorroborated Testimony of Complainant.**—Some cases have gone even further than any of the above, and hold that an officer's return of service cannot be impeached by the unsupported evidence of the person on whom service appears to have been made: *Sullivan v. Niehoff*, 27 Ill. App. 421; *Allen v. Hickey*, 53 Ill. App. 437; *Lancaster v. Snow*, 184 Ill. 534, 56 N. E. 813; *Tatum v. Curtis*, 68 Tenn. (9 Baxt.) 360. In *Davant v. Carlton*, 53 Ga. 491, it was held that the verity of an official return was not overcome by the testimony of a defendant seven years afterward that he had never been

served. Doubtless the lapse of time between the date of service and the testimony contradicting it had much weight in this case, but the language of the court would seem to indicate a general holding that the uncorroborated evidence of the party appearing to have been served is not sufficient to overthrow an official return. Said Judge McCay: "The negative statement of a party that he never was served bears no comparison in strength with the entry itself. It is, in the first place, the sworn entry at the time, of an officer of the court, with no interest to enter contrary to the fact, and with no motive or even occasion to do so. If the entry be untrue, he is liable for damages as well as for punishment. That the sheriff cannot now call up the act of service, is very natural, and is of but very slight importance, and that the defendant can say positively that this service was not made seven years ago, is more than most men would be willing to say in the face of this entry. State it as strongly as he may, it is, at last, only negative testimony; a statement that he does not remember to have been served. True, he says, in terms, he was not, but all he can mean is that he has no memory if it. . . . If an entry of service by the sheriff is to be set aside by the oath of the defendant seven years after it is made, then a judgment is but a poor record. As we have said, we think, in the nature of things, such an entry is very strong evidence, and whilst it is impossible to fix accurately its weight as compared with other evidence, we think it is entitled to at least the dignity asked for it in the charge requested. It should only be set aside upon very satisfactory proof of its correctness. It should require the strongest testimony to rebut it."

But the doctrine that an official return cannot be impeached by the uncorroborated testimony of the party appearing to have been served is repudiated in the case of *Trager v. Webster*, 174 Mass. 580, 55 N. E. 318, where it was held that the testimony of defendant alone in an action on a judgment, was sufficient to overcome the sheriff's return of personal service, the court saying: "The weight of evidence in these days is measured by more delicate tests than a simple count of witnesses"; and this in our judgment is much the better rule, for otherwise relief in many cases would be denied where the complainant would be justly entitled to it. Positive evidence in support of a defendant's negative averment that he had not been served can rarely be obtained from others.

**BARRY v. CALVARY CEMETERY ASSOCIATION.**

[211 Mo. 105, 109 S. W. 559.]

**CEMETERIES—Duty to Maintain Grounds in Safe Condition.** If visitors to a cemetery leave the roadways and walk across the grass-covered grounds, they are not entitled to expect the same character of passageway that is provided in the regular roadways. (p. 775.)

**CEMETERIES—Duty to Keep Grounds in Safe Condition.**—Although a cemetery association knows that people are in the habit of wandering over the grounds regardless of the roadways, and impliedly invites the public to make such use of the grounds, it owes them no further duty than to keep the premises in a reasonably safe condition. (p. 775.)

**CEMETERIES—Liability to Person Injured.**—Where one in visiting a relative's grave leaves the regular roadway and walks across the grounds, she cannot hold the cemetery association liable in case she steps into a small hole so concealed by grass that ordinary inspection would not disclose it, when there is no evidence how the hole was made or that the association knew of its existence. (pp. 775, 776.)

David Murphy, for the appellant.

J. L. Hornsby, for the respondent.

<sup>107</sup> VALLIANT, P. J. This is an action for damages for personal injuries sustained by plaintiff in consequence, as she alleges, of the negligence of defendant. The defendant, as its name indicates, is a cemetery association; it owns a large cemetery in the city of St. Louis, containing several hundred acres. The plaintiff, <sup>108</sup> according to her petition, had a proprietary interest in a lot in the cemetery and a sentimental interest in the fact that a deceased brother of hers was buried in the lot and she had the right to visit the cemetery. The petition charges that it was the duty of the corporation "to keep its grounds and every part thereof contiguous to the burial lots in a reasonably safe condition, so that lot and grave owners and others could pass over and upon the grounds of defendant to and from their respective lots and graves"; that on a certain day she was lawfully in the cemetery on her way to visit the grave of her brother, walking across the grounds of defendant; that there was an excavation or hole in the ground, on every side of which the grass had so grown and bent down as to completely conceal it, and in consequence the plaintiff stepped into the hole with one foot and badly sprained her ankle and seriously injured the joint. The petition avers that the defendant knew, or by the exercise of ordinary care could have known, that the hole was there. The damages alleged were four thousand seven hundred dollars.

The answer was a general denial and a plea of contributory negligence.

At the close of the plaintiff's case the court, at the request of the defendant, gave an instruction to the effect that the plaintiff was not entitled to recover, which resulted in a nonsuit with leave, which the court refused to set aside, and plaintiff has appealed.

The plaintiff's testimony tended to show as follows: On the morning in question the plaintiff, in company with her sister and daughter, was in the cemetery aiming to go to the grave of the plaintiff's brother. They first intended to visit another lot and they started in that direction, but after going a part of the way they concluded to abandon that purpose and turned back to visit the brother's grave. There <sup>109</sup> were roadways and sidewalks in the cemetery and up to the time the plaintiff and her companions turned back they had walked along the sidewalks, but they came to a point where they thought they could shorten the walk, and as one of the party manifested a desire to return in time to go to church that morning, they concluded to leave the regular roadway and sidewalk and cut across vacant lots, and they did so. The plaintiff's sister and daughter were leading and she was following last; within a few feet after she left the sidewalk one of her feet went into a hole in the earth and she fell, spraining her ankle and hurting her quite badly. The size of the hole is not given exactly, although one witness measured it three months after the accident and stated that it then measured fourteen and one-half inches long, eleven inches wide and nine and one-half inches deep. The plaintiff testified, and so did her other witnesses, that the hole was large enough for her foot to sink into it, but so small that it was with great difficulty the foot could be extricated; that in pulling it out assistance was required, and such force was used as to cause much pain and tear the shoe. What caused the hole the evidence does not show, but it does show that it was entirely covered with grass so that it could not be seen. People who visited the cemetery did not always confine themselves to the regular roadways and sidewalks, but frequently strolled across the grounds. The lot to which plaintiff and her companions were aiming to go was not immediately contiguous to the roadway or sidewalk but was near it—plaintiff thought it was one hundred to two hundred feet distant, was not sure; it was five hundred feet distant from the point where plaintiff left the road to cut across the vacant lots. Some three months or more after the accident plaintiff called on

the superintendent of the cemetery; he went with her to the scene of the accident, and she pointed out the hole to him. One of <sup>110</sup> plaintiff's witnesses who accompanied her and the superintendent testified that the hole at that time was full of leaves. The superintendent said it was a bad place, and if he had known it he would have had it filled before. He did afterward have it filled.

This is the second suit of the plaintiff against the defendant for this alleged wrong. The first suit resulted in a verdict and judgment for the plaintiff for three hundred and fifty dollars from which defendant appealed to the St. Louis court of appeals, where the judgment was reversed without remanding, the court holding that under the evidence the defendant was not liable: *Barry v. Calvary Cemetery Assn.*, 106 Mo. App. 358, 80 S. W. 709.

The petition in the former case is not before us, but this is evidently the same cause of action, and the testimony for the plaintiff now is not materially different from what it was then. The law of the case is well expressed in the opinion in that case by Bland, P. J., speaking for the court, and we see no occasion for a further discussion of it.

The roadways and sidewalks were landmarks to direct pedestrians and others the way to go, but if persons chose to leave the regular way provided for them and, for their own convenience or pleasure, undertook to go across the grass-covered ground, they were not entitled to expect the same character of passageway that was provided in the regular road. If, as is contended by plaintiff, the defendant knew that people were in the habit of wandering over the grounds regardless of the roads, and impliedly invited the public to make such use of the grounds, then the most that could be said as to the duty of the defendant was to keep its grounds in reasonably safe condition for people to walk over. According to the plaintiff's evidence, here was a cemetery containing several hundred acres, and the only thing pointed out to mar its safety was this small hole so concealed from the view by the grass <sup>111</sup> that no ordinary inspection could discover it. The size of the hole is best shown by the fact that it was just large enough to receive the lady's foot pressed into it by her weight, but so small that it was only with painful exertion that it could be extracted. It was somewhat larger when the witness measured it, three months later, but it is not unreasonable to conjecture that, in the effort to get the plaintiff's foot out, the hole was made larger. Her testimony was that a man came to her assistance and helped her out of it. How

the hole was made was left to conjecture. In the case above mentioned that was before the court of appeals, there was evidence tending to show that gophers sometimes burrowed such holes in those premises, but however that may be and whatsoever made the hole, it was not of a kind to suggest that it was done in defendant's business, and there is no evidence that defendant knew it or was likely to discover it except by accident or extraordinary care. On the plaintiff's own evidence she has no right to recover of the defendant for her misfortune.

The judgment is affirmed.

All concur.

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*If the Owner of Premises* invites people, expressly or by implication, to go thereon, there arises the obligation to use care to see that the premises are in a reasonably safe condition: *Klugherz v. Chicago etc. Ry. Co.*, 90 Minn. 17, 101 Am. St. Rep. 384; *Thornton v. Maine State Agricultural Soc.*, 97 Me. 108, 94 Am. St. Rep. 488. This, however, is the extent of his obligation; he is not an insurer of their safety: *Ryder v. Kinsey*, 62 Minn. 85, 54 Am. St. Rep. 623; *Montgomery v. Muskegon Booming Co.*, 88 Mich. 633, 26 Am. St. Rep. 308.

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## STATE v. STOCK EXCHANGE.

[211 Mo. 181, 109 S. W. 675.]

### **RESTRAINT OF TRADE—Boycotting by Traders' Exchange.**

In a suit against members of a livestock exchange and of a traders' exchange for an injunction against their maintenance of a combination to control the livestock market in Kansas City, it is no defense to the members of the livestock exchange that they are constrained to act unlawfully in refusing to deal with others than members of the traders' exchange for fear of boycott by the latter, and if the acts of the members of the traders' exchange amount to an unlawful interference or constraint, the court will enjoin the members of the latter exchange from boycotting the members of the other exchange. (p. 779.)

**RESTRAINT OF TRADE—Boycott—Combination by Voluntary Associations.**—While a voluntary association of livestock buyers cannot sue or be sued, still a suit to enjoin an unlawful combination in restraint of trade by means of the association may be brought against the individuals composing it, and the name of the association may be used to distinguish the defendants in their associated capacity. (p. 779.)

**RESTRAINT OF TRADE—Boycott—Liability of Associations in Unlawful Combination.**—While the members of a voluntary association to boycott competing traders are not partners in a legal sense, still where they in considerable numbers pursue a course of conduct agreed upon to effect the boycott, they become responsible, not only each for his own acts, but each for the acts of the other and for all. (p. 780.)

**RESTRAINT OF TRADE—Boycott—Right to Withhold Trade.** The rule that an individual has the right to refuse to deal with another without giving any reason therefor, and that what he has a right himself to do he may agree with others to do, is not without limitations. (pp. 780, 781.)

**RESTRAINT OF TRADE—Joint or Individual Action.**—It is the combination or agreement that results in restraint of trade that the anti-trust statutes denounce, whether the result is accomplished by the act of each individual on his own account doing as he agreed to do, or by the joint action of all. (p. 781.)

**RESTRAINT OF TRADE—Boycott—Combination of Livestock Associations.**—A petition stating that the defendants who are members of a traders' exchange refuse to have any dealing in livestock with persons not members of the exchange, for the reason only that they are not members, and that by threats of boycott they have so intimidated the members of a livestock exchange that they will not deal with persons not members of the traders' exchange, by which means the traders' exchange has obtained control of the market in Kansas City, states a cause of action under the anti-trust laws. (p. 784.)

**LAW—Standard of Honesty and Business Integrity.**—The law is satisfied with the standard of honesty and business integrity which it has itself erected, and it recognizes the right of no man or set of men to erect for another any other standard and coerce him to measure his conduct by it. (p. 785.)

**RESTRAINT OF TRADE—Exclusion from Market of Nonmembers of Association.**—A voluntary association of livestock traders cannot lawfully exclude from the market persons not members of the association for no other reason than that they are not members. (p. 785.)

Herbert S. Hadley, attorney general, and John Kennish, assistant attorney general, for the appellant.

Kimbrough Stone and Frank Hagerman, for the respondent, Kansas City Livestock Exchange.

187 VALLIANT, P. J. In January, 1905, the attorney general instituted this suit in the circuit court of Jackson county against the defendants, alleging that they had formed a pool or combination to control and limit the trade in livestock on the market of Kansas City, and to limit competition in that trade, in violation of sections 8978 and 8979, Revised Statutes of 1899, and of the common law, and praying an injunction to restrain them from further practice of the alleged unlawful <sup>188</sup> conduct. The defendants are nominated in the petition as the Kansas City Livestock Exchange, a voluntary association, and the individuals and corporations composing that association, and also the Traders' Livestock Exchange, likewise a voluntary association, and the individuals and corporations composing that association. The appearance of all the defendants was entered by their respective counsel. On the filing of the petition a temporary injunction was issued. An amended petition was filed in April,

1905. Each group of defendants—that is, those composing the Kansas City Livestock Exchange and those composing the Traders' Livestock Exchange—filed a demurrer to the amended petition; the court sustained the demurrers, whereupon, the attorney general declining to plead further, final judgment for defendants was rendered, and this appeal was taken.

The only question is, Does the amended petition state facts sufficient to show that defendants have committed, or are in the attitude of committing, acts that constitute a violation of the laws of this state commonly called the anti-trust law or laws forbidding acts in restraint of trade?

1. There are two groups of defendants named in the petition; one is composed of those who constitute what is called the Kansas City Livestock Exchange, the other of those who constitute what is designated as the Traders' Livestock Exchange. The difference, if any, in the character of business done by the defendants composing one of these exchanges and that of those composing the other is not very clearly set out in the amended petition, and perhaps is not very important, but we gather from the briefs the idea that the defendants composing the Kansas City Livestock Exchange are engaged chiefly as commission merchants to receive shipments of livestock for that market consigned to be by them sold or otherwise disposed of as <sup>189</sup> directed by the shippers, whilst the defendants composing the Traders' Livestock Exchange are buyers and speculators in such livestock. At all events the members of the two exchanges do a large business with each other, and, in accordance with the averments of the petition, they together handle practically all the livestock business in that market. The gravamen of the complaint is the members of the Traders' Exchange have taken such action as tends to exclude all persons from buying and selling livestock coming to that market except members of that exchange, and to limit competition in such trade to those members. We will notice more particularly, presently, what the amended petition charges on that point. But there is no allegation that the defendants composing the Kansas City Livestock Exchange have willfully done anything, or purpose to do anything, to so exclude others who may desire to do business with them, or to limit competition in the trade, but the allegation is that defendants composing the Traders' Exchange have boycotted, and are threatening to boycott, the members of the other exchange if they do any livestock business with any persons not members of the Traders' Ex-



change, and the inference to be drawn is that if the members of the Kansas City Livestock Exchange have done any of the acts complained of, they have done so only by fear of the boycott. It may fairly be inferred from the amended petition that if the members of the Kansas City Livestock Exchange were left free to act they would not do any of the things called in the petition unlawful.

When a defendant is called into court to answer the consequence of his unlawful conduct whereby a plaintiff has been made to suffer, it is no defense for him to say that he was constrained to do the unlawful act for fear of losing the custom of a large trader or group of traders, but when he is called into a court of equity to show cause why he should not be enjoined <sup>190</sup> from yielding to such constraint, and it appears that the influence which is pressing him is an unlawful influence and it is within the power of the court to prevent it, equity will not leave him under the unlawful constraint and at the same time enjoin him from yielding to it, but it will exert its power to remove the cause, and then there will be no occasion for an injunction.

Therefore, if the defendants composing the Kansas City Livestock Exchange are refusing and unwilling to do business with any other persons than members of the Traders' Exchange for fear of the boycott, and if the acts of the members of the Traders' Exchange amount to an unlawful influence or constraint, the right thing for the court to do is to enjoin the members of the Traders' Exchange from boycotting the members of the other exchange, and that will end the trouble. Under this view of the law the demurrer of the members of the Kansas City Livestock Exchange should be sustained.

2. In support of the demurrer in behalf of the Traders' Livestock Exchange, the point is made that it is a mere voluntary association, and therefore it has no legal entity—it can neither sue nor be sued. The association as such has no legal entity, and therefore can neither sue nor be sued, but in the case at bar the defendants are the individuals and corporations that compose the exchange, and the name "Traders' Livestock Exchange" merely serves to distinguish those defendants in their associated capacity.

The point is also advanced that the association is not a partnership and the members are not partners in trade. That, too, is true to a certain extent. The association, as its purposes are defined, lacks the essential elements of a co-partnership; it is not a combination of skill and capital em-

barked in a definite business for mutual profit; one member cannot act for the <sup>191</sup> whole so as to bind all in a contract. And from this premise it is argued that no member is affected by any act of another member or of all the other members combined; he is responsible only for his own acts. That argument cannot, with safety, be carried to the extent that it is here sought to carry it. Granting that the members of the association are not partners in the sense of the commercial law, and that one member cannot, in that sense, bind the association, still where a large body of men combine for a particular purpose and agree inter sese to adopt a uniform course of conduct, a course of conduct that, if pursued by one individual, would perhaps be of little consequence, yet if pursued by a large number would be of great consequence for good or evil, and therefore where, in pursuance of that agreement, the body of men so combined or a considerable number of them, though acting separately in each transaction, pursue the course of conduct agreed on, the law will presume that the acts committed were the result of the agreement, and will hold all those who entered into the combination and agreement as instigators, aiders and abettors of the acts, and therefore responsible, not only each for his own act, but each for the acts of each other and for all. If this were not the law, how could a conspirator ever be held for the act of his co-conspirators?

Let the case at bar serve as an illustration: if the members of the Traders' Livestock Exchange have entered into such a combination and agreement between themselves as binds each individual and all the individual members, then, if each acting separately on his own account so far as the buying and the selling is concerned, but acting under restraint of the agreement so far as to refuse to deal with anyone not a member of the association, and if by that line of conduct the livestock market is closed to all except members of the association, how could those who have accomplished <sup>192</sup> that purpose, or who are persisting in that course, be held accountable for what they have done or be restrained from continuing in that course if each individual is to be adjudged by his act alone without regard to the influence of the agreement they all made to effect that purpose? We do not understand any of the cases cited by counsel for respondent as holding contrary to the views above expressed.

3. It is said in the argument in support of the demurrer that any man has the right to refuse to deal with another for any reason that seems good to him, and he is not required

to give a reason; and, advancing a step further in that line of argument, it is said that what he has a right himself to do he may agree with another or others to do.

Primarily, that proposition is sound, but even that principle may be carried too far. One man may be as exclusive in his individual dealings as possible, yet not appreciably affect the general market. Unless one happens to possess unusual strength he cannot, by himself, affect what in the language of the exchange is called "corner the market." So if a buyer and speculator in the livestock market in Kansas City should refuse to buy from or sell to men composing a certain class of traders, his action would not be such an interference with the rights of the prescribed class as would materially shut them out from the market, and perhaps he might make a limited compact with others of his way of thinking that would not be such a material interference with the freedom of the market as to bring him and his associates within the limits denounced by the statute, but that would depend on the extent to which the compact goes; carried to a certain degree it might not limit competition in the market, but carried further it might. The statute is not directed against individual action; it is directed against combination. But the argument is that here we have a <sup>193</sup> case where there is no combined action, because each member acts for himself, that the association, as such, neither buys nor sells, nor refuses to buy from or sell to persons of the prescribed class. The statute is directed against the combination to do the forbidden act, and it has in mind that each individual will do on his own account what he has agreed with those in the combination to do, and thus the unlawful result will be accomplished.

It is the combination or agreement that results in restraint of trade that the statute denounces, whether the result is accomplished by the act of each individual on his own account doing as he agreed to do, or by the joint action of all. The result may be the same whether each individual, acting for himself, pursues the course marked out by the combination or whether they all join in a united transaction. It is the combination to accomplish that result that the statute is aimed to prevent.

The learned counsel for respondents refer to *Anderson v. United States*, 71 U. S. 604, 19 Sup. Ct. Rep. 50, 43 L. ed. 300, as authority in support of the demurrer. That case has points of close resemblance to this and also points of wide difference.

That was a suit in a federal court in Kansas City against these defendants as members composing the Traders' Livestock Exchange, charging them with being a combination in violation of the act of Congress entitled, "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1900. The most marked point of difference between that case and this is that the decision in that case rested on a finding of the fact from the evidence that the defendants were not guilty of the acts charged, whereas here we have a demurrer to the petition which admits all the facts well pleaded.

<sup>194</sup> The record in that case contained the preamble to the articles of association of the Traders' Livestock Exchange in which it was stated that its object was "to promote and protect all interests connected with the buying and selling of livestock at the Kansas City stockyards, and to cultivate courteous and manly conduct toward each other and to give dignity and responsibility to yard traders" and, to that purpose, certain rules were adopted, among which were rules 10, 11 and 12, which, together with rule 8, which does not appear in that record, are quoted in the amended petition in the case at bar and which we will presently more particularly note. It is sufficient for the present to say that the rules forbade the members dealing with any yard traders except themselves or with any person or concern who did so. The court in that case holds the purposes of the exchange as set out in the preamble to be praiseworthy, and finds nothing in the rules derogatory of that purpose. At page 613 the court said: "There is no evidence that these defendants have in any manner other than by the rules above mentioned hindered or impeded others in shipping, trading or selling their stock, or that they have in any way interfered with the freedom of access to the stockyards of any and all traders and purchasers, or hindered their obtaining the same facilities which were therein afforded by the stockyards company to the defendants as members of the exchange, and we think the evidence does not tend to show that the above results have flowed from the adoption and enforcement of the rules and regulations referred to."

At page 617 the court said: "The rule has no direct tendency to diminish or in any way impede or restrain interstate commerce in the cattle dealt in by the defendants. There is no tendency, as a result of the rule, directly or indirectly, to restrict the competition among defendants for the class of cattle dealt in <sup>195</sup> by them. Those who are sell-

ing the cattle have the market composed of defendants, and also composed of the representative buyers of all the packing-houses at Kansas City, and also the various commission merchants who are constantly buying on orders and of those who are buying on their own account. This makes a large competition wholly outside of the defendants. The owner of cattle for sale is, therefore, furnished with a market at which the competition of buyers has a broad effect. All yard traders have the opportunity of becoming members of the exchange, and to thus obtain all the advantages thereof. The design of the defendants evidently is to bring all the yard traders into the association as members, so that they may become subject to its jurisdiction and be compelled by its rules and regulations to transact business in the honest and straightforward manner provided for by them. If, while enforcing the rules, those members who use improper methods or who fail to conduct their business transactions fairly and honestly are disciplined and expelled, and thereby the number of members is reduced," etc., it does not amount to an unlawful restraint of interstate commerce.

We have thus quoted largely from the opinion in that case because learned counsel rely on it with confidence, but we do not consider it as justifying or excusing what the amended petition in the case at bar charges these defendants with having done and with still doing, and which by their demurrer they admit they have done and are doing.

The petition in this case was filed after the decision in that case had been rendered and the attorney general doubtless had the opinion before him; at all events, he has charged in this petition that these defendants have done and are doing acts that limit competition and restrain trade such as the court in the case above mentioned said the evidence failed to show <sup>196</sup> they were thus guilty of. The memberships of the two exchanges are set forth in the amended petition showing a large number of each, and the statement is that the magnitude of their business is such that jointly they control all the livestock business that is transacted at the Kansas City stockyards. That is a statement of a fact on which, if defendants so desired, they might join issue. And in that connection the petition states that the Traders' Exchange has adopted the following rules:

"Rule VIII. Membership in this exchange shall be one thousand dollars (\$1,000), upon payment of which the secretary shall issue a certificate of membership, which shall be transferable."

"Rule X. This exchange will not recognize any yard trader, unless he is a member of the Traders' Livestock Exchange.

"Rule XI. When there are two or more parties trading together as partners they shall each and all of them be members of this exchange.

"Rule XII. No member of this exchange shall employ any person to buy or sell cattle, unless such person hold a certificate of membership in this exchange."

And the amended petition states that in conformity to the requirements of those rules the members of the Traders' Exchange refuse to have any dealing in the buying or selling of livestock with the persons or corporations in that business who are not members of the exchange, for the reason only that they were not members, and that by threats of boycott they have so intimidated the members of the Kansas City Livestock Exchange that they will not buy from or sell livestock to persons or corporations who are not members of the Traders' Exchange. Then the petition states a number of specific transactions in which the Traders' Exchange, by boycotting and threats of boycotting, intimidated <sup>197</sup> other livestock dealers from trading with persons and corporations not members of the Traders' Exchange, because not members, and by this course of conduct the defendants, the members of the Traders' Livestock Exchange, have obtained control of the market and of the price of livestock therein and have limited competition therein. If these statements are not true, the defendants should deny them and let the evidence answer. If they are true, the defendants composing the Traders' Livestock Exchange have been and are violating the anti-trust laws of this state, because they have in effect excluded from the market all yard traders except themselves. the effect of which is to limit competition in the trade and give them control of the market.

It is said that any yard trader may become a member of the exchange, and that therefore if anyone is shut out from the market it is only because he does not choose to enter. Perhaps it is true that anyone may become a member, although the amended petition which is our only source of information does not say so, but if so, he is admitted to what ought to be an open free market only through a door that is guarded by the Traders' Exchange and only on terms prescribed, the first of which is the payment of one thousand dollars entrance fee. Moderate as that fee may be, in consideration of the advantages to be obtained, it is nevertheless

a condition not imposed by law, and, in a sense, it is a price to be paid for that which the law gives him without a price. The initiation fee to some business exchanges that have come under our notice is several times one thousand dollars, and, as no one has a right to membership in a voluntary association except on the terms prescribed by the association, there is nothing to prevent or forbid the members of the Traders' Exchange increasing the amount of the fee to any sum. The law <sup>198</sup> makes no objection to the demanding by a voluntary association of a fee of admission of any sum whatever, but the law does object to the requiring of a person going into a public market that he should become the member of a voluntary association and enter the market or continue therein only on the terms prescribed by such association.

We fully appreciate what is said of the advantages, moral and material derived from exchanges of the kind in question. When properly conducted, they not only facilitate business, but tend also to advance the standard of business integrity; still men must be free to go into them or not, as they see fit, and they must not block the way of anyone to a public market merely because he is not a member of the exchange. Conceding the wholesome moral influence of exchanges of this kind, still the law is satisfied with the standard of honesty and business integrity which it has itself erected, and it recognizes the right of no man or set of men to erect for another any other standard and coerce him to measure his conduct by it.

The law recognizes the right of such voluntary association to expel a member for dishonest conduct and refuse thereafter to have any business transaction with him, as was the case in *Missouri Bottlers' Assn. v. Fennerty*, 81 Mo. App. 525, and *Gladish v. Kansas City Livestock Ex.*, 113 Mo. App. 726, 89 S. W. 77, but that is very different from the case now before us. To exclude one man or several men for good cause is not to be considered along with the act of excluding all persons except those in the combination for no other reason than that they are not in the combination.

The statements in the amended petition are sufficient, if true, to entitle the attorney general to the relief he asks as against the defendants composing the Traders' Livestock Exchange; therefore, the demurrer filed by them should be overruled; but the demurrer <sup>199</sup> filed by the defendants composing the Kansas City Livestock Exchange should be sustained.

The judgment is reversed and the cause remanded, to be proceeded with according to the views herein expressed.

All concur.

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*Unlawful Trusts and Monopolies* are discussed in the note to *Harding v. American Glucose Co.*, 74 Am. St. Rep. 235. Monopolies embrace any combination the tendency of which is to prevent competition in trade in its broad and general sense, and to control prices to the detriment of the public: *Pocahontas Coke Co. v. Powhatan Coal etc. Co.*, 64 W. Va. 508, 116 Am. St. Rep. 901. Any combination of competing corporations the necessary consequence of which is the controlling of prices or limiting production or suppressing competition in such a way as to create a monopoly, is contrary to public policy and void: *Charleston Gas Co. v. Kanawha Gas Co.*, 58 W. Va. 22, 112 Am. St. Rep. 936. The true test of the validity of a contract or combination between corporations or other persons to fix the price and control the supply of a commodity is whether it affords only a fair and just protection to the parties, or whether it is so broad as to interfere with the interests of the public. If the former, it is valid; if the latter, it is void: *Finck v. Schneider Granite Co.*, 187 Mo. 244, 106 Am. St. Rep. 452.

*A Combination in Restraint of Trade* is a conspiracy in law whenever the act to be done has a necessary tendency to prejudice the public, or oppress individuals by unjustly subjecting them to the power of the confederates, and giving effect to the purposes of the latter, whether of extortion or mischief: *Klingel's Pharmacy v. Sharp*, 104 Md. 218, 118 Am. St. Rep. 399.

*An Agreement Among the Members of an Association* which practically controls the business of buying and selling cattle at a great commercial center that they will make no purchases or sales for others for a commission less than fifty cents on each head of cattle handled, creates a restriction in the full and free pursuit of a lawful business, and constitutes a trust within the terms of chapter 265 of the Laws of 1897 of Kansas; and the exaction of such a commission by a member of the association is a misdemeanor, and a contract to pay it is void: *State v. Wilson*, 73 Kan. 343, 117 Am. St. Rep. 479.

*Boycotting* is the subject of a note to *Gray v. Building Trades Council*, 103 Am. St. Rep. 488.

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## PHILLIPS v. ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY.

[211 Mo. 419, 111 S. W. 109.]

**RAILROAD HOSPITAL—Liability to Patients.**—A hospital association formed to provide medical services to the employes of a certain railroad company, and maintained by involuntary deductions from the wages of these employes, is not a charitable institution within the rule that exempts such institutions from liability to patients. (p. 795.)

**RAILROAD HOSPITAL—Liability to Patients.**—A hospital association formed to provide medical service to employes of a certain railroad company, and maintained by involuntary deductions



from the wages of these employés, is not exempt from liability to patients by the mere employment of competent surgeons, but it must go further and competently treat the patients received. Such associations occupy the position of ordinary physicians and surgeons. (p. 796.)

**HOSPITAL ASSOCIATION—Liability of Railroad Company to Patients.**—A hospital association, with a separate corporate charter, having for its officers the chief officers of a railroad company, and for its object the treatment of employés of the railroad company exclusively, maintained by involuntary deductions from the wages of these employés, requiring notice to the chief surgeon and claim agent of the railroad company whenever an employé is removed to the hospital, and making the surgeons of the association the surgeons of the railroad company, is at least the agent of the railroad company (if not in fact the railroad company itself masquerading under another name), for whose negligence in the treatment of patients the railroad company is liable. (p. 797.)

**RAILROAD HOSPITAL—Admission by Surgeon as to Patient's Condition.**—A letter written by the chief surgeon of a railroad hospital to the assistant general auditor of the railroad company stating that a patient who has been in the hospital is mentally unbalanced, when neither of them knew that the patient had already been killed by a street-car after leaving the hospital unattended, is admissible in evidence in an action for the death against the railroad company. (p. 799.)

**NEGLIGENCE—Proximate Cause.**—It is not Necessary to a Defendant's Liability, after his negligence has been established, to show, in addition thereto, that the consequences of his negligence could have been foreseen by him. It is sufficient that the injuries are the natural, though not the necessary and inevitable, result of the negligent fault—such injuries as are likely, in ordinary circumstances, to ensue from the act or omission in question. (p. 801.)

**RAILROAD HOSPITAL—Liability for Death of Insane Patient.** Where the chief surgeon of a railroad hospital, knowing that a patient is insane, permits him to be placed unattended on a train to make his way home in a large city, the death of the patient, after leaving the train, by being struck by a street-car may reasonably be expected. (p. 802.)

Joseph A. Wright, for the appellant.

W. F. Evans and J. G. Egan, for the respondent.

**424 GRAVES, J.** This is an action by the widow to recover the sum of five thousand dollars, for the alleged negligent killing of her husband, James B. Phillips, who died April 11, 1904. The trial court having given a peremptory instruction to find for the defendant, the plaintiff took an involuntary nonsuit, with leave, and after unsuccessful motion to set aside the nonsuit so taken perfected her appeal to this court.

Phillips, the deceased, was an employé of defendant in its auditor's department. As such employé <sup>425</sup> there had been taken out of his wages a small monthly hospital fee, which entitled him to be admitted and treated in a certain hospital system alleged, upon the one hand, to be maintained by the

defendant for that purpose, and, upon the other hand, to be a separate and distinct corporation from the defendant, and maintained by certain employes of defendant, and not by the defendant itself. Shortly prior to his death Phillips had been furnished a pass by the defendant over its line from St. Louis to Springfield and return, and using such employe's pass he went from St. Louis to Springfield to take treatment for his ailments in the hospital there, which was a part of the hospital system above mentioned. For a time he was treated, and on a certain morning took passage upon one of defendant's trains at Springfield bound for St. Louis, his home. This train arrived about 7 o'clock that evening and deceased left the train unharmed. About 9 o'clock of the same evening a man, partially undressed and in condition to retire for the night, was lying across one of the many street-car lines of the city and was run over and killed by a passing car. Some two weeks later the body was exhumed and identified as that of James B. Phillips. Plaintiff had no knowledge of the peculiar and untimely death until about the latter date. The claim is that Phillips was mentally unbalanced, which fact was known to defendant, and that defendant was remiss in duty in not notifying his family of his departure from the Springfield hospital before his arrival in St. Louis, and further, in turning loose upon the streets of said city, unattended, a man in that known mental and helpless condition.

There are several peculiarly interesting questions, which, together with the incident facts, will be duly noted.

<sup>426</sup> 1. Plaintiff having been cast upon her proof rather than upon the pleadings, the legal questions involved must be entwined with all pertinent facts shown. In such case the facts proven by her are established facts for the purposes of this review. At the threshold of the inquiry is the relationship between defendant and "The Employes' Hospital Association of the Frisco Line," a corporation, separately incorporated by the leading officials of defendant. The hospital at which plaintiff's husband was treated was part and parcel of the hospital system managed by the association above named. Defendant contends that it is in no sense responsible for the negligent acts, if such there were, of "The Employes' Hospital Association of the Frisco Line"; that it is a distinct corporate entity, not under control of defendant, and that it is responsible for its own acts of negligence. This relationship between defendant and the Hospital Association is important on the question of excluding certain evi-

dence, in addition to the point now in review. The charter of this association was in evidence. By article 1 thereof the corporation is named. Articles 2, 3 and 4 read thus:

"Article II. The purpose for which this association is formed is the support of a benevolent and charitable undertaking in this: To provide medical and surgical treatment and care for the employés of the St. Louis and San Francisco Railroad Company, and of its associated companies, who may be injured or disabled by accident or sickness while in such employ, and in the line of duty, to such extent only and under such rules and regulations as may be prescribed from time to time by the trustees hereinafter provided for; and to furnish such employés with additional privileges and benefits, not inconsistent or interfering with the main object of the association as may from time to time be directed by the said trustees; and to that end <sup>427</sup> may purchase, acquire, erect and maintain, suitable buildings, with necessary land and appurtenances for hospital and other purposes within the purview of these articles; and to sell, convey, encumber and transfer any such property whenever said trustees shall direct.

"Article III. All the powers of the association and of any corporation into which it may be merged shall be vested in and exercised by five trustees, who shall manage and conduct the business and control all its property; the names and residences of those who shall be trustees until their successors shall be chosen as hereinafter provided, are as follows:

"B. F. Yoakum, of St. Louis, state of Missouri.

"L. F. Parker, of St. Louis, state of Missouri.

"A. J. Davidson, of St. Louis, state of Missouri.

"C. C. Mills, of Monett, state of Missouri.

"Chas. Huffschnmitt, of St. Louis, state of Missouri.

"Their successors shall be chosen at such time and in such manner as may be provided by the by-laws, which the trustees shall adopt for the government of the affairs of the association, and which they shall make for the government of the affairs of the association and which they may amend as shall seem best to them.

"Article IV. The association shall not engage in business for pecuniary profit in any form, and shall not have any capital stock; the funds necessary for carrying out its purpose shall be raised in such manner as may be provided by the by-laws."

Article 5 provides the place of business for the corporation, and article 6 provides the term of fifty years as the

life of the corporation. By the rules adopted and promulgated by B. F. Yoakum, president of the board of trustees, it is provided, among other things, as follows:

*"Rules and Regulations.*—It being contemplated <sup>428</sup> that, for the consideration of the contribution paid monthly by the members of the Employés' Hospital Association of the Frisco Line, a home and medical attention for the sick and injured of said association will be provided, in accordance with the following rules and regulations, it is directed:

"1. Medical relief will only be furnished at the hospital of the association, except as hereinafter designated.

"2. Only those who have become sick or injured while in the employ of the St. Louis and San Francisco Railroad System, and in the line of their duty, will be entitled to gratuitous treatment. Those suffering from any complaint which existed, or the cause of which existed, before the party last entered the employ of the railroad company, will not be entitled to treatment.

"3. Employés of the railroad system taken sick or injured while at any point on the line of the St. Louis and San Francisco Railroad, on temporary lay-off, are entitled to treatment; provided, said sickness was contracted while in course of his employment prior to such lay-off, and provided further, that they have become liable for dues for the month during which their sickness originated or injury occurred. . . .

"5. Any member who may be too seriously ill or injured to be removed with safety to his life, may receive temporary aid along the line of the railroad, when authorized by the chief surgeon. . . .

"11. Any member of the association who desires medical treatment must take to his physician a written or printed notice from his employer that he is entitled to such treatment, and no employer will be allowed to furnish such notice unless he is fully satisfied that the patient is entitled to same. All such printed or written notices are good only for the months in which they are issued, or for a single spell of sickness. . . .

<sup>429</sup> "16. When a patient is too seriously ill or injured to be promptly sent to the association hospital the attending physician or surgeon shall at once wire a full report to the chief surgeon, and must act under instructions of rule No. 5 until further advised. However, at the earliest possible moment consistent with the patient's safety, he must be sent to the hospital."

Upon the organization of the hospital association, or shortly thereafter, the defendant in this case sent out rules to employés as follows:

"The Employés' Hospital Association of the 'Frisco Line,' having agreed to furnish necessary medical, surgical and hospital treatment to such employés of the St. Louis and San Francisco Railroad System as may become sick or injured while in the service of said companies, and to erect and maintain a hospital for the use of such sick and injured, and the employés of said system having agreed to contribute to a fund to be paid to said Hospital Association, to be used and expended by the association for such purpose, the following rules for the guidance of employés are hereby promulgated:

"1. Mail carriers at stations where carrying the mail is the only duty performed by them for the company, are exempt from assessment, and are not entitled to the services and benefits of the Hospital Association.

"2. The sick and injured employés above mentioned are entitled to hospital care and treatment free of charge so long as they require surgical or medical attention and obey the rules established for their protection, but not for a term longer than one year continuously unless by permission of the board of trustees of said Hospital Association.

"3. Heads of departments and foremen will be furnished with blank certificates, and will issue them properly signed to such employés as are entitled to <sup>430</sup> the benefit of the Hospital Association and every employé receiving such certificate will be entitled to receive from the head of his department free transportation over the companies' lines to the hospital, which, in case of emergency, when delay may be dangerous, will be provided by telegraph on application to the proper officer. These certificates are good only in the month for which they are issued.

"4. The company hereby donates to the Hospital Association the use of its telegraph lines to facilitate the care and treatment of sick or injured employés, and therefore all persons in the service of said companies, and all others are hereby notified that no bills for medical or surgical services, nursing, drugs or funeral expenses, will be paid by these companies unless first authorized by the general claim agent.

"5. In every case of personal injury to an employé, the conductor or foreman of the department in which the party is employed must report particulars as soon as possible by wire to division superintendent or head of department in

which the accident occurs. State whether a surgeon has been summoned to attend, and if so, give such surgeon's name, and state further whether the injured man will be transported to General Hospital. It will be the duty of the above officers to see that such telegraphic advice is promptly given them, and they will at once telegraph full particulars to superintendent, chief surgeon, and general claim agent.

"6. If such injured employé can be moved, send him to General Hospital by first train and notify chief surgeon and general claim agent. If the injured employé cannot be moved, place him in care of the nearest local agent and summons the most available local surgeon to attend him. If possible, he should be taken to the nearest emergency hospital, to be transported to General Hospital when able. In case of absolute <sup>481</sup> necessity when life or limb is involved, secure the nearest competent surgeon to give attention to the injured person until the local surgeon can reach the spot, or the injured person can be transported to General Hospital or to one of the emergency hospitals. Be particular to notify such surgeon that his services are required for first attention only, and that any differences in the amount to be paid him by the Hospital Association for such service shall be decided by the chief surgeon or the Hospital Association as final arbiter. Notify the chief surgeon by wire at once of such employment, and also as to whether amputation or surgical operations are immediately necessary.

"7. Stretchers for use of injured men will be placed at each station where division of local surgeons are located, and in cabooses and train baggage-cars.

"8. The conductor in charge of train having patients for General Hospital will at once report that fact by wire to chief surgeon and to general claim agent, and state whether ambulance is required. In case such patients are for emergency hospitals, the division surgeon at the point where the emergency hospital is located must be similarly notified by wire.

"9. In cases of wrecks or accidents when a number of persons, either passengers or employés, are injured and require immediate attention, summon at once the nearest competent surgeon, summon at the same time the nearest division or local surgeon who can reach the scene of the accident most quickly, and in addition to the notice to be given division surgeon, superintendent, or head of department, notify by wire, promptly, the chief surgeon, superintendent, and gen-

eral claim agent, giving full particulars as to the name and whereabouts of the injured persons, name of surgeons in attendance, and state what further attention is required for the relief of the injured. . . .

"13. The persons who have been, or may hereafter be, appointed by the Hospital Association chief <sup>432</sup> surgeons, assistants, hospital dispensary, division and local surgeons and physicians, are hereby appointed chief surgeon, assistants, division and local surgeons and physicians, as the case may be, of the St. Louis and San Francisco Railroad Company, and its leased and operated lines (while they hold such positions in connection with said Hospital Association), for the care and treatment under the rules above established of all passengers, citizens and nonemployés who may be injured on the line of this company, and as such will be respected and assisted in the discharge of their professional duties when called upon.

B. F. YOAKUM,

"Vice-President and General Manager."

The defendant likewise sent out an official circular of date June 29, 1899, as follows:

"A large majority of the employés of this company have requested the establishment of a railway hospital system on the line of the St. Louis and San Francisco Road, similar to the system in vogue and successfully carried on by many railroad companies and their employés, with which the employés of this company are generally familiar, and have agreed to contribute to a fund for the proper care of such of their number as may become sick or be injured while in the service of the company.

"The benefits and advantages secured under this system by employés who unfortunately become disabled through illness or injury from following their usual avocation and thereby sustain consequent loss, have been conclusively demonstrated. The further fact that the employés secure hospital benefits, including medical and surgical attention, at a much less cost yearly than by any other assessment or insurance plan for that object, will commend to all concerned the establishment of the system on this company's lines.

<sup>433</sup> "In pursuance to above, the Employés' Hospital Association of the Frisco Line has been duly organized and incorporated, and a suitable building for the general hospital, for the treatment of sick and injured employés, erected at Springfield, Missouri, which is owned by the association, and

will be in charge of its chief surgeon. This building will be ready for occupancy August 1, 1899. Arrangements will be made with hospitals at St. Louis, Missouri, Ft. Smith, Arkansas, Paris, Texas, Joplin, Missouri, Pittsburg, Kansas and Wichita, Kansas, for treatment in cases of emergency, until the patient can be safely removed to Springfield. Supply stations for dispensing purposes will be established at such convenient points on the line as shall be found necessary.

"Patients received at the hospital will be provided, free of charge, with everything necessary for their careful and comfortable treatment, including the services of the hospital surgeons or physicians, so long as they require surgical or medical attention and obey the rules established for their protection, but not longer than one year, without special authority from the trustees.

"For the purpose of carrying into effect the above system, and to enable all the employés to become members of and entitled to all the benefits and privileges of said association, notice is hereby given to all concerned that, commencing with the wages for month of July, 1899, which are payable in August, an assessment will be made on the pay-rolls (including salary vouchers), as follows:

"Thirty-five cents per month from the pay of each employé whose monthly wages amount to less than \$50 per month; fifty cents per month from the pay of each employé whose monthly wages amount to \$50 and less than \$100; seventy-five cents per month <sup>434</sup> from the pay of each employé whose monthly wages amount to \$100 and less than \$125; one dollar per month from the pay of each employé whose monthly wages amount to \$125 and more. Deductions to apply to time checks as well as pay-rolls. No deduction will be made from the earnings of an employé whose month's earnings do not amount to five dollars. No deduction will be made from the wages of any employé who is discharged or quits the service of this company on or before the 31st day of July, 1899. After that date no exception will be made.

"Heads of departments, foremen and all others who issue time checks, will see that the proper deduction is made on the first time check issued in the month, designated 'Hospital.' In case an employé returns to service in the same month and after having drawn pay by time checks, and receives another time check in the same month, the person issuing the time check will note on the second check, 'Hospital fees paid on previous check.'



"This company will pay to said hospital fund as an assessment the sum of five hundred dollars annually, in monthly installments.

"All employés of the St. Louis and San Francisco Railroad System are entitled to hospital benefits under such rules and regulations as may be established for the government of the hospital.

"Rules and regulations governing the disposition and treatment of ill and injured employés will be issued and all employés should become familiar with those regulations, as they are established for the benefit of all.

"The surgeons and physicians of the St. Louis and San Francisco Railroad Company, will, on and after August 1, 1899, be under the control and direction of the chief surgeon of the Hospital Association and all ill or injured employés will, on and after that date, <sup>485</sup> be under the care and treatment of the Hospital Association.

"B. F. YOAKUM,

"Vice-President and General Manager."

From this circular it appears that no option is left an employé, but, on the other hand, defendant appropriates a certain amount of his wages and furnishes him medical treatment. From oral evidence it appears that the officers of this hospital association were officers of the defendant; the treasurer was the same; the employés made no formal application for admission as members, but only signed pay-rolls with the deductions made as provided for in the foregoing documents.

We have set out this evidence perhaps in more detail than should have been done, but the relationship between these two corporations is an important one, and not confined to this case alone. To our mind it is immaterial as to the true character of the hospital association as indicated by its charter provisions. It has, however, but few, if any, of the earmarks of a voluntary benevolent association. Nor are there any earmarks of a public charity. What is received is paid for by the recipients. Under the weight of authority it cannot be held to be a charitable institution: *Haggerty v. St. Louis K. & N. W. R. R. Co.*, 100 Mo. App. 424, 74 S. W. 456; *Coe v. Washington Mills*, 149 Mass. 543, 21 N. E. 966; *Brown v. La Societe Francaise*, 138 Cal. 475, 71 Pac. 516; *Miller v. Chicago B. & Q. R. R. Co.*, 65 Fed. 305; *Texas & Pac. Coal Co. v. Connaughten*, 20 Tex. Civ. App. 642, 50 S. W. 173.

So that the rule that exempts such institutions from liability as announced in *Murtaugh v. St. Louis*, 44 Mo. 479, does not apply. Nor are institutions of the character of the one disclosed by this record exempted from liability by the mere employment of competent servants. They must go further and competently treat the patients received. In such case they occupy <sup>436</sup> the position of ordinary physicians and surgeons and are bound by the same rules, which are too familiar for repetition here. If they undertake to furnish the treatment, not as a charity, they stand in no different light from the ordinary physician.

But this question is really beside the issues in this case. No one can read this record without concluding that if the thin corporate shell of the hospital association is broken, the yolk therein contained is the defendant. By rule 1 above quoted defendant exempts certain mail carriers from assessment and excludes them from benefits. By rule 3, the heads of the departments and the foremen of the defendant are furnished with blank certificates which they fill and issue to employés entitled to receive benefits, and such heads of departments and foremen, the alter ego of defendant, thus decide who shall be treated by the hospital association. By rule 5, the defendant's chief surgeon and general claim agent must be notified, and by rule 6 if the employé injured can be moved to the hospital, the chief surgeon and general claim agent must be notified. Why notify the general claim agent of defendant if the two corporations were separate and distinct entities, in fact? That the hospital association is operated for the benefit of defendant as much or more than for the benefit of the employés is too apparent from this record. Rule 8, above, breathes the same thought, as also do rules 9 and 10. But beyond all is rule 13, which makes the chief surgeon and other surgeons of the hospital association, the chief surgeon and the local and division surgeons of the defendant. Eliminating all other matters, this rule 13 makes the chief surgeon and other surgeons the agent and employés of the defendant. But further showing that the hospital association, or its several surgeons, is but the alter ego of defendant, we have circular No. 35, *supra*, by which <sup>437</sup> defendant says to all employés that they will be assessed to pay for this medical attention. No option is given an employé. By force of this rule, defendant says to an employé, "We will take so much of your monthly earnings, and in the event you are hurt or become sick, and in the judgment of the heads of the departments and the foremen

in our employ you are entitled to medical treatment, we will furnish it to you through the hospital association."

So that it becomes unnecessary in this case to break the extremely thin and attenuated corporate shell of the hospital association, and expose to open view the yelk therein contained. The hospital association, whether it in fact be a separate corporate entity, or in fact the defendant itself masquerading under an assumed name, is at least the agent and employé of the defendant to perform these particular services. The defendant pays its said agent five hundred dollars annually, and in addition it requires of its employés that they pay to it the remainder, and by it such sum is paid to the agent for these services. To say the least, this hospital association, together with all its surgeons and physicians are but agents of defendant, and made so by express words in rule 13, *supra*. The negligence of these agents is the negligence of the defendant. As said in the case of *Orcutt v. Century Bldg. Co.*, 201 Mo. 424, 99 S. W. 1062, 8 L. R. A., N. S., 929, the defendant holds the purse strings of the hospital association. Not a dollar does it get save through defendant. Defendant pays for itself five hundred dollars, and the remainder is paid by the tribute which defendant levies upon its employés, which is collected and paid through defendant. The hospital system is a worthy one and a well-taken advance step, but under the record in this case such hospital association is but the agent of the defendant.

2. We come now to the competency of the following letter:

438 "ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY.

"G. W. Cale, Jr., Chief Surgeon.

"Springfield, Mo., Apr. 13, 1904.

"Mr. W. P. Newton, Assistant General Auditor, St. Louis, Mo.

"Dear Sir: Mr. J. B. Phillips, who was in the hospital, is mentally unbalanced and should be sent to an asylum for treatment. Won't you please advise his family or friends so that necessary steps can be taken to protect him?

"Yours truly,

"G. W. CALE, Jr."

Stamped on back: "Vice-Pres't & Gen'l Auditor, Apr. 14, 1904. St. L. & S. F. R. R. Co."

The writer of this letter was the chief surgeon of the hospital association, and by rule 13 hereinabove discussed was

the chief surgeon of the defendant. He was therefore the agent of defendant having in charge the treatment of the deceased. Under rule 13, *supra*, defendant seems to have had a chief surgeon, division surgeons and local surgeons, and Dr. Cale was the head of this line of medical agents under the appointment of defendant by force of this rule. The letter was written to the assistant of the head of another department. It conveyed the facts which Dr. Cale had learned in the course of his official duties as the chief surgeon of defendant, under rule 13, *supra*.

It was at least partly for the information of a co-ordinate department of the defendant railway company's service. This letter was written two days after the death of plaintiff's husband, but at a time when neither the plaintiff, the defendant nor the writer knew of such fact. The letter was excluded by the learned <sup>439</sup> trial judge. Was his action in this respect correct? We think not. Rule 4 of the hospital association reads: "The association will not furnish treatment for contagious, chronic, incurable, or venereal diseases, nor cases of insanity, nor injuries or diseases the result of intemperance, vicious habits, personal difficulties."

By rule 3 of the defendant hereinabove fully set out, the deceased, being at work in the auditor's department of defendant, could not even gain admission to the hospital without a certificate from the head of that department, nor could he get transportation to which he was entitled, save through that department. Under these rules, when taken and considered together, it became and was the duty of the chief surgeon, or what we might term the head of the medical department of defendant, to inform the head of the department issuing the certificate to deceased, under rule 3 of the defendant, that such party was insane, and that under rule 4, quoted last above, he was not such a person as to whom medical attention was due.

This letter therefore, is but one written by the chief surgeon of defendant in the line of his duty, as such duty appears from the uncontradicted record evidence. It in effect notified the auditor's department that the man was insane, and should be sent to a proper asylum; that he was not entitled to further treatment in the hospital under the rules thereof, and that no further certificates should be given him. If Dr. Cale was the agent of the defendant, as we have seen that he is, then such an admission made pertaining to things occurring and being done by him in the course of the performance of his duty is an admission of the defendant. The

letter-head upon which the letter was written shows him to be defendant's chief surgeon, as well as the chief surgeon of the <sup>440</sup> hospital. This was the third time that the deceased had been under the treatment of the hospital force, and if he was insane, it was the duty of defendant's chief surgeon, who was also chief surgeon of the hospital to make known that fact under the rules above mentioned. His duties had not yet terminated, and when he wrote the letter he was simply in the performance of such duties. Under such circumstances this letter is in the nature of a report made by one official to another, and is not in the same line as a statement made, after an accident, but too late to be recognized as a part of the *res gestae*. The cases usually applying the *res gestae* doctrine have no application here.

We think that this letter is in the nature of an official report from one of the chief officials of defendant to another of such officials and a report which was contemplated by the rule. It stands in the nature of an admission by an agent, whilst acting in the line of duty, and as such is an admission of defendant: *Malecek v. Tower Grove & L. R. R. Co.*, 57 Mo. 17; *McGenness v. Adriatic Mills*, 116 Mass. 177; 2 Wharton's Law of Evidence, 3d ed., sec. 1177.

In the Missouri case cited it was said: "The evidence of the admissions of Buell, the company's superintendent, was certainly admissible to prove that it recognized the assault, etc., of its driver, and justified it upon the ground of the non-payment of fare. Corporations can only act and speak through their authorized agents. The acts and admissions of Buell, in this regard, were those of the corporation."

The Massachusetts court, in the case cited, speaks tersely in this language: "The remaining question is in reference to the admission in evidence of the statement of the superintendent. The defendant is a corporation, and can only act through agents, and, in the absence of any evidence to the contrary, the superintendent <sup>441</sup> in charge of the mill must be deemed the proper person to whom to make complaint and to have authority to give information and direction in regard to the drainage from it. His recognition that it was a matter that required to be attended to, and should be, was therefore properly put in evidence: *Morse v. Connecticut River R. R. Co.*, 6 Gray, 450. The expression used by him that he 'would not have it around his place as it was around there for five hundred dollars,' was a mere mode of stating that the nuisance existed, and could not have been considered as an admission that this sum was the amount of

the damages, nor do we understand that it was put in evidence as such."

And Dr. Wharton, in his most excellent work, couches the rule thus: "As has been already incidentally seen, a party who commits the management of his whole business, or of a particular line of his business, to an agent, is bound by the admissions of the agent, as to his entire business committed to him; nor, when the agent is a general agent, representing his principal continuously, is it necessary for the admission of such declarations that they should either have been part of the *res gestae*, or should have been specially authorized. Eminently is this the case with corporations": 2 Wharton on Law of Evidence, 3d ed., sec. 1177.

Other cases are cited in the briefs and others not cited could have been cited, but these suffice to illustrate the rule.

Said letter is at least admissible to show that Dr. Cale, defendant's chief surgeon and agent, had knowledge of the fact that deceased was unbalanced in mind, when he permitted him to be placed upon the train unattended: *McDermott v. Hannibal etc. R. R. Co.*, 87 Mo. 285. To what was said by Henry, C. J., in that case, we can add nothing, for the proposition is fully discussed <sup>442</sup> and the cases reviewed. There was error in refusing to admit this letter.

3. It is next contended that defendant is liable only for such injuries as could have been reasonably expected to have been foreseen; that is to say, if it be granted that defendant was negligent, yet it is only liable for such injuries as would reasonably be expected to follow from such negligence and not for mere remote contingencies. In this we think the defendant is correct. But apply the rule to this case. In the view we have just expressed the defendant, by and through its agent, had assumed the duty of treating the deceased. The evidence tended to show that the patient was insane, and that defendant had knowledge of that fact. Now, if the patient was insane and the defendant had knowledge of that fact, then might it not have reasonably presumed that accident might befall a man in that condition? The freaks of a wandering mind are varied, it is true, but none knew them better than the skilled chief surgeon, who represented the defendant, when he had the deceased conveyed to the train. We are not saying that the act of placing his practically undressed body across a street railway track was the result of his insane condition, but there are sufficient circumstances to authorize the submission of the question, under properly guarded instructions, to a jury for its decision. It

cannot be said that such an act was not one that could not have been reasonably anticipated by defendant's surgeon when he placed an insane man aboard of a train, unattended and without notice to his family, knowing that he would have to find his home in a populous city, filled with a network of street railway lines. The rule is properly stated by Thompson in his work on the Law of Negligence, section 59, thus: " 'It is not necessary,' said the supreme court of Minnesota, following the <sup>443</sup> supreme judicial court of Massachusetts, 'that the injury in the precise form in which it in fact resulted should have been foreseen. It is enough that it now appears to have been a natural and probable consequence.' In other words, it is not necessary to a defendant's liability, after his negligence has been established, to show, in addition thereto, that the consequences of his negligence could have been foreseen by him; it is sufficient that the injuries are the natural, though not the necessary and inevitable, result of the negligent fault—such injuries as are likely, in ordinary circumstances, to ensue from the act or omission in question." This rule has found full recognition in this state: *Miller v. St. Louis etc. R. R. Co.*, 90 Mo. 389, 2 S. W. 439.

A case very much in point is the case of *Atchison etc. R. R. Co. v. Parry*, 67 Kan. 515, 73 Pac. 105. In the Parry case, the passenger became mentally unbalanced whilst on the train and was by the conductor placed in charge of the depot-master after being taken from the train. The depot-master permitted him to leave the depot and his custody while in that condition. He wandered some five miles and placing himself across the track was killed. The case before us is much stronger. Here the deceased occupied a double relationship to the defendant. He was not only a passenger but he was likewise a patient being treated by defendant's agent. Defendant's agent had full knowledge, if the evidence be true, that deceased was insane. Defendant, through its agent, had that knowledge when deceased was placed on the train, and this exclusive of the evidence tending to show the condition and actions of deceased whilst on the train.

Of course, if the deceased was not insane, it matters not what means he used to end his life. If he was not insane, there can be no liability upon the part of defendant. Defendant's liability must be bottomed on the facts that deceased was insane; that defendant <sup>444</sup> knew such fact; and that his death was occasioned by reason of such fact.

It must be found that the act of lying down upon the railroad track was the result of his mental condition afore-

said. In his unfortunate death there are some circumstances tending to show that a perverted mind might have been attempting to place a tired body to rest for the night. For instance, the taking off of the outer garments.

Under proper instructions this cause should have been submitted to the jury, and the trial court erred in giving the peremptory instruction for the defendant. The cause is reversed and remanded, to be proceeded with in accordance with these views.

All concur.

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*If a Railroad Company Maintains a Hospital*, and contracts for a consideration to treat its employes for injuries received, it is liable for the malpractice of a surgeon it employs, notwithstanding the exercise of due care in his selection: *Sawdey v. Spokane Falls etc. Ry. Co.*, 30 Wash. 349, 94 Am. St. Rep. 880, and see the cases cited in the cross-reference note thereto.

*An Incorporated Eleemosynary Hospital*, organized and maintained for no private gain, but for the proper care and medical treatment of the sick, and for that purpose made the manager of a donated trust fund, is not liable for injury received by a patient therein, through the negligence of its managers or their employes, and the fact that patients who are able to pay are required to do so does not deprive the corporation of its eleemosynary character, nor permit a recovery for damages on account of the existence of contract relations: *Downes v. Harper Hospital*, 101 Mich. 555, 45 Am. St. Rep. 427.



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**NEBRASKA.**

**SILLASEN v. WINTERER.**

[76 Neb. 52, 107 N. W. 124.]

**INJUNCTION Against Repeated Trespasses.**—If the nature and frequency of trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land, an injunction will be granted. (p. 804.)

Wilcox & Halligan, for the appellants.

Beeler & Muldoon and H. E. Goodall, for the appellees.

<sup>52</sup> **AMES, C.** There is no dispute of fact in this case. Appellants are the owners of a contiguous body of land in Keith county around which, in 1903, they plowed a strip in intended compliance with, and for the purpose of securing the protection of, section 8, article 3, chapter 2, Compiled Statutes of 1905, commonly known as the "Herd law," which reads as follows: "That cultivated lands, within the meaning of this act, shall include all forest trees, fruit trees, and hedgerows planted on said lands, also all lands surrounded by a plowed strip, not less than one rod in width, which strip shall be plowed at least once a year." The strip <sup>53</sup> was not quite continuous, but there were some breaks or gaps in it which were filled or occupied by fences of the legal standard, so that the incompleteness of the strip was fully supplied within the intent and meaning of the statute. There is some controversy whether the entire width of the strip was plowed upon the lands of appellants or whether it encroached to some extent upon lands of third and, as to this controversy, disinterested parties. We do not think the question is material. The object of the statute is not to promote cultivation of the soil, but to provide a substitute for a fenced inclosure which will suffice to notify the public that the land inclosed is privately owned and exclusively possessed.

For some years prior to this time appellants and appellee had occupied this and other lands belonging to the government, and to individuals, in common for grazing purposes, but when the inclosure above described had been made appellants notified appellee of the fact and required him to restrain his cattle from further trespass upon their land. Appellee not only expressly refused compliance with this request, but practically and continually disregarded it by permitting his cattle, to the number of one hundred and fifty head or more, to trespass daily upon the inclosed lands, and confessed an intention to continue so doing indefinitely. There are no contract obligations involved in the suit. Appellants sought relief in the lower court by injunction, which was denied them apparently on the ground that they had an adequate remedy by an action at law for damages, and appellee was permitted to show by witness the annual rental value of the lands for grazing purposes. Such a procedure would amount in practice to compelling appellants to lease their land indefinitely for such annual compensation as a jury should see fit to award them, and would be equivalent to taking private property, not for public, but for private, use. We think that such is not only a principle that the courts will not sanction, but that it is one the practical application of which equity will prevent by injunction. It is, of course, <sup>54</sup> not intended to hold, nor does the plaintiff contend, that occasional acts of trespass, voluntary or involuntary, that are committed by a solvent person, and that are susceptible of compensation by damages recoverable in a common-law action, will be restrained by injunction, but such are as far as possible from the nature of the injuries complained of in this action. These were voluntary trespasses. It does not matter in such a case as this, in which an attempt is openly made wrongfully to appropriate the use and occupation, in whole or in part, of the plaintiff's land, whether the trespasser is solvent or insolvent. A land owner may deny himself a fortune, if he chooses so to do, to insure that his premises shall be put to only such uses as he desires, or that they may remain vacant or unoccupied. Concerning simple acts of trespass equity has, in most cases, no jurisdiction, but the rule is firmly established in this state and elsewhere that, where the nature and frequency of trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land, an injunction will be granted: *Lynch v. Egan*, 67 Neb. 41, 93 N. W. 775; *Pohlman v. Evangelical Lutheran Trinity Church*, 60 Neb. 364,

83 N. W. 201; Peterson v. Hopewell, 55 Neb. 670, 76 N. W. 671; Shaffer v. Stull, 32 Neb. 94, 48 N. W. 882; 4 Pomeroy on Equity Jurisprudence, 3d ed., 1357. Appellants might, indeed, have brought successive actions for damages from day to day as acts of trespass occurred, but damages in such cases would have been extremely difficult to measure, and doubtless would not have been as great as the expense of recovery, and the same would have been true of procedure by distraint of the animals damage feasant, if, indeed, the latter would have been at all practicable. The only practical remedy they would have at law would have been to submit to the trespasses until the end of the grazing season, and then sue for the value of the use and occupation. But such a course, instead of protecting their rightful and lawful possession, which is guaranteed to them by the constitution and laws of the land, presupposes a practical abandonment and loss of it.

<sup>55</sup> We recommend that the judgment of the district court be reversed and the cause remanded, with instructions to grant an injunction in conformity with the prayer of the petition.

Letton and Oldham, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded, with instructions to grant an injunction in conformity with the prayer of the petition.

Judgment accordingly.

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*Injunctions Against Trespasses on Real Property* are discussed in the note to Moore v. Halliday, 99 Am. St. Rep. 731. An injunction will lie to restrain domestic fowls from trespassing upon the premises of another, when repeated invasions thereon by them have occurred in the past and are threatened in the future: Keil v. Wright, 135 Iowa, 383, 124 Am. St. Rep. 282.

## STAATS v. WILSON.

[76 Neb. 204, 107 N. W. 230, 109 N. W. 379.]

**JUDGMENTS—Collateral Attack.**—A judgment, though erroneous, is not subject to collateral attack. (p. 808.)

**PARTITION—Judgment in—Res Judicata.**—A judgment in partition, unless appealed from, is final, and estops the parties, there-to from claiming a greater interest than is given them by the decree, even though the proceedings were irregular. (p. 809.)

**ESTOPPEL—Acceptance of Benefits.**—If a widow, for the purpose of procuring an absolute title to a homestead, pays each of the heirs an adequate sum for their interests, which they accept and retain, they are estopped from asserting title to such homestead as against the widow's grantee who purchased with their knowledge and in good faith. (p. 810.)

**PARTITION, PAROL—Retention of Benefits—Estoppel.**—A parol partition, joined in by one who retains the benefits thereof and who acquiesces therein for a considerable time, operates as an estoppel. (p. 810.)

J. H. Barry and E. Fulloon, for the appellants.

G. Gillespie and J. Gagnon, for the appellee.

**205** **EPPERSON, C.** Christopher Hoagland died intestate in Richardson county in 1891, seised in fee simple of the northwest quarter of section 26, township 3, range 13, in said county. He left surviving him his widow and six sons and daughters, and the children of a deceased son. While the administration of his estate was pending, his widow filed her application in the county court of Richardson county for the appraisement of the homestead, as provided by section 30 of the Compiled Statutes of 1889. Appraisers were appointed by the court and filed their written appraisement of the southwest forty acres of said land, which they valued at \$2,000. On March 16, 1892, the widow filed her written acceptance of the appraisement, and paid to the administrator the sum of \$1,000, being in excess of the appraised value over and above \$1,000, which she evidently considered she was entitled to as her homestead interest. The administrator distributed to the heirs the \$1,000 surplus paid by the widow, except one-third thereof, which the widow of said deceased claimed or deducted at the time of payment. On the twenty-third day of April, 1892, John C. Hoagland, one of the heirs at law of said deceased, instituted an action in the district court for Richardson county for the **206** partition of the entire quarter section of land. In this action all the necessary parties were joined, and personal service of summons was had upon

Mary Staats and Sarah Staats, two of the children and heirs of said deceased.

To this petition the widow filed her separate answer, alleging the facts above set forth as to the appraisement of the southwest quarter of said one hundred and sixty acres, and the payment by her to the administrator of the \$1,000, and of her election to retain the homestead so appraised, claiming that it descended to her in absolute title, and that the court had no jurisdiction in that action over the said forty-acre tract. She further claims that, as widow of the deceased, she owned an undivided one-third of the balance of said land, and prayed for a judgment confirming her share, and asked that the same be set off to her. To this answer the plaintiff replied by general denial. Mary Staats and Sarah Staats made no appearance in said proceeding. Upon trial of that cause the court found that the southwest quarter of said quarter section of land was the homestead of the widow, and, as to the balance of said land, that the widow is the owner and entitled to the undivided one-third part, and that the children of said deceased were each the owner of a one-seventh part, and by his judgment confirmed the interest of the parties, respectively, and appointed referees to make partition into the requisite number of shares. Later the referees made their report, showing that they had made partial partition by allowing to the widow the southeast quarter of the northwest quarter of section 26, which was of no greater value than one-third the total value of the entire premises to be partitioned, and reported that the balance of said land cannot be partitioned without great prejudice to the owners thereof. The court confirmed this report and ordered the referees to sell the balance of said land as provided by law. This order was complied with, and the remaining eighty acres sold for the sum of \$3,448, which sale was reported to and confirmed by the court November 30, 1892. The referees were directed <sup>207</sup> to make their deeds to the purchaser and distribute the proceeds of the sale to the parties according to their respective shares. On the first day of March, 1894, the widow, by her warranty deed, conveyed to the defendant all of the land so claimed by her. It is apparent that the widow, the administrator, the heirs and the courts attempted to follow the provisions of the Baker act of 1889, which was by this court declared unconstitutional in the case of *Trumble v. Trumble*, 37 Neb. 340, 55 N. W. 869. The widow died in 1901.

On the 26th day of March, 1903, plaintiffs herein instituted this action in the district court for Richardson county for a

partition of the said south half of said quarter section of land, so conveyed to the defendant by the widow, claiming each to own one-seventh part thereof. They admit that the defendant owns the other five-sevenths, the other heirs having conveyed to him whatever interest they possessed. The plaintiff, Sarah Staats, claimed as heir and George F. Staats as the grantee of Mary Staats. The plaintiffs contend that the proceedings in the probate court and the early partition case were void and of no effect, because they were conducted under the provisions of the Baker act, which in the light of subsequent adjudication is known to be unconstitutional, and that they are entitled now to a division of the property, the same as though the former proceedings in partition and the attempted assignment of the homestead had never been had.

The defendant contends, among other things, that the rights of the widow, to which he succeeded, were adjudicated by a competent court, that the plaintiffs were estopped from claiming title to the land in controversy. The judgment of the lower court was for defendant, and plaintiffs appeal.

The rights of the parties hereto depend upon their conduct and the proceedings had, which differ as to the two tracts of land, the southwest quarter known as the homestead, and the southeast quarter assigned in the partition <sup>208</sup> case. The title of the widow to the southeast quarter, if any she had in addition to dower, was acquired by the assignment of the same to her in the partition case. In that case the court had jurisdiction over all the interested parties. They, and none other, owned the property and were entitled to a partition thereof. The widow had a dower interest in and to the one hundred and twenty acres of land. This should have been assigned to her. She claimed a greater interest, and asked the court to give her one-third absolutely; the plaintiffs herein, or those to whose title they succeeded, did not oppose the application of the widow. The court, being fully vested with jurisdiction, granted her petition, and set off to her in actual partition the forty acres, being one-third of the land involved. The court found that she was legally entitled to the land assigned to her. The court therefore erred, and, had proceedings in error been prosecuted, the judgment would have been reversed. The court's jurisdiction did not depend on the unconstitutional Baker act. The judgment was not void, but erroneous: *Brandhoefer v. Bain*, 45 Neb. 781, 64 N. W. 231. It is not subject to collateral attack. By the judgment in that partition case the title confirmed in each of the parties thereto became *res judicata*.

In other words, had the Baker act never existed, and had the court proceeded as it did, its proceedings would have been irregular and subject to reversal in a direct proceeding. In the absence of proceedings to review, its judgment would have stood as final, so far as it affected the parties thereto or their grantees. The fact that the legislature had passed a void act does not render the judgment less effective than it would have been had no such act been passed.

Plaintiffs contend that a judgment in partition proceedings is not final. Section 811 of the code, relating to actions in partition, provides: "After all the shares and interests of the parties have been settled . . . judgment shall be rendered confirming those shares and interests, and directing partition to be made accordingly." Section 839 provides: "When all the parties in interest <sup>209</sup> have been duly served, any of the proceedings herein prescribed shall be binding and conclusive upon them all." Section 840 provides: "The judgment of partition shall be presumptive evidence of title in all cases, and as between the parties themselves it is conclusive evidence thereof, subject, however, to be defeated by proof of a title paramount to, or independent of, that under which the parties held as joint tenants or tenants in common." This language is so plain that no judicial interpretation is required.

As to the homestead 40, a different and more difficult question is presented. The proceedings for partition in which the homestead was mentioned did not finally dispose of same to the extent of adjudicating the rights of the plaintiffs herein. The records of the county court do not show an assignment to the widow, but show that the land of the deceased descended to the heirs, subject to the homestead of the widow. The defendant's grantor claimed the homestead as the widow of the deceased, and by reason of the payment of the \$666.66 distributed to the heirs in payment for that part thereof which she thought she was not entitled to as widow. Her attempt to procure an assignment of the homestead and the payment of the \$666.66 was prior to the early partition suit, which, as heretofore shown, disposed of the balance of the estate. That the deceased had a homestead interest in his land to which his widow succeeded there is no doubt. At the time she elected to take the forty-acre tract as her homestead and paid the surplus to the administrator, and upon payment of a share thereof to the said Mary Staats and Sarah Staats, each of them executed a voucher in which payment thereof was acknowledged as

"the portion due me of the sum paid by Ella M. Hoagland widow of said Christopher M. Hoagland, by reason of her election to retain homestead under and by virtue of section 30, chapter 23 of the Compiled Statutes of 1887, as amended by act of 1889, \$95.23." Had the Baker act been constitutional, it would have vested title in the widow. The receipt of this fund by these heirs is not <sup>210</sup> denied, neither is it denied that they received their distributive share of the proceeds of the purchase price paid for the north half of the quarter section.

The conduct of the widow and the heirs regarding the homestead amounted to a partial parol partition of the land with owelty. Each was competent to contract and had an interest which she had a legal right to dispose of. The heirs accepted money advanced by the widow which otherwise they would not have received, and parted with title which otherwise they would have retained. Their conduct vested an equitable title to the homestead in the widow which, in our opinion, she could have confirmed by a proper proceeding in her lifetime. Parol partitions are unsatisfactory and should be discouraged, but, when indulged by one who retains the benefits thereof, and who acquiesces therein for a considerable time, operate as an estoppel: Freeman on Cotenancy and Partition, 2d ed., sec. 398; Whittemore v. Cope, 11 Utah, 344, 40 Pac. 256. The heirs knew that their mother, the widow, claimed absolute title. They received a just compensation for their interests. They stood by and saw the plaintiff take possession, and probably knew the terms of his purchase. The conscience of this court knows no rule that will permit them to recover.

We recommend that the judgment of the district court be affirmed

Ames and Oldham, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be affirmed.

The following opinion on rehearing was filed October 8, 1906. Judgment of affirmance adhered to:

EPPERSON, C. The facts in this case are stated in the former opinion reported ante, p. 806. A rehearing was granted, additional briefs filed and the case again argued orally.



**211** 1. Plaintiffs contend that in the partition case instituted by John C. Hoagland the court did not have the jurisdiction to set off to the widow the southeast quarter of the northwest quarter of the Hoagland land. It is admitted that the court had jurisdiction of the parties and the subject matter; but it is argued that the court had no jurisdiction to assign to the widow the forty acres or one-third in value of all the land partitioned, when by law the widow was only entitled to a dower interest in the land. Such decree, it is argued, is null and void, and may be attacked collaterally. Counsel cite *Cizek v. Cizek*, 69 Neb. 797, 96 N. W. 657, 99 N. W. 28, in support of their contention. It was there held: "In a suit arising under the provisions of chapter 25, Compiled Statutes of 1901, the district court has not jurisdiction to award real estate of the husband to the wife in fee as alimony, and a decree, in so far as it attempts so to do, is void and subject to collateral attack."

The *Cizek* case is not analogous to the case at bar. The statute giving the district court the power to grant alimony does not provide that real estate belonging to the husband may be set off to the wife as alimony or in lieu of alimony, and the question considered in *Cizek v. Cizek*, 69 Neb. 797, 96 N. W. 657, 99 N. W. 28, was: "Is the power to give the husband's real estate to the wife by decree in a divorce suit implied in the power which the statute expressly confers to give alimony?" The order awarding specific real estate to the wife as alimony was held void and subject to collateral attack. It was a special matter not presented by the pleadings and foreign to the issues. In the Hoagland partition case, which is assailed in the case at bar, the only issue presented was the widow's right to have the forty acres in controversy set off to her as her interest in her late husband's estate. The court had jurisdiction, under the statutes quoted in our former opinion, to ascertain and confirm the shares of the parties. Can it be said that by erroneously decreeing to her more than she was entitled to the court exceeded its jurisdiction? By the order confirming in the widow the forty-acre tract as her share, the court kept **212** within the issues raised by the pleadings and within the statute giving it power to order partition.

2. As to the homestead 40, we see no error in our former opinion. The heirs received \$666.66 for their interest in land worth \$2,000. Their interest was subject to the widow's life estate. It is not shown that the amount received was inadequate. In *Wamsley v. Crook*, 3 Neb. 344, it is said:

"It is a well-settled rule of law that one cannot be permitted to receive both the purchase money and the land. And the application of this principle of estoppel 'does not depend upon any supposed distinction between a void and voidable sale. The receipt of the money, with the knowledge that the purchaser is paying it upon an understanding that he is purchasing a good title, touches the conscience, and therefore binds the rights of the party in one case as well as in the other.' "

This case was cited with approval in *McMurtry v. Brown*, 6 Neb. 368; *Yanow v. Snelling*, 34 Neb. 280, 51 N. W. 820. Plaintiffs received their share of the \$666.66 from the widow, who thought she was buying their interest. They thought they were selling, and they were. They never returned the purchase price. It is evident that the decree of the district court was right. Our former opinion affirming that decree should be adhered to, and we so recommend.

Ames and Oldham, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the former judgment in this case is adhered to.

Affirmed.

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*The Effect of Compulsory Partitions* is the subject of a note to *Carter v. White*, 101 Am. St. Rep. 864. A decree in partition is conclusive between the parties: *Morrill v. Morrill*, 20 Or. 96, 23 Am. St. Rep. 95; *Carson v. Broady*, 56 Neb. 648, 71 Am. St. Rep. 691. And if parties to a suit in partition acquiesce in the proceedings, and receive and retain their shares of the proceeds, they will be estopped from afterward questioning the validity of the proceedings, as will one who takes a conveyance from them with knowledge of the facts: *Williams v. Wescott*, 77 Iowa, 332, 14 Am. St. Rep. 287.

On the *Effect of Parol Partitions of Real Estate*, see the note to *McCoy v. McCoy*, 102 Am. St. Rep. 245.

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## PETERSEN v. PETERSEN.

[76 Neb. 282, 107 N. W. 391.]

**DIVORCE — Reconciliations — Dismissal — Intervention.**—If a wife begins an action for divorce and before answer filed the parties become reconciled and resume the marital relation, a dismissal of the action carries with it a pending application for alimony, and the wife's attorney cannot revive such application for his own benefit by means of intervention. (p. 813.)

T. J. Mahoney and J. A. C. Kennedy, for the appellant.

J. O. Detweiler, for the appellee.

283 AMES, C. May 31, 1904, Emma Petersen began an action in the district court for Douglas county against Soren T. Petersen, with whom, she alleged in her petition, she had lived for more than ten years then last past as his wife, and by whom during that time she had been recognized as such publicly and in such manner as to establish a lawful marriage between him and herself, but alleging that he had been guilty of certain breaches of duty toward her in that relation, on account of which she was entitled to a decree of divorce and alimony, for which she prayed. The petition also contained a prayer for temporary alimony to enable the plaintiff to maintain and carry on her action. On the next day the defendant was served with a copy of the petition, together with a notice that the application for temporary alimony would be urged upon the attention of the court three days later, viz., on June 4th. On the latter date the hearing of the application was, at the request of the defendant, postponed until June 10th. On the 6th of June the parties met and effected a reconciliation, which was ratified on the same day by a formal celebration of their marriage in conformity with the statute. What their relations had been before that time does not appear, otherwise than by the allegations of the petition in response to which no pleading was ever filed, but on the 18th of the month the plaintiff filed in the court a formal written application to dismiss the action at her own costs, which motion the court on the same day denied, because of the pendency of a petition by J. A. C. Kennedy, attorney for the plaintiff, for leave to intervene and prosecute a claim against the husband for an allowance of a sum of money, as for alimony, to compensate him for his services in the beginning and prosecution of the suit. To this application the defendant filed a general demurrer, which was afterward sustained, and the petition for an intervention was dismissed, as was also the action, at the renewed request of the plaintiff. The intervener, Kennedy, prosecutes error.

284 The proceeding by the plaintiff in error differs in no essential particular from a suit at law prosecuted by him against the husband to recover as upon a quantum meruit for services rendered to the wife in the divorce suit. No order for alimony has ever been made, and no fund has ever been paid into court or in any way raised or created upon which he can pretend to have acquired any lien. Whether such a fund ever would have been created, even if the action had proceeded, rested wholly in the discretion

of the trial court. Her application for temporary alimony created no right, and even if an allowance therefor had been granted, the money would have been awarded, not to her attorney, nor necessarily for attorney's fees alone, and the amount of the latter would have been the subject of a contract expressed or implied between her attorney and herself. The husband would have incurred no obligation to his wife's attorney, but, in the discretion of the court, might have been compelled to contribute to the relief of her necessities.

Intervener cites no authority in support of his claim, but several are cited in opposition thereto, among which are: *McCulloch v. Murphy*, 45 Ill. 256; *Thompson v. Thompson*, 3 Head (Tenn.), 527; *Carden v. Carden* (Tenn. Ch. App.), 37 S. W. 1022; *Anderson v. Steger*, 173 Ill. 112, 50 N. E. 665. The case of *Aspinwall v. Sabin*, 22 Neb. 73, 3 Am. St. Rep. 258, 34 N. W. 72, cited by plaintiff in error, goes, we think, to the very extreme in this direction, but still falls short of reaching the end he seeks to attain. In that case an award of alimony specifically as fees to the plaintiff's attorneys had in fact been made apparently for services already rendered. That is to say, the court had adjudged the right of counsel to compensation and the amount of it against both the plaintiff and the defendant, and the subsequent reconciliation of the parties and their dismissal of the action did not have the effect to satisfy or annul that judgment. In *Waters v. Waters*, 49 Mo. 385, cited by plaintiff in error, the husband was plaintiff in a divorce suit which he had prosecuted so far as to compel his wife to obtain<sup>285</sup> the services of counsel for the preparation of her defense. He was, therefore, himself at least morally responsible for the creation of the obligation which he was called upon to discharge, and a claim for which was pending when he dismissed his suit. It is not unlikely that he was liable at law and independently of the divorce statute as for a necessity furnished to his wife at his instance, but, in any view, the case is so different from the one at bar as not to be in point. The same considerations apply to *Powell v. Lilly* (Ky.), 68 S. W. 123, and other cases from the same state, also cited by plaintiff in error. In this case the wife was plaintiff, and, in the absence of proof, there is no presumption that the defendant, if he were her husband, had been guilty of such quasi-criminal conduct as justified an application to the court for a dissolution of the marriage tie. Proof thereof, if any existed, did not rest in the breast of the plaintiff in error, and was not supplied by the unsup-

ported allegations of the petition and application, but could have been elicited, if at all, only by such an investigation into the marital and domestic history of the plaintiff and defendant as, after reconciliation and the resumption of the marital relations, would have been plainly and offensively repugnant to public policy.

We are of opinion, therefore, that the court did not err in sustaining the demurrer and dismissing the intervention, and recommend that the judgment be affirmed.

Oldham and Epperson, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be affirmed.

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*Intervention* is the subject of a note to Walker v. Sanders, 123 Am. St. Rep. 280.

*The Right of a Litigant to Dismiss His Action* without the consent of his attorney is discussed in the note to Cameron v. Boeger, 93 Am. St. Rep. 169. Generally, a client may dismiss his suit at pleasure without the intervention of his attorney: Tompkins v. Railroad, 110 Tenn. 157, 100 Am. St. Rep. 795; Boorgren v. St. Paul City Ry. Co., 96 Minn. 51, 114 Am. St. Rep. 691; O'Connor v. St. Louis Transit Co., 198 Mo. 622, 115 Am. St. Rep. 495. As to validity of a contract whereby the client abridges this right, see Lipscomb v. Adams, 193 Mo. 530, 112 Am. St. Rep. 500; note to Cameron v. Boeger, 93 Am. St. Rep. 172-175; Matter of Snyder, 190 N. Y. 66, 123 Am. St. Rep. 533.

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## MARTIN v. MARTIN.

[76 Neb. 335, 107 N. W. 580.]

**TRIAL—Instructions—Method of Giving.**—Instructions should be delivered in open court, and if the jury, after retiring, desire to be informed as to any part of the law arising in the case, they should request that they be conducted to the court, where the information desired may be given them. (p. 818.)

**TRIAL—Instructions—Method of Giving.**—If, after the jury has retired, and the court is engaged in a trial, a request is presented for further instructions, the court may, with the consent of the parties, send an answer to the jury by the officer in charge thereof. (p. 818.)

**DEEDS—Acknowledgment—Necessity for.**—As between the parties, an acknowledgment is not essential to the validity of a deed, except in the conveyance of a homestead. (p. 819.)

**ADVERSE POSSESSION.**—Recognition of Title in the Former Owner by the payment of rent to him by one claiming adversely, after he has acquired a perfect title by adverse possession, does not divest him of title. (pp. 819, 820.)

**DEEDS—Delivery.**—A pleading alleging that a deed was made and executed, sufficiently pleads a delivery. (p. 821.)

**DEEDS—Delivery.**—A delivery of a deed to a third person by the grantor, with directions to deliver it to the grantee named therein, constitutes a good delivery of the deed. (p. 821.)

M. S. Gray, J. F. Peters and Mockett & Mattley, for the plaintiff in error.

Morning, Berge & Ledwith, M. H. Weiss and T. C. Marshall, for the defendant in error.

**335** DUFFIE, C. Catherine Martin, the plaintiff in error and plaintiff in the court below, brought this action in ejectment against her son, Anthony Martin, to recover possession of the northwest quarter of section 17, township 4, range 2 west, Thayer county, Nebraska. Michael J. Martin, the deceased husband of the plaintiff, was the patentee of this land, and in his will, which was duly probated in the state of Pennsylvania, where he lived and died, and also in Thayer county, Nebraska, where the land is situated, he **336** gave to the plaintiff a life estate therein. The petition is the usual petition in ejectment, and the answer, in addition to a general denial, sets up the following defenses: That in February, 1878, the land, which was then worth not to exceed five hundred dollars and was wholly unimproved, was owned by Michael J. Martin, the father of the defendant; that about that date Michael J. Martin, who was then located in Pennsylvania, proposed to the defendant that he go west and locate, and, as an inducement thereto, promised defendant the land described in the petition on the condition only that the defendant would locate in the state of Nebraska, and remain and establish himself, and improve the land in question; that about that time the said Michael J. Martin made and executed to the defendant a deed to said land, and conveyed the same to the defendant in fee simple, which deed, before its delivery to the defendant, fell into the hands of one John J. Martin, who concealed it for many years, and then, as a condition of its delivery, undertook to extort money or property from the defendant. It is further alleged that the defendant accepted the proposal of his father, and left the state of Pennsylvania and went to Thayer county, Nebraska, in February, 1878; entered into possession of the land in dispute, and has ever since been in the actual, open, exclusive, continuous, hostile, notorious and adverse possession of the same; that in 1878 he broke up and put the land in cultivation, and has ever since cultivated the

same, planted fruit and ornamental trees thereon, and that the same is in a high state of cultivation; that his father, during his lifetime, made no claim of ownership, nor did he demand rent for said land, and that since his father's death in 1886 the plaintiff has never demanded possession from the defendant nor rent for use of the premises. He alleges that he has acquired title by adverse possession, that the plaintiff's action is barred by the statute of limitations and asks to have his title quieted. The reply was a general denial. The jury returned a general verdict for the defendant, and a finding that at the date <sup>337</sup> of the commencement of the action defendant was the owner and entitled to the possession of the premises. The jury also returned certain special findings to the effect, first, that in January, 1878, Michael J. Martin promised and agreed to give the defendant the land in dispute on the condition above set out, and that the defendant, acting under such agreement, entered into the actual possession of said land and performed the condition of said agreement; second, that Michael J. Martin and his wife, Catherine, in January, 1878, made and executed a deed to the land in dispute to the defendant, that said deed was delivered to John J. Martin for the purpose of being delivered to Anthony Martin, the defendant, and that Michael J. Martin intended to have it so delivered; third, that the defendant, for more than ten years prior to the commencement of the action, had been in actual adverse possession of the land under a claim of ownership. Judgment was entered on the verdict and special findings of the jury in favor of the defendant, and the plaintiff has brought the case here for review.

After the jury had been instructed and had retired to consider their verdict, they sent the following communication to the court by the bailiff having them in charge: "Is a will made in one state in force and effective in another state, the will having been probated in the state in which it was executed?" In relation to this the record contains the following: "And which said request and question being presented in open court, all parties being represented by counsel, the same was by the court called to their attention, and, upon due consideration whereof, the court, upon his own motion and in answer to the above question and request of the jury, gave the following instruction in writing, said instruction being sent to the jury-room by the court through the bailiff, to wit: 'The jury is instructed, in answer to the

attached question, that the probate of a foreign will in this state is the statutory and legal method of proving the facts creating a right of inheritance, and, when probated here in Nebraska, <sup>338</sup> all the rights thereunder relate back to the time when the same became effective in the original jurisdiction'; to which act of the court, in the giving of such supplemental instruction, the plaintiff then and there duly excepted."

The method of giving this instruction is assigned as error. It is urged that our statute requires all instructions to be in writing and to be read by the court to the jury, and much force is placed upon section 287 of the code, to the effect that if the jury, after they retire, desire to be informed as to any part of the law arising in the case, they may request the officer to conduct them to the court, where the information upon the point of law shall be given. The precise question here presented has never before been raised and passed on by the court. Aside from the requirements of our statute, it is a general principle, which obtains everywhere, that all instructions to the jury shall be delivered in open court: 11 Ency. of Pl. & Pr. 275; *Hopkins v. Bishop*, 91 Mich. 328, 30 Am. St. Rep. 480, 51 N. W. 902. We do not mean to say that, where, as often happens, the court is engaged in a trial when a request like that in question is presented, he cannot, by consent of parties, send his answer to the jury by the bailiff in charge thereof; but the record ought to show that consent was given, in order that no controversy may thereafter arise. The exception taken by the plaintiff is not clear and definite, the language being, "to which act of the court, in the giving of such supplemental instruction, the plaintiff then and there duly excepted." It is possible that this should be considered as an exception to the method of instructing the jury, instead of to the substance of the instruction given, and if it be construed as an exception to the method there can be no doubt that the court was in error in proceeding as it did. The error, however, was without prejudice, in view of the special findings of the jury. Not only did they find that the defendant had been in the actual adverse possession of the premises for more than ten years prior to the commencement of the action, but <sup>339</sup> they found also that the plaintiff and her husband, during his lifetime, made and delivered to the defendant a deed of the premises conveying to him the fee title. In this condition of the case any error committed by the court in



the manner of instructing the jury upon other points in the case is immaterial.

Objection was made to the introduction of the deed of Michael J. Martin to the land in controversy, for the reason that the same was acknowledged before a justice of the peace, and no certificate was attached, as required by statute, showing the official character of the justice. The signatures of the grantors were proved. It is familiar law that, except in the conveyance of a homestead, the acknowledgment is not essential to the validity of a deed. It only goes to the right to have the deed recorded. As between the parties a deed without any acknowledgment is good.

Complaint is made of the refusal of the court to give the following instruction asked by the plaintiff: "You are instructed that if you find from the evidence that the defendant did, at any time within ten years next preceding the filing of this suit, to wit, November —, 1903, recognize or acknowledge the legal estate and right of possession of the plaintiff, in any manner, by the payment of rent for the use of said land to plaintiff or to any other person, or that the defendant recognized the right of plaintiff or any person, in any manner whatsoever, by the payment of rents, or any acts of the defendant in connection with said land, or the use thereof, inconsistent to the claim of defendant, that he is the owner, then the claim of defendant that he is the owner of said land by adverse possession cannot be sustained, and you must find the legal estate and right of possession to be in plaintiff." In argument it is insisted that any act of the defendant recognizing ownership by the plaintiff within ten years prior to the commencement of the action defeats his claim of title to the land by adverse possession. There was evidence from which the jury might have found that the defendant, <sup>340</sup> at the request of his mother, paid rent to his sister within ten years prior to the commencement of the action, but the evidence was conclusive that the defendant had entered into possession of the land in 1878 or 1879, and held actual possession from that time to the date of the trial. If, as he contends, and as the jury were warranted in finding, his possession was under a claim of ownership, then his title had accrued and become perfect many years prior to the commencement of the action. The law is well settled that recognition of title in the former owner by one claiming adversely, after he has acquired a perfect title by adverse possession, will not divest him of

title. In *Riggs v. Riley*, 113 Ind. 208, 15 N. E. 253, it is held that, where, by open and continuous adverse possession of land under claim of ownership for over twenty years by a person and his grantors, he has gained title thereto in fee, payment of rent by him thereafter for two years to the person having the paper title, and a subsequent survey procured by the latter without objection on the part of the former, will not defeat the title already gained by adverse possession. In *School District v. Benson*, 31 Me. 381, 52 Am. Dec. 618, it is said: "But the title, obtained by disseisin so long continued as to take away the right of entry, and bar an action for the land by limitation, cannot be conveyed by a parol abandonment or relinquishment, it must be transferred by deed." And in *London v. Lyman*, 1 Phila. (Pa.) 465, it is said: "Adverse possession for twenty-one years is a title; it cannot be defeated by a subsequent recognition of a previous title, which, originally rightful, has lost that character by a delay to enforce it." There was no error in refusing the instruction. Other instructions to the effect that the jury must find the defendant's possession to be actual, open, continuous and adverse for at least ten years next immediately preceding the commencement of the action were refused, but as the court had instructed to the same effect on its own motion, and also that the burden was upon the defendant to establish the adverse character of his holding, there <sup>341</sup> was no need of repeating the same and no error in refusing to do so.

In its third instruction the court said to the jury: "The third defense interposed by the defendant is that Michael J. Martin, now deceased, and his wife, Catherine Martin, conveyed the premises to him by deed of general warranty, a copy of which is attached to the petition, marked "Exhibit A," and that by reason and by virtue of said deed he became seised of the premises and is owner thereof." In her brief the plaintiff says: "As we have pointed out, this is contrary to the answer of the defendant, is contrary to the statement of the case by the court, and is not claimed by the defendant in instructions asked by him of the court. The answer simply pleads two defenses: First, a parol agreement to convey the land; and, second, the statute of limitations. The deed was simply plead as an incident to the parol agreement and was not set up as a defense, and it has never been claimed by the defendant in this case that the deed was delivered." The plaintiff must have overlooked the fourth paragraph of the defendant's answer, as follows: "I

pursuance of the proposition above set forth, the said Michael J. Martin, at or about the time last aforesaid, made and executed to this defendant a deed to the land described in plaintiffs' petition, a copy of which deed is hereto attached, marked "Exhibit A," and made a part hereof, and thereby conveyed to this defendant an absolute title in fee simple to the premises described in plaintiff's petition, which deed as aforesaid, before its delivery to this defendant, fell into the hands of one John J. Martin, who concealed it for many years, and then, as a condition of its delivery, undertook to extort money or property from this defendant as a condition precedent to the delivery of said deed." A pleading alleging that a deed was made and executed sufficiently pleads a delivery (*Brown v. Westerfield*, 47 Neb. 399, 53 Am. St. Rep. 532, 66 N. W. 439), and there was evidence to sustain a finding by the jury that the deed was actually delivered by the grantors to John J. Martin, with directions to deliver it to the <sup>342</sup> defendant. That this is the theory upon which the case was tried is evident from the third instruction of the court, in which he informed the jury that, in order to be effective to pass title, a deed must be delivered, and that a delivery must be shown by a fair preponderance of the evidence; and if the deed was delivered by Michael J. Martin to defendant Anthony Martin, either by himself or by some one authorized and directed to do so, it would be sufficient.

It is insisted that the judgment and verdict are not supported by the evidence. The witnesses contradicted each other on many material points, and there are letters in the record, signed by the defendant, addressed to his mother and other relatives, which are not fully and clearly explained. It is quite well established that the defendant cannot write except to sign his own name, and that these letters were written by his wife, some of them without his knowledge, or at least not at his dictation or direction. These letters point quite clearly to a recognition of his mother's title, and the explanation is, as above stated, that they were written without his direction or consent. There is also evidence of his payment of rent, but not before the statute of limitations ran in his favor, provided, as found by the jury, he has asserted title to the land in question since his occupancy in 1878 or 1879. On the other hand, there is evidence tending to show that he visited his father just prior to his death in 1886, and was then told that this land was his, and that the deed had been delivered to John J. Martin for delivery to

him, and that he received letters to the same effect directing him to request delivery of the deed from his brother John. There is also evidence tending to show that the plaintiff had stated, after the dismissal of another action involving title to this land, that they had always intended this tract for the defendant; that the land was his and that she would not have brought an action had she not been persuaded by some of her other children. Probably we would have been better satisfied with a verdict for the plaintiff, but <sup>343</sup> from the conflicting and contradictory testimony given by witnesses who were, to a certain extent, interested in the result, some of whom, we regret to say, must have testified knowingly to facts which had no existence, as the conflicting statements could not possibly have been through error or forgetfulness on their part, it is a case in which the facts and the credibility of the witnesses are particularly suited for the determination of a jury, who saw and heard the witnesses and who were more or less acquainted with many of them. Under the rule so well and long established, that this court will not set aside the verdict of a jury found on conflicting evidence, regardless of our own opinion of what the verdict should be, we cannot interfere with the findings of the jury.

The petition in error contains more than one hundred assignments. We cannot attempt to notice them all, and many of them relate to the same matter. The special findings, we think, dispose of the matters material to a disposition of the case. That there were some rulings on questions of evidence which were technically incorrect may be true, but these errors could have no weight with the findings of the jury on the question of the making and delivery of a deed to the premises by defendant's father, and the finding on that question is conclusive of the case.

We recommend an affirmance of the judgment.

Albert and Jackson, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

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*When the Statute of Limitations has Run in Favor of a disseisor, no subsequent acknowledgment of the former owner's title, except by deed sufficient to pass title to the land, will divest the title acquired by adverse possession: See the note to Menzel v. Hinton, 95 Am. St. Rep. 674.*

WABASH RAILROAD COMPANY v. SHARPE.

[76 Neb. 424, 107 N. W. 758.]

**CARRIERS—Act of God—Inexcusable Detention.**—A common carrier is responsible for injury to goods by the act of God, if the goods were exposed to injury by the carrier's inexcusable detention. (p. 824.)

**CARRIERS—Act of God—Wrongful Delay in Delivery.**—If a carrier wrongfully delays the transportation of goods, and because of such delay they are injured by flood, the carrier is liable. (p. 824.)

F. M. Hall, G. S. Grover and C. C. Marlay, for the plaintiff in error.

Mockett & Polk and O. B. Polk, for the defendant in error.

<sup>425</sup> DUFFIE, C. May 19, 1903, Morton R. Sharpe delivered to the Wabash Railroad Company, at Lafayette, Indiana, five thousand four hundred pounds of household goods for shipment to Lincoln, Nebraska. The goods were shipped from Lafayette on the 21st of May, were delayed in Hannibal, Missouri, twenty-four hours for rebilling, and were delivered to the Missouri Pacific Railway Company, a connecting carrier at Kansas City, on May 26th, and held in the yards by the latter company until May 31st, where they were practically destroyed by the great flood occurring at the time. The goods finally reached Lincoln June 18th, but in such condition as to be useless. This action was brought to recover the value of said goods, and judgment went in favor of the plaintiff for eight hundred and sixty-five dollars and eighty cents, from which judgment the company has taken error to this court.

It is claimed by the railroad company that they shipped the goods within a reasonable time, and delivered them to the connecting carrier at Kansas City in good condition. This may all be true, and still it is no answer to the plaintiff's claim. The common carrier of goods insures their safe delivery to the consignee against loss or injury from whatever cause arising, except only the act of God and the public enemy. The delivery of the goods to the carrier in good order, and their arrival at the place of destination in bad order, makes a prima facie case against the carrier. It then devolves upon it to show that the loss or damage <sup>426</sup> was caused by the act of God or some other cause which would exempt it from liability. It may be conceded in the present case

that the flood by which the goods were practically destroyed was an act of God, which, under ordinary circumstances, would relieve the company; but we think the rule supported by the weight of authority is that a common carrier is responsible for injury to goods by act of God, if he departs from his line of duty, and while thus in fault, and in consequence of that fault, the goods are injured by an act of God which would not otherwise have produced the injury. Or, as stated in one of the cases, a common carrier is responsible for injury to goods by act of God where the goods were exposed to injury by the carrier's inexcusable detention: *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426; *Michaels v. New York C. R. Co.*, 30 N. Y. 564, 86 Am. Dec. 415. In *McClary v. Sioux City & P. R. Co.*, 3 Neb. 44, 19 Am. Rep. 631, it is said: "And it is held that if the carrier wrongfully delay the transportation of goods, and because of the delay they are injured by a flood, the carrier would be liable," citing *Lowe v. Moss*, 12 Ill. 477, and *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426. In the absence of any showing to the contrary, it would seem that a delay of five days or more in the yards at Kansas City was an unreasonable delay, but there is evidence that the officer in charge of the United States weather bureau at Kansas City on May 26th, the date that these goods were delivered there, notified the public and all railroad companies of the coming flood and warned them to guard their property in the lowlands, and that this notice continued from day to day until the flood had reached its height. Under this condition of affairs there can be no doubt of the negligence of the carrier, and that this negligence exposed the goods to the injury and damage that they afterward suffered by the act of God.

It is further claimed by the defendant company that in consideration of a reduced rate given to the plaintiff he released it from all liability in excess of five dollars a hundred pounds. Our constitution prohibits a common carrier <sup>427</sup> from limiting its common-law liability, and in *Chicago etc. R. Co. v. Gardiner*, 51 Neb. 70, 70 N. W. 508, it was held: "A limitation of the liability of a common carrier contained in a shipping contract will not be recognized or enforced in this state, though valid in the state where made, when such attempted restriction of liability is illegal and contrary to the public policy of this state." This rule has been followed in numerous cases since, and has become the settled law of the state.

The judgment, in our opinion, is clearly right, and we recommend its affirmance.

Albert and Jackson, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

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*While an Act of God will Excuse a Common Carrier for a loss of goods, yet where his negligence concurs in or contributes to the loss, he is nevertheless liable therefor: Jones v. Minneapolis etc. R. R. Co., 91 Minn. 229, 103 Am. St. Rep. 507; Central of Georgia Ry. Co. v. Hall, 124 Ga. 322, 110 Am. St. Rep. 170. Hence, unnecessary delay on his part, subjecting the goods to loss by an act of God, which would not have happened had he been diligent, is of itself negligence that makes him liable for the loss: Alabama Great Southern Ry. Co. v. Quarles, 145 Ala. 436, 117 Am. St. Rep. 54; Alabama Great So. Ry. Co. v. Elliott, 150 Ala. 381, ante, p. 72; Rodgers v. Missouri Pac. Ry. Co., 75 Kan. 222, 121 Am. St. Rep. 416; Wald v. Pittsburg etc R. R. Co., 162 Ill. 545, 53 Am. St. Rep. 332; Richmond etc. R. R. Co. v. Benson, 86 Ga. 203, 22 Am. St. Rep. 446; Green-Wheeler Shoe Co. v. Chicago etc. R. R. Co., 130 Iowa, 123, 106 N. W. 498, 5 L. R. A., N. S., 882; Bibb Broom Corn Co. v. Atchison etc. Ry. Co., 94 Minn. 269, 110 Am. St. Rep. 361, and authorities cited in the cross-reference note thereto.*

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## CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY v. SLATTERY.

[76 Neb. 721, 107 N. W. 1045.]

**CARRIERS—Care of Livestock.**—An act of Congress requiring carriers engaged in the interstate shipment of livestock to care for them while in transit, by unloading them for rest, water, and feeding once in every twenty-eight consecutive hours, unless prevented from so doing by storm, or other accidental cause, does not relieve such carrier from liability for damages arising from negligence in properly caring for, feeding, and watering livestock in its charge, though the transportation thereof is delayed by storm. (p. 828.)

**CARRIERS OF LIVESTOCK—Shipping Contract.**—A carrier of livestock is not relieved of its responsibility to properly care for the stock while in transit, by reason of the terms of an express contract whereby the shipper agrees to accompany the stock, if the carrier, with knowledge of his failure to do so, proceeds under the shipping contract. (p. 828.)

**CARRIERS OF LIVESTOCK—Liability as Insurer.**—A carrier of livestock is an insurer of the safety of the property while in its charge for transportation. (p. 829.)

**CARRIERS OF LIVESTOCK—Liability—Evidence.**—The delivery of livestock to a carrier in good order, and their arrival at the place of destination in bad order, makes a prima facie case against the carrier, and it devolves upon the carrier to show that the

loss or damage resulted from some cause which exempts it from liability. (p. 829.)

**CARRIERS OF LIVESTOCK, Care Required of.—Unavoidable Delay** in the shipment of livestock affords no excuse to the carrier for a failure to exercise that degree of care required of it in the transportation of the stock. (p. 829.)

J. W. Deweese and F. E. Bishop, for the plaintiff in error.

Ashton & Mayer, for the defendant in error.

<sup>722</sup> JACKSON, C. The plaintiff charges in his petition that on May 29, 1903, he delivered to the defendant twenty horses to be conveyed from South Omaha, Nebraska, to East St. Louis, Illinois; that the horses were not delivered to him at the destination until June 3, 1903, but were delayed in course of shipment almost four days longer than the time regularly required for transportation between those points; that they were not properly handled and cared for during any part of the time within which they were under the care of the defendant, and were for a period of over fifty-six hours without food and water, and exposed continuously to the sun and rain, <sup>723</sup> and when they were delivered they were sick, gaunt and bruised, as a result of the ill-treatment complained of, and that from the effects of such treatment two of the horses died, and that the plaintiff sustained damages. The defendant admits the shipment, and avers it was by virtue of a written contract entered into at the time the shipment was agreed upon; that the stock was shipped and delivered to the consignee at the destination named, without any failure or neglect on its part; that, as a part of the consideration, the plaintiff agreed to accompany the same in order to look after and care for the comfort and necessities of the stock while en route, and that he would give the stock proper and reasonable attention while in transit for the purpose of feeding and unloading, when necessary; that, in violation of the contract, the plaintiff did not accompany the shipment, although free transportation was provided and he was furnished with every facility for so doing. As a further defense, it was answered that, by reason of an unprecedented flood that was then prevailing along its line of road, it was unable to transport the stock by the usual route of travel, but was obliged to divert the shipment to another route, and that there was no unnecessary delay or neglect of duty on the part of the defendant; that if the stock sustained any injury by reason of improper attention, it was due to the neglect of the plaintiff, who failed to ac-



company the shipment. In reply, the plaintiff denied that the horses were injured through any fault or negligence on his part, and alleged that the consignment was accepted and forwarded by the defendant with knowledge on its part that no one would accompany the stock. The plaintiff had judgment in the trial court, and the defendant seeks a reversal.

The testimony on behalf of the plaintiff tends to prove that on the twenty-eighth day of May, 1903, he came into the city of South Omaha over the Union Pacific Railroad, with this carload of horses, and that they were there delivered to the Union Stockyards Company. He applied to the live-stock agent of the defendant company to have the horses shipped <sup>724</sup> out over the defendant's line to East St. Louis, and informed the defendant's agent that he was going out that evening on the passenger train to St. Louis; that he signed a contract in blank, and also a shipping order to the Union Stockyards Company, and thereupon left for St. Louis; that the horses were delivered to him in St. Louis on the afternoon of June 3d in a gaunt and damaged condition, some of them suffering from pneumonia, from the effects of which one died in two or three days, and another some weeks thereafter; that on the route covered by the shipment there were facilities for unloading and feeding stock at Creston, Iowa, St. Joseph, Missouri, and other points. On behalf of the defendant the evidence discloses a condition arising from an unusual storm and flood, sufficient without question, to excuse the delay; that the shipment arrived at Monroe, Missouri, on the morning of June 1st, where the horses were unloaded, fed, watered and cared for until the next day at 9 o'clock P. M., when they were reloaded and forwarded to St. Louis. The contract set out in the company's answer was put in evidence and contains this condition: "In consideration for free transportation for one person, designated by the first party (plaintiff), hereby given by said railway company, such person to accompany the stock, it is agreed that the said cars, and the said animals contained therein, are and shall be in the sole charge of such person, for the purpose of attention to and care of said animals, and that the said railway company shall not be responsible for such attention and care. . . . It is agreed that the said animals are to be loaded, unloaded, watered and fed by the owner or his agents in charge." The evidence also discloses that the shipping contract was delivered to the conductor in charge of the train at the city of South Omaha, and when he discovered that no person was aboard

in charge of the stock he returned the contract to the company's agent, who forwarded it by mail, addressed to the plaintiff in East St. Louis, Illinois, where it was received by him. There is no evidence as to whether the <sup>725</sup> stock was at any time unloaded, fed and watered between the time it left South Omaha on May 29th and the time it was unloaded at Monroe, Missouri.

On behalf of the railroad company it is claimed that the transaction was an interstate shipment and governed by federal statute. Section 4386 of the Revised Statutes of the United States provides: "No railroad company within the United States whose road forms any part of a line of road over which cattle, sheep, swine or other animals are conveyed from one state to another, . . . shall confine the same in cars . . . for a longer period than twenty-eight consecutive hours without unloading the same for rest, water and feeding, for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental causes." By section 4387 it is provided: "Animals so unloaded shall be properly fed and watered during such rest by the owner or person having the custody thereof, or in case of his default in so doing, then the railroad company . . . transporting the same at the expense of the owner or person in custody thereof; and such company, owners or masters shall in such case have a lien upon such animals for food, care and custody furnished, and shall not be liable for any detention of such animals." The statute also provides a penalty for the violation of these provisions. We do not understand how the defendant is aided by the provisions of the federal statute. It is true that the obligation in the first instance rests upon the owner or his agent in charge, but it attaches with equal force to the public carrier in case of default by the owner. Nor is the carrier released from its responsibility by reason of the express terms of the written contract, whereby the shipper agreed to accompany the stock, but failed to do so. Where the company, with knowledge of such failure, proceeded under the shipping contract, it would still be liable for any loss resulting from its failure to provide the stock with proper care and protection: *Chicago etc. R. Co. v. Williams*, 61 Neb. 608, 85 N. W. 832, 55 L. R. A. 289. The case does not fall within the rule of *Chicago etc. 726 R. Co. v. Schuldt*, 66 Neb. 43, 62 N. W. 162, where not only was there an agreement that the shipper should accompany the stock and be responsible for its care, but he was provided with transportation for that purpose and personally

accompanied the shipment, and it was held that the carrier was only required to provide proper facilities, and, when doing so, was not liable for injury arising from lack of care through the fault of the shipper himself.

Again, liability on the part of the company is denied because of the failure of the plaintiff to prove that the railroad company did not stop the shipment for feed and rest at such places as were possible; that if he claims damages on account of the failure to perform that duty the burden was upon him to show that the company failed to perform it. A carrier of livestock is an insurer of the safety of the property while in its charge for transportation: *Kinnick Bros. v. Chicago etc. R. Co.*, 69 Iowa, 665, 29 N. W. 772. There are, of course, exceptions to this rule, but the delivery of livestock to a carrier in good order, and their arrival at the place of destination in bad order, makes a prima facie case against the carrier, and it devolves upon the carrier to show that the loss or damage resulted from some cause which would exempt it from liability: *Wabash R. Co. v. Sharpe*, 76 Neb. 424, ante, p. 823, 107 N. W. 758.

But it is said that the damage was the direct result of an act of God. This conclusion, however, is not justified by the evidence. The evidence in that respect, as already stated, was sufficient to show a just cause for delay, but there is an entire absence of evidence to show that the flood in any manner interfered with the unloading of the stock, providing it with food and water, and giving it such care as would insure its delivery at the destination in good condition. A cause for unavoidable delay in shipment affords no excuse for a failure to exercise that degree of care required of a common carrier in the transportation of stock: *Kinnick Bros. v. Chicago etc. R. Co.*, 69 Iowa, 665, 29 N. W. 772.

The assignments of error are all covered by the general discussion of the case and will not be noticed separately.

727 There is no prejudicial error in the record, and we recommend that the judgment be affirmed.

Albert, C.; concurs.

Duffie, C., not sitting.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

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*The Presumption of Negligence*, if any, which arises against a carrier where goods are lost or injured during transportation is dis-

cussed in *McCarthy v. Louisville etc. R. R. Co.*, 102 Ala. 193, 48 Am. St. Rep. 29; *Georgia R. R. etc. Co. v. Keener*, 93 Ga. 808, 44 Am. St. Rep. 197; *Central R. R. Co. v. Hasselkus*, 91 Ga. 382, 44 Am. St. Rep. 37; *Browning v. Goodrich Transp. Co.*, 78 Wis. 391, 23 Am. St. Rep. 414; *Wheeler v. Oceanic Steam Nav. Co.*, 125 N. Y. 155, 21 Am. St. Rep. 729; *Merchants' Dispatch Transp. Co. v. Bloch Bros.*, 86 Tenn. 392, 6 Am. St. Rep. 847. As to such presumption in the case of a shipment of livestock, see *Cleve v. Chicago etc. Ry. Co.*, 77 Neb. 166, post, p. 837.

*The Duty of Common Carriers* to water livestock in course of transportation is discussed in the note to *Heller v. Chicago etc. Ry. Co.*, 63 Am. St. Rep. 554-558. Under section 4386 of the United States Revised Statutes, it is negligence per se for a railroad company to keep livestock upon its cars for more than twenty-eight consecutive hours without unloading them for rest, water and feeding; and the company is liable not only for the penalty imposed by the statute, but also for all damages or injuries that may thereby be sustained by the owner of the animals: *Nashville etc. Ry. Co. v. Heggie*, 86 Ga. 210, 22 Am. St. Rep. 453.

*A Provision in a Contract* for the carrying of livestock that the shipper will unload and load the stock at his own expense and risk at any place where the same may be unloaded for any purpose does not relieve the carrier from the duty of unloading after twenty-eight consecutive hours of confinement for resting, food and water, where the carrier does not give the shipper an opportunity to unload his cattle for such purposes: *Reynolds v. Great Northern Ry. Co.*, 40 Wash. 163, 111 Am. St. Rep. 883.

## CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY v. HEALY.

[76 Neb. 786, 111 N. W. 598.]

**RAILROADS—Relief Department—Remedies.**—Under a contract of membership in a railroad relief department, providing that the acceptance of the benefit by the beneficiary of the member shall bar an action for damages arising from his death, the acceptance by the widow of a member of such benefit bars her claim against the company for damages for herself, but does not defeat the rights of her minor children, and after having received such benefit, she may, as administratrix of the deceased, prosecute an action for damages in favor of such children. (p. 832.)

**RAILROADS—Relief Department—Forfeiture—Public Policy.** A provision in a contract of membership in a railroad relief department that if suit is brought against the company for damages arising from, or growing out of, the death of a member, any benefit otherwise payable shall thereupon be forfeited, is against public policy and void. (p. 834.)

J. W. Deweese, W. S. Morlan and F. E. Bishop, for the plaintiff in error.

T. J. Doyle, for the defendant in error.

<sup>786</sup> SEDGWICK, C. J. The questions presented on this motion for rehearing have been thoroughly briefed and carefully presented. We have re-examined the decisions of this court construing contracts relating to membership in the defendant's relief department. In the former opinion in this case, <sup>787</sup> 76 Neb. 783, 107 N. W. 1005, it was decided that the commencement of an action against the defendant for damages by this plaintiff as administratrix of the estate of her husband worked a forfeiture of her rights as beneficiary in the certificate herein sued upon. Questions arising upon the construction of these contracts have been before this court in several cases, but we have never been called upon to adjudicate the precise question involved in this case, unless it be in *Walters v. Chicago etc. R. Co.*, 74 Neb. 551, 104 N. W. 1066. In that case the plaintiff was the mother of the deceased. There was no widow and children. The plaintiff, therefore, although she prosecuted her action for damages as administratrix of the estate of the deceased, prosecuted it solely in her own interest. She did not voluntarily dismiss her action, but after final judgment had been rendered against her in her action for damages she attempted to recover as beneficiary of the relief fund. It was held that her former action was a bar to such recovery. In the opinion in that case the distinction between the principles there involved and ordinary cases of election of remedy was pointed out and clearly stated. The sense in which the doctrine of election of remedies was applicable in *Chicago etc. R. Co. v. Bigley*, 1 Neb. (Unof.) 225, 95 N. W. 344, and *Chicago etc. R. Co. v. Olsen*, 70 Neb. 559, 97 N. W. 831, was also correctly stated. In those cases it was held that, when the beneficiary elected to take the benefits under the relief certificate, and actually received a part of the amount due under the beneficiary certificate, a subsequent ineffectual attempt to recover damages arising out of the negligence of the company would not prevent the collection of the remainder of the benefits under the certificate. It has been several times held by this court that one who has received benefits from the relief departments under his relief certificate cannot himself maintain an action for damages for the negligence of the company in causing the same injury which was the basis of his claim for benefits: *Clinton v. Chicago etc. R. Co.*, 60 Neb. 692, 84 N. W. 90; *Chicago etc. R. Co. v. Bell*, 44 Neb. 44, 62 N. W. 314; *Chicago etc. R. Co. v. Curtis*, 51 Neb. 442, 66 Am. St. Rep. 456, 71 N. W. 42. <sup>788</sup> This was the situation in the Olsen case (70 Neb. 559, 97 N. W. 831). When

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the defendant was sued for damages caused by its negligence, it answered that the plaintiff had elected to claim under his benefit certificate and had received a part of the benefits to which he was entitled, and so defeated his action for damages. After having defeated his action for damages upon that ground, it was not allowed to deny its liability under the benefit certificate.

In the case at bar the plaintiff, as administratrix of the estate of the deceased, represented her several minor children as well as herself. Her husband was killed while in the employ of the defendant company. She had good reason to believe, and she testified she did believe, that his death was caused by the negligence of the defendant. If it was so caused, it was her duty as administratrix to recover damages from the defendant in behalf of her minor children. This duty she attempted to perform. In an early case in this court it was determined that the widow, by accepting benefits from the relief department under a contract like the one in question, settled and barred her claim against the company for damages, but it was also held that such action on her part would not defeat the rights of her minor children. After having received benefits herself from the relief department, she might as administratrix prosecute an action for damages against the company in behalf of her minor children: *Chicago etc. R. Co. v. Wymore*, 40 Neb. 645, 58 N. W. 1120. Speaking of that case, this court in *Chicago etc. R. Co. v. Bell*, 44 Neb. 44, 62 N. W. 314, said: "In that case Wymore was a member of the relief department, and was killed through the negligence of the railroad company. After his death his widow accepted from the funds of the relief department the death benefit to which she was entitled by virtue of being Wymore's widow, and his membership in the relief department. She then brought a suit as administratrix against the railroad company for damages for negligently killing her husband. This suit was brought under chapter 21 of the Compiled Statutes, 1893; and we held that the right of action conferred by <sup>789</sup> the statute was for the benefit of the widow and next of kin of the deceased who had lost his life through the negligence of the railroad company, and that the acceptance by the widow of the death benefit from the funds of the relief department was a release and discharge of her cause of action against the railroad company given by that statute for her own benefit; but that neither Wymore's membership in the relief department, nor his contract with it, nor the acceptance of the death benefit,

by the widow, operated to bar or release her cause of action as administratrix against the railroad company in favor of Wymore's children. We adhere to that case."

In action of this kind there is especial reason for adhering to the earlier decisions of the court. Contracts of employment and of membership in the relief department are being continually made, and it is of highest importance that the contracting parties shall so far as possible understand their respective rights and duties when entering upon such contracts. If the two cases last referred to are to be regarded as a correct exposition of the law, we suppose that from the language quoted it would follow that, if this plaintiff had prosecuted her action as administratrix for the benefit of the children alone, such action would not have been a bar to her claim upon the relief fund. She, however, made no such distinction in the action which she brought. She sought to recover damages for herself as well as for her children. If, therefore, she had collected and received such damages in that action it would, we suppose, under the principles announced in the cases referred to, have barred all her claims against the relief fund. She began her action for damages and recovered a substantial verdict against the defendant in the trial court. The judgment of the trial court was reversed upon proceedings in error in this court upon the ground that the evidence showed contributory negligence on the part of the deceased. The evidence showing such contributory negligence was the testimony of one of the employés of the defendant, who testified that the deceased was warned of <sup>790</sup> peculiar dangers which he was incurring, and was told to take precautions, which he failed to do, and knowledge of these facts was wholly in the possession of the defendant's agents. The plaintiff makes it appear that she could not and did not foresee that she would be confronted with such evidence, and that when she commenced her action for damages all the circumstances were such as to not only warrant her in bringing such action, but to make it her duty as administratrix so to do.

When the judgment for damages had been reversed by this court, the plaintiff at once dismissed her case without prejudice, and brought this action to recover under the benefit certificate. The question presented is whether the terms of the benefit certificate and the rules of the company, which were made a part of the contract, will under these circumstances prevent her recovery from the relief fund.

That part of the contract relied upon for this purpose is in these words: "If any suit shall be brought against said company, or any other company associated therewith as aforesaid, for damages arising from or growing out of injury or death occurring to me, the benefits otherwise payable, and all obligations of said relief department and of said company created by my membership in said relief fund, shall thereupon be forfeited without any declaration or other act by said relief department or said company." It is contended that the construction of this language is that, if any suit for damages is brought by any party, the benefits payable to the beneficiary in the relief department are forfeited, whether such beneficiary participates in the action for damages or not; but this is not the meaning of the language used. The provision is that the person who brings the suit for damages against the company shall forfeit the right to the relief fund. Can the forfeiture provided for in this contract be enforced? The benefit provided for in the relief certificate did not depend upon the negligence of the company in causing the accident, nor upon the question of contributory negligence of the deceased. Even his gross negligence or his criminal <sup>791</sup> conduct contributing to his death would not defeat the right of his widow to participate in this fund. The amount to which she is entitled is fixed by the contract. It became due her upon the death of her husband. It partakes of the nature of life insurance. It is not measured by the amount of her loss. The jury estimated the damages to which she was entitled as administratrix at three thousand five hundred dollars. When she began her action for damages she had reason to suppose that she ought to recover at least that amount from the defendant. She knew that she could obtain five hundred dollars from the relief fund without trouble. By the death of her husband she was confronted by the alternative to either waive her right to damages and her right to enforce that claim in the courts, or to forfeit the five hundred dollars which was hers and could be had for the asking. Her testimony shows that she realized the situation. Upon the advice of friends and her counsel she concluded that it was her duty to enforce her claim for damages. There can be no doubt that this was good advice as the claim then appeared. She attempted to enforce that claim, and, as soon as she ascertained that the facts were such that she could not enforce it, she dismissed her action and asked for her relief benefit. She is told that she has forfeited the five hundred dollars. The contract itself



calls this a forfeiture, and there is no doubt that it is correctly named. The deceased during his lifetime paid for this benefit out of his earnings. It is therefore as though he had deposited five hundred dollars with the company upon the contract and agreement that he should go into the employment of the company, and upon his death the five hundred dollars should be paid to his widow, with the further provision that, if the widow should sue the company for damages upon an allegation of negligence in causing his death, the five hundred dollars should be forfeited. She has a constitutional right that the courts shall be open to her to redress the grievance of negligently killing her husband and to litigate her claims predicated upon such negligence; but if she exercises that right she must, under this contract, suffer a forfeiture for so doing. If the company required its employes to deposit money with the <sup>792</sup> company upon contract that, if such employe should afterward be injured in the service of the company, and should bring an action for damages predicated upon the negligence of the company, the money so deposited should be forfeited, would such a contract be enforced? Can a party contract beforehand under penalty and forfeiture that he will not litigate a claim that may thereafter arise? The policy of our law is to furnish every citizen with speedy redress for any injury that he may receive in person or property, and a contract which essentially imposes a penalty upon seeking such redress is contrary to that policy. The decision in *Walters v. Chicago etc. R. Co.*, 74 Neb. 551, 104 N. W. 1066, so far as it conflicts with the views herein expressed, is wrong and is overruled.

The former judgment entered in this cause is vacated and the judgment of the district court is affirmed.

Judgment accordingly.

**This Action was Based** upon a certificate of membership issued to one Healy, in the insurance organization known as the "Burlington Relief Department" of the defendant railroad company. The beneficiary named was the wife of Healy, the plaintiff herein, Healy lost his life by accident while in the service of the defendant company, leaving surviving him four minor children and his widow. She was appointed administratrix, and prosecuted an action against the company to recover damages for the alleged wrongful or negligent act causing the death of the insured. From a verdict and judgment in her favor the railroad company prosecuted error, and secured a reversal of the judgment. When the cause was remanded to the district court such administratrix voluntarily dismissed it without prejudice to a new action, and began the present one, in which she re-

covered judgment, which is sought to be reversed by this proceeding.

The contract of membership in such relief department, provides that all rights of recovery thereunder shall be forfeited "if any suit shall be brought against said company . . . for damages arising out of injury or death occurring to me," the insured. On the original hearing of this case on appeal, *Chicago etc. R. R. Co. v. Healy*, 76 Neb. 783, 107 N. W. 1005, it was decided that a suit by an administratrix of a deceased employé who was a member of a railroad relief department, to recover damages for the alleged wrongful death of such employé, if commenced on behalf of herself alone, or on behalf of herself and her minor children, was a bar to a subsequent action to recover the insurance benefit, when such administratrix and the named beneficiary is the same person, but upon a rehearing, as shown by the principal case, the court modified its opinion to the extent of holding that though the widow of such employé, after receiving the benefit provided for by the certificate of membership in such relief department, cannot maintain an action to recover damages for herself caused by such death, she might after receiving such benefit, as administratrix of the estate of the deceased, prosecute an action for damages against the railroad company in behalf of her minor children.

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*A Person Entitled to an Election* between inconsistent remedies will ordinarily be confined to the one which he first prefers and adopts: *Seeley v. Seeley-Howe-Le Van Co.*, 130 Iowa, 626, 114 Am. St. Rep. 452; *Krause v. Board of School Trustees*, 162 Ind. 278, 102 Am. St. Rep. 203. But one who supposes he has more than one remedy is not deprived of all remedy because he first tries a wrong one which is not inconsistent with his true and effectual remedy: *McCoy v. McCoy*, 32 Ind. App. 38, 102 Am. St. Rep. 223; *Jacobs v. Jacobs*, 130 Iowa, 10, 114 Am. St. Rep. 402; *Davis v. Schmidt*, 126 Wis. 461, 110 Am. St. Rep. 938.

*An Agreement by an Employé of a Railroad Company*, upon becoming a member of its relief department, that an acceptance of benefits from the relief fund shall release the company from liability for damages in case of injury, is valid and binding upon an employé who voluntarily signs such agreement and accepts such benefits. It estops him from suing the company for damages: *Chicago etc. R. R. Co. v. Curtis*, 51 Neb. 442, 66 Am. St. Rep. 457.

*A Release by an Injured Employé of His Claim* for damages in consideration of his re-employment, there being no promise to re-employ, wants consideration and cannot be enforced: *Missouri etc. Ry. Co. v. Smith*, 98 Tex. 47, 107 Am. St. Rep. 607.

# CLEVE v. CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY.

[77 Neb. 166, 108 N. W. 982.]

**CARRIERS OF LIVESTOCK, Liability of.**—In the transportation of livestock, the liability of a common carrier attaches, including liability for injuries thereto occasioned by the acts of the carrier's servants. (p. 839.)

**CARRIERS OF LIVESTOCK, Limitations upon Liability of.**—The absolute liability of a common carrier for the safe delivery of property committed to it for carriage is qualified when applied to livestock, and made subject to the exception that it is not an insurer against injury resulting from the inherent nature or propensities of the animals and without the fault of the carrier. (p. 839.)

**CARRIER OF LIVESTOCK—Burden of Proof.**—Where, by the contract, the shipper accompanies his livestock with tenders or caretakers, no presumption of negligence on the part of the carrier arises merely from the proof of the fact that loss or injury has attended the shipment, but the burden is on the shipper to show that the loss, if any, was occasioned by the negligence of the carrier. (p. 840.)

**CARRIERS OF LIVESTOCK—Evidence Necessary to Sustain Action for Injury Due to Delay.**—To recover damages for the alleged delay in the transportation of livestock, it is necessary to introduce some competent evidence tending to show the length of time ordinarily required to transport a shipment from the place where received to the point of delivery, and that a longer time was consumed than was necessary for that purpose. (p. 841.)

J. W. Deweese, Frank E. Bishop and John C. Watson, for the appellant.

W. W. Wilson, contra.

**167 OLDHAM, C.** This was an action for damages instituted by the plaintiff in the court below against the defendant railway company for the loss of two fat steers in the shipment of cattle from Nebraska city to Chicago. The cattle were shipped on the eighth day of August, 1899, and it was charged in the petition that the cattle died from overheating on account of delay in the shipment. Defendant's answer was in the nature of a general denial and plea of the statute of limitations. The cause was submitted to the court without the intervention of a jury, and at the close of the evidence judgment was entered for plaintiff. To reverse this judgment defendant appeals to this court.

Several alleged errors in the proceeding are called to our attention in the brief of the railway company, only one of which, however, it will be necessary to examine, in view of the conclusion about to be reached, and that one is that the evidence is not sufficient to sustain the judgment of the

trial court. The testimony offered by plaintiff in the court below tended to show that on the eighth day of August, 1899, he shipped, under contracts entered into with the Burlington and Missouri River Railroad in Nebraska, eight carloads of stock from Nebraska City to Chicago. The stock were accompanied by two tenders during the entire shipment, and plaintiff himself accompanied the stock as far as Shenandoah, Iowa, at which point he took a passenger train to Chicago, the place of destination.

<sup>168</sup> It appears from the testimony that the weather was hot when the shipment was made, but that all the stock were loaded in good condition, in suitable cars, properly bedded, at Nebraska City, at about 1 or 2 o'clock in the afternoon, on the day of the shipment. It further appears from the testimony that two stops were made between Nebraska City and Hamburg, Iowa, where the shipment was transferred from the branch to the main line of the road. Plaintiff and one of his tenders, McCarthy, testify that when the train reached Hamburg, it remained on a sidetrack between two rows of box-cars for about thirty or forty minutes, and that the cattle became heated by reason of the fact that the box-cars prevented the air from circulating through the stock-cars. There is no competent evidence, however, that complaint was made either to the conductor of the train or to the station agent of this delay, nor is there any testimony that the delay was unnecessary and unusual. Plaintiff does say that he told the tenders to tell the conductor to move the train or the cattle would suffer from the heat. Mr. McCarthy, the only tender who testified, admitted that he did not notify the conductor of the train of the probable injury from this delay, or request him to move either the train or the box-cars that impeded the circulation of the air. He thought, according to his testimony, that Mr. Cleve, the owner of the cattle, had entered complaint. On the other hand, the conductor in charge of the train denied that any complaint was made to him of the delay at Hamburg, or that the delay there was unnecessary or for a longer time than was required to water and take on another car. It is shown in the evidence that one steer got down at Hamburg, and that this steer was dead when the train reached Stanton, about 7 o'clock in the evening. It is also in evidence that another steer got down near Stanton, and that this steer died shortly after the shipment was received in Chicago. There is no evidence in the record as to when the shipment, on schedule time, should have arrived in Chicago. Plaintiff,

however, testified that it <sup>169</sup> was a slow shipment and stopped at all the stations, but there is no evidence that the stopping at each station was unnecessary or unusual in the transportation of livestock from Nebraska City to Chicago. There is no complaint of any failure to feed or water the cattle during the shipment, and it is admitted that the two attendants of the cattle were furnished with transportation by the company under the contracts of shipment. In fact, the cattle were shipped under three contracts, by consent of the agent of the defendant, in order that transportation might be furnished to plaintiff and his two tenders, who accompanied the cattle.

Now, the question arises as to whether or not this evidence is sufficient to show actionable negligence on the part of the defendant railway company. The authorities are not exactly uniform on the question as to whether or not the common-law liabilities of carriers attach to railway and transportation companies in receiving and transmitting livestock. In Michigan it is held that a railway company is only required to transport livestock with reasonable diligence and to use ordinary care, prudence and skill: *Heller v. Chicago etc. R. Co.*, 109 Mich. 53, 63 Am. St. Rep. 541, 66 N. W. 667; *Sisson v. Cleveland etc. R. Co.*, 14 Mich. 489, 90 Am. Dec. 272. This rule appears to be favored in Kentucky and Tennessee; *Louisville etc. R. Co. v. Harned*, 23 Ky. Law Rep. 1651, 66 S. W. 25; *Baker v. Louisville etc. R. Co.*, 10 Lea (Tenn.), 304. The clear weight of authority, however, is that in the transportation of livestock the liabilities of a common carrier attach, and this rule was adopted in this state in the early case of *Atchison etc. R. Co. v. Washburn*, 5 Neb. 117, wherein it was held that, when the railway company undertakes to carry livestock for hire, it assumes all the duties and liabilities of a common carrier with reference to such property, and it is liable for injuries thereto occasioned by the negligence of its servants. The general rule of absolute liability of a common carrier for the safe delivery of property committed to it for carriage is qualified when applied to livestock, and <sup>170</sup> made subject to the exception that it is not an insurer against injury resulting from the inherent nature or propensities of the animals, and without fault of the carrier. As to the presumption arising from loss or injury to stock while being transported by a common carrier, the authorities are at variance, one line holding that the presumption is that due care has been exercised by the carrier, and that the burden is on the plaintiff

to show negligence on the part of the carrier: See *Crew v. St. Louis etc. R. Co.*, 20 Fed. 87, and *Crandall v. Goodrich Transp. Co.*, 11 Biss. 516, 16 Fed. 75, and cases there cited. On the other hand, it has been held that, when loss or damages accrued during a shipment of livestock, the burden is upon the carrier to show that the cause of the loss or death was within the exceptions qualifying its general liability: *Moulton v. St. Paul etc. R. Co.*, 31 Minn. 85, 47 Am. St. Rep. 781, 16 N. W. 497; *Lindsley v. Chicago etc. R. Co.*, 36 Minn. 539, 1 Am. St. Rep. 692, 33 N. W. 7; *Burke v. United States Express Co.*, 87 Ill. App. 505; *Nelson v. Great Northern R. Co.*, 28 Mont. 297, 72 Pac. 642; *Ft. Worth etc. R. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834; 5 Thompson's Commentaries on the Law of Negligence, sec. 6576.

While the weight of American authority seems to favor the rule that in cases involving loss or injury to animals during transit the carrier has the burden of showing that the injury was occasioned without its fault, yet a distinction is made between livestock committed exclusively to the care of a common carrier and livestock shipped under a contract by which the owner, in person, or by his employes, accompanies the stock for the purpose of caring for them during transit. This distinction has been recognized by this court in the case of *Chicago etc. R. Co. v. Williams*, 61 Neb. 608, 85 N. W. 832, 55 L. R. A. 289, in which it was held that, where the shipper of stock does not agree to furnish a caretaker and some of the animals die, or are injured for want of care or protection in transit, the carrier must bear the loss. In rendering this opinion, it was said by Sullivan, J., "that the rule is not doubted that, where the owner<sup>171</sup> is in charge of livestock in transit, the burden is on him to show a loss caused by the carrier's negligence." In the still later case of *Chicago etc. R. Co. v. Schuldt*, 66 Neb. 43, 92 N. W. 162, the above quotation was cited with approval, and it was further held that common carriers of livestock have a right to limit by contract the assumption of liability that accrues to them merely as bailees, and not strictly as common carriers. We think these cases establish the rule in this jurisdiction that, where by contract the shipper accompanies his livestock with tenders or caretakers, no presumption of negligence on the part of the carrier arises merely from the proof of the fact that loss or injury has attended the shipment, but the burden is on the shipper to show that the loss, if any, sustained was occasioned by the negligence of the carrier. Now, the only negligence alleged against the

carrier in the case at bar is that of delay in the shipment. In the case of *Johnston v. Chicago etc. R. Co.*, 70 Neb. 364, 97 N. W. 479, the rule was laid down that, "in order to recover damages for an alleged delay in the shipment of livestock, it is necessary to introduce some competent evidence tending to show the length of time ordinarily required to transport the shipment from the place where received to the point of delivery, and that a longer time was actually consumed than was necessary for that purpose."

We think, under this rule, the evidence introduced was wholly insufficient to sustain the judgment, and we therefore recommend that the judgment of the district court be reversed and the cause be remanded for further proceedings.

Ames and Epperson, CC., concur.

By the COURT. For the reasons given in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

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*The Respective Duties of Carriers and Shippers of Livestock* are discussed in the note to *Heller v. Chicago etc. Ry. Co.*, 63 Am. St. Rep. 548. As to presumptions of negligence in case of a loss of or injury to livestock during transportation; see *Chicago etc. Ry. Co. v. Slatery*, 76 Neb. 721, ante, p. 825.

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## HARVEY v. GODDING.

[77 Neb. 289, 109 N. W. 220.]

**APPEAL AND ERROR—Construction of Statute Authorizing an Appellate Court to Issue a Writ of Mandate to Carry a Judgment into Execution.**—The statute of Nebraska providing for a special mandate to be awarded to the district court to carry a judgment into execution, and that the lien of the judgment shall continue for five years after the first day of the term of the district court to which the mandate may be directed, applies only to cases in which the appellate court, in reversing a judgment of the trial court, proceeds to render such judgment as the court below should have rendered, and does not have the effect of continuing the lien of the judgment which has been affirmed on the appeal and the execution of which was never stayed by any bond for supersedeas. (p. 845.)

**EXECUTION SALE After the Judgment Ceases to be a Lien.** The title of a purchaser made after the lien of the judgment had expired is the same only as if it had never been a lien, and does not divest title acquired from the judgment debtor during the life of the lien. (pp. 846, 847.)

**JUDGMENT, When Becomes Dormant in Nebraska, and Effect of a Sale Thereunder.**—Under the statutes of Nebraska provid-

ing that no judgment on which execution shall not have been taken out and levied before the expiration of five years next after its rendition shall operate as a lien on the estate of any debtor to the preference of any bona fide judgment creditor or purchaser, a judgment becomes dormant after such five years, and a sale thereunder does not pass title as against such judgment creditor. (p. 847.)

**JUDGMENT AND ATTACHMENT LIENS, Merger of and the Effect of a Sale After the Expiration of the Judgment Lien.**—The fact that a judgment was aided by an attachment, and the judgment contains an order for the sale of the attached property, does not continue the judgment lien beyond the time fixed by statute. The lien of the attachment merges in that of the judgment, and the latter being lost by the lapse of time, no lien exists, and a sale subsequently made under execution is without effect as against one acquiring title from the judgment debtor before the expiration of the judgment lien. (p. 847.)

**CONVEYANCE BY INSOLVENT DEBTOR, Burden of Proof that It was Made in Good Faith.**—If an Insolvent Husband Conveys Real Property to His Wife, the burden must be assumed by her of showing that the conveyance was made in good faith. (p. 848.)

**HUSBAND AND WIFE and Her Separate Property Resulting from a Gift by Him to Her.**—If a husband conveys property to his wife as a gift when he is solvent and not in contemplation of insolvency, and the gift is not excessive in view of his circumstances at the time, and she sells this property subsequently and has in her possession money resulting therefrom, this is her separate property, and if loaned by her to him, places her in the same position as any other creditor. (pp. 848, 849.)

**HUSBAND AND WIFE and His Right to Prefer Her as a Creditor.**—A husband, being a debtor of his wife, has the right to make a preference in her favor. (p. 849.)

**PURCHASER IN GOOD FAITH, Wife, When is from Her Husband.**—A wife to whom her husband conveys real property in payment of money due from him to her is entitled to be regarded as a purchaser in good faith, and hence her title is not divested by a sale under execution issued against him when the lien of the judgment has expired. (p. 849.)

E. F. Warren, for the appellant.

W. F. Moran and W. A. Corson, contra.

**290 ALBERT, C.** The plaintiff, Belle S. B. Harvey, brought this suit to quiet the title to certain real estate in Otoe county. The controversy is between her and the defendant, Cordelia J. Godding, and we shall refer to them hereafter as plaintiff and defendant, respectively. The defendant, Asa Godding, is the husband of Cordelia J. Godding, and claims some interest by virtue of such relationship, but not otherwise. The defendant Mohrman is in possession of the property claiming as tenant of Mrs. Godding. Plaintiff's husband is the common source of title. The plaintiff claims under a deed executed and delivered to her by her husband on the first day of June, 1895, which was filed for record and recorded on the seventeenth day of Decem-



ber, 1897. The defendant bases her claim of title to the property upon the following state of facts: On the fourteenth day of December, 1892, the First National Bank of Omaha commenced an action aided by attachment against the plaintiff's husband. The writ was levied upon the property in question on the nineteenth day of December of the same year. On the twenty-fifth day of March, 1895, a judgment was rendered against the plaintiff's husband for a certain amount and an order entered directing a sale of the attached property. The judgment defendant prosecuted error to this court, without a supersedeas, where the judgment of the district court was affirmed on the twentieth day of October, 1898. For some reason a mandate did not issue until the fifth day of January, 1900, when one issued commanding the district court "to cause execution to issue carrying into effect your (its) said judgment," and which was filed in the district court on the second day of April, 1900. The first writ issued to enforce the judgment was an order of sale issued on the seventh day of September, 1901, whereunder the property was sold. The sale was confirmed and a sheriff's deed executed to the purchaser on the ninth day of November of the same year. The purchaser at the sheriff's sale subsequently conveyed to the defendant. The district court dismissed the bill, and the plaintiff appeals.

<sup>291</sup> The plaintiff contends that, because more than five years had intervened between the date of the judgment against her husband and the issuance of the order of sale thereon, the judgment was dormant and not a lien against the property when the order of sale issued, and, consequently, that the sale of the property under such order of sale was ineffective to divest her title. On the other hand, the defendant contends: (1) That the period during which a judgment remains alive and continues to be a lien upon the real estate of the judgment debtor is to be computed in this case from the second day of April, 1900, the date upon which the mandate from this court was filed in the district court commanding the district court to enforce the judgment against the plaintiff's husband, and, consequently, that the judgment was alive and a lien upon the property when the order of sale issued and the sale was made thereunder; (2) That, even if the judgment had become dormant, and had ceased to be a lien against the property at the time the order of sale issued, the sale and subsequent proceedings under said judgment are not void, but merely voidable, and cannot be assailed in a collateral proceeding.

The defendant's first contention is based on one of the provisions of section 509 of the code. That section, so far as is material at present, is as follows: "No judgment heretofore rendered, or which hereafter may be rendered, on which execution shall not have been taken out and levied before the expiration of five years next after its rendition, shall operate as a lien upon the estate of any debtor, to the preference of any other bona fide judgment creditor (or purchaser); but in all cases where judgment has been or may be rendered in the supreme court, and any special mandate awarded to the district court to carry the same into execution, the lien of the judgment creditor shall continue for five years after the first day of the next term of the district court to which mandate may be directed." The defendant insists that the mandate from this court on the judgment against plaintiff's husband <sup>292</sup> was a special mandate within the meaning of the foregoing section. Dictum may be found sustaining this position, but we do not think it is tenable. We think the special mandate referred to in that section is the special mandate required in section 594 of the code. That section is as follows: "When a judgment or final order shall be reversed either in whole or in part, in the supreme court, the court reversing the same shall proceed to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment; and the court reversing such judgment or final order shall not issue execution in causes that are removed before them on error, on which they pronounced judgment as aforesaid, but shall send a special mandate to the court below, as the case may require, to award execution thereupon; and it shall be the duty of the judges of the supreme court to prepare and file their opinion in every case as brought before them, within sixty days after the decision of the same, and no mandate shall be sent to the court below until the opinion provided for by this section has been filed. The court to which such special mandate is sent shall proceed in such case in the same manner as if such judgment or final order had been rendered therein, and on motion and good cause shown, it may suspend any execution made returnable before it by order of the supreme court, in the same manner as if such execution had been issued from its own court, but such power shall not extend further than to stay proceedings until the matter can be further heard by the supreme court." The foregoing section deals with cases wherein this court has rendered a judgment of reversal. In such cases it is

optional with this court either to proceed to render such judgment as the court below should have rendered or to remand the cause to the court below for such judgment. It provides that in case the former course is pursued and the proper judgment rendered in this court, this court may not issue execution on such judgment, but shall issue a special mandate to the court below to award execution <sup>293</sup> "thereupon." By the provision of section 509, therefore, in case this court should render "such judgment as the court below should have rendered," instead of remanding the cause for such judgment, the judgment rendered by this court would continue to be a lien on the property of the judgment defendant for five years from the date of filing the special mandate in the district court. The two sections should be read together, the one providing a means whereby judgments rendered in this court may become a lien upon the real estate of the debtor in the county from which the proceedings in error were prosecuted, the other as fixing the period during which the lien shall continue. Both sections refer to a "special mandate." The latter shows the sense in which the makers of the code used the term. There is nothing in the code to indicate that they used it in any other sense. It is clear to us that the special mandate referred to in section 509 is the special mandate required by section 594 to be issued to the lower court commanding it to execute a judgment rendered by this court upon the reversal of a judgment of such lower court in whole or in part, and has no application to a case like that of the plaintiff's husband, where the only judgment of this court was one affirming the judgment of the lower court and which called for no special mandate. As execution on the judgment against the plaintiff's husband was not stayed pending his appeal to this court, it would follow that the judgment became dormant and ceased to be a lien upon his property at the end of five years after its rendition and before the order of sale in question issued.

The defendant's second contention involves this question: Is a sale of real estate under an execution issued on a dormant judgment void, or merely voidable, as to a grantee of the judgment debtor who took title from the judgment debtor while the judgment was alive and a lien on the property? Three cases decided by this court are relied on as sustaining the proposition that a sale thus made is not void, but merely <sup>294</sup> voidable. The first is *Gerecke v. Campbell*, 24 Neb. 306, 38 N. W. 847. That case, however, is not in

point. There an execution had issued on a dormant judgment and had been levied on a crop of growing corn. The judgment debtor thereupon paid the judgment, and the levy was released. He afterward brought suit against the justice who issued the execution, claiming that he had paid the judgment under duress. The question finally presented was whether the execution was void, or merely voidable, and this court held that it was voidable, but not void. It will be observed that there the execution was assailed by the judgment debtor himself. Here a sale of real estate under an execution issued on a dormant judgment is assailed by the plaintiff, who held title to the property as grantee of the judgment debtor when the execution issued and the sale thereunder was made. The distinction between the two cases is obvious. The second case relied on is *Gillespie v. Switzer*, 43 Neb. 772, 62 N. W. 228, and the third is *Link v. Connell*, 48 Neb. 574, 67 N. W. 475. In these cases the sales sought to be avoided were each made under a decree of foreclosure of a mortgage. In each case the sale was attacked by one claiming title by conveyance, mediate or immediate, from the mortgagor subsequent to the mortgage, and on the ground that more than five years had intervened between the date of the decree and the date of the issuance of the order for the sale of the property. Both cases might have been disposed of on the ground that the provisions of the code with respect to the time when a judgment becomes dormant and ceases to be a lien on the real estate of the judgment debtor have no application to a decree in equity for the sale of specific real estate, as was held in *Herbage v. Ferree*, 65 Neb. 451, 91 N. W. 408. But the court put both decisions on substantially the same ground, namely, that a sale of real estate to satisfy a judgment which has become dormant under the provisions of section 482 of the code is voidable only, and cannot be assailed in a collateral proceeding. There is ample authority for the foregoing rule, if limited to the judgment debtor.<sup>295</sup> But outside of the two cases cited we have been unable to find a single case where it has been applied to the judgment debtor's grantee who held title when the execution issued and the sale thereunder was made. The rule as thus extended is utterly irreconcilable with the doctrine that, when a judgment becomes dormant, its lien is lost as against a mortgage executed by the debtor and recorded during the life of the judgment lien (*Flagg v. Flagg*, 39 Neb. 229, 58 N. W. 109), and that, when a dormant judgment is revived, it is not a lien on real estate

conveyed by the judgment debtor after the rendition of the judgment and before it had become dormant (*Halmes v. Dovey*, 64 Neb. 122, 8 N. W. 631). Even where execution issues during the life of the judgment lien, but the sale made thereunder takes place after the time fixed by statute for the termination of such lien, except in the state of Missouri, it has been uniformly held, both in this country and England, that the title acquired by such sale is precisely the same as though the judgment had never been regarded as a lien, and that such sale does not operate to divest a title acquired from the debtor during the life of the judgment lien: 2 *Freeman on Executions*, 3d ed., sec. 205; 2 *Freeman on Judgments*, 4th ed., sec. 394a. In *Tucker v. Shade*, 25 Ohio St. 355, the court said: "It is well settled that the title of a purchaser from the judgment debtor is, on the judgment becoming dormant, discharged from the lien, and that the subsequent revivor of the judgment will not affect such title." We are satisfied that the rule announced and applied in *Gillespie v. Switzer*, 43 Neb. 772, 62 N. W. 228, and in *Link v. Connell*, 48 Neb. 574, 67 N. W. 475, is too broad, and that it should be modified and restricted so as not to apply to those whose rights in the property have been acquired from the debtor during the life of the judgment lien.

The fact that the action in which judgment was taken against plaintiff's husband was aided by attachment, and that the judgment contains an order for the sale of the attached property, would not continue the lien beyond the period fixed by statute nor bring the case within the <sup>296</sup> rule announced in *Herbage v. Ferree*, 65 Neb. 451, 91 N. W. 408. In that case the court was dealing with a decree in equity entered in a suit where the relief sought and obtained was the foreclosure of a mortgage lien. Here we are dealing with a judgment rendered in an action at law. When the judgment was rendered the attachment lien was merged in that of the judgment, differing from an ordinary judgment lien only in that it related back to the levy of the attachment. A judgment lien is a mere incident, and cannot exist independently of the judgment. When the judgment becomes dormant the lien ceases to exist.

Another defense urged to the plaintiff's suit is that the conveyance of the property in question to her was made without consideration and in fraud of her husband's creditors, including the judgment creditor hereinbefore mentioned, and, for that reason, she cannot be heard to assail the va-

lidity of a sale made under an execution issued in favor of such judgment creditor. That the plaintiff's husband was insolvent when this conveyance was made is conclusively established. Consequently, the burden is upon the plaintiff to show that the conveyance was made in good faith: *National Bank of Commerce v. Chapman*, 50 Neb. 484, 70 N. W. 39. The evidence is uncontradicted that in 1882 the plaintiff's husband was worth more than two million dollars over and above his debts. His business was prosperous and not attended by unusual hazards. At that time he made a gift to his wife, the plaintiff in this suit, of a large tract of land in this state. It is not claimed that this gift was made in contemplation of insolvency nor that it was excessive in view of the husband's financial condition and that a part of his wealth had come to him through her. The plaintiff held title to this tract of land until the spring of 1891. At that time her husband and one of the corporations with which he was connected had become involved in debt, and it was arranged between him and the plaintiff that she should sell the land and allow him to use the proceeds temporarily to discharge some of his indebtedness. The sale was made and the <sup>297</sup> money loaned by the plaintiff to her husband. Her husband's affairs became more and more involved until 1893, when he was forced to mortgage his holdings to raise money and to satisfy his creditors. As he says in his testimony, the properties were put in groups, each covered by a mortgage. The property in suit then belonged to him, and, intending to execute a mortgage thereon to secure a note of twelve hundred dollars to be turned over to the plaintiff to secure a part of his indebtedness, he executed a mortgage, describing the property as "lots 1 and 2 of block 15, in the town of Syracuse," etc., instead of lots 1 and 2 of block 15, Gray's Second Trustee's addition to the town of Syracuse, the true description. This note and mortgage were turned over to the plaintiff for the purpose stated. Her husband, unable to meet his obligations, conveyed the fee title to this property to the plaintiff by its true description on the first day of June, 1895, which is the conveyance under which she now claims. The evidence adduced by the plaintiff explanatory of the conveyance of the property to her is uncontradicted, and, while some discrepancies are shown, the explanation in the main appears reasonable and straightforward, and sufficient to overcome the presumption arising from the fact that the transaction was between husband and wife. That the money loaned by the

plaintiff was derived from a sale of property which she had received as a gift from her husband is immaterial, because the gift was made when he was solvent and not contemplating insolvency, and was not excessive in view of his circumstances at the time: *Morse v. Raben*, 27 Neb. 145, 42 N. W. 901; *Jones v. Clifton*, 101 U. S. 225, 25 L. ed. 908; *Sexton v. Wheaton*, 8 Wheat. (U. S.) 229, 5 L. ed. 603. The plaintiff was one of her husband's creditors and he had a right to make a preference in her favor: *Clarke Drug Co. v. Boardman*, 50 Neb. 687, 70 N. W. 248; *National Bank of Commerce v. Chapman*, 50 Neb. 484, 70 N. W. 39.

In view of the evidence and the law governing this case, as we understand it, the plaintiff is entitled to the relief prayed. It is therefore recommended that the decree of the district court be reversed and the cause <sup>298</sup> remanded, with directions to enter a decree in favor of the plaintiff.

Duffie and Jackson, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the decree of the district court is reversed and the cause remanded, with directions to enter a decree in favor of the plaintiff.

Judgment accordingly.

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*The Issue of Execution upon a Judgment* barred by a lapse of time confers no right to sell; and the sale, if attempted, will be ineffectual to pass title: *Coward v. Chastain*, 99 N. C. 443, 6 Am. St. Rep. 533; *Ludeman v. Hirth*, 96 Mich. 17, 35 Am. St. Rep. 588.

*A Judgment cannot be Prolonged by a Court* beyond the period fixed by statute: *Ruth v. Wells*, 13 S. D. 482, 79 Am. St. Rep. 902; *Smith v. Schwartz*, 21 Utah, 126, 81 Am. St. Rep. 670.

*The Duration of an Attachment Lien* is the duration of the judgment in which it was protected: *Stillman v. Hamer*, 70 Kan. 469, 109 Am. St. Rep. 465. The purpose of an attachment is to hold property of the defendant as security for such judgment as may be rendered; and when the judgment is rendered and becomes a lien upon the attached property, the lien of attachment becomes merged in that of the judgment, and its only effect thereafter is to preserve the priority thereby acquired, which priority is maintained and enforced under the judgment: *Bagley v. Ward*, 37 Cal. 121, 99 Am. Dec. 256.

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## FRYER v. FRYER.

[77 Neb. 298, 109 N. W. 175.]

**DEEDS, Delivery, Necessity for.**—Actual Manual Delivery is not Essential to give effect to a deed. (p. 851.)

**DEEDS, Delivery Recording, When Equivalent to.**—The placing of a deed on record by the grantor, with intent and for the purpose of passing the title to the grantee, renders evidence of the actual manual delivery and formal acceptance unnecessary. (p. 851.)

Wilson & Brown, A. J. Sawyer and N. Z. Snell, for the appellants.

George A. Adams, contra.

<sup>298</sup> **ALBERT, C.** This is an appeal from a decree of foreclosure whereby the lien of plaintiff's mortgage is given priority over the respective judgment liens of the two banks, defendants herein. The mortgage is in the form of an absolute conveyance to the plaintiff by the defendant, William I. <sup>299</sup> Fryer, and his wife of certain real estate in the city of Lincoln, was signed and acknowledged by the grantors on the twenty-second day of April, 1901, and was filed for record on the twenty-eighth day of April, 1902, by William I. Fryer, who had retained it in his possession after it was signed and acknowledged, and after it was recorded, was forwarded to him at Denver, Colorado, where he had taken up his abode. Plaintiff resides in the state of Iowa. On the eighteenth day of December, 1902, each of the defendant banks brought an action against William I. Fryer, who was the fee owner, and caused, a writ of attachment to issue which was levied on the premises covered by the mortgage. In each of these cases judgment was given in favor of the plaintiff therein and an order entered for the sale of the premises for the satisfaction of the judgment. In the present suit the contest is between the plaintiff and the two banks as to the priority of their respective liens, and is now narrowed down to the single question whether there had been a delivery of the mortgage to the plaintiff before the levy of attachments on the property. The two banks join in an appeal, and contend that, while the evidence shows the mortgage was signed, acknowledged and recorded some time before their attachments were levied, it is insufficient to sustain a finding that it was delivered to the plaintiff before that date.

Appellants' contention seems to be based on the fact that the plaintiff never saw the mortgage nor had actual manual



possession of it until after this suit had been pending for some time, and long after the levy of the attachments. But the authorities are uniform that actual manual delivery is not essential to give effect to a deed. In *Issitt v. Dewey*, 47 Neb. 196, it was held that, where the grantor places his deed on record for the purpose and with the intent of passing title to the grantee, actual manual delivery and formal acceptance are not essential to the validity of the conveyance. In the case at bar the evidence is conclusive that at the date of the mortgage deed the mortgagor, William I. Fryer, was indebted to the <sup>300</sup> plaintiff on two notes, aggregating five thousand dollars, for borrowed money, and that at the time such indebtedness was contracted it was agreed between the parties that William I. Fryer should convey the property in suit to the plaintiff as security for the debt, and file the conveyance for record. William I. Fryer testified on behalf of the plaintiff, and, while portions of his testimony would indicate that he had no clear recollection of what he did with the instrument after it was forwarded to him at Denver, toward the close of his testimony he testified positively that it had been forwarded to the plaintiff before the date of a certain payment made by him, which was made September 21, 1902, and almost three months before the attachments were levied. It was after learning of this testimony that plaintiff made search and found the instrument among his papers. His statement, received in evidence as a part of his testimony, accounting for his failure to discover it earlier, is to the effect that it must have been received by another member of his household and placed among his papers during his absence from home. The record further shows that at least two months before the attachments were levied William I. Fryer had importuned the plaintiff to reconvey a portion of the mortgaged premises to the latter's wife, and that plaintiff had refused to do so. The evidence, we think, is amply sufficient to show that the instrument was placed on record by William I. Fryer with the intent and for the purpose of passing the title to the plaintiff, and to render evidence of an actual manual delivery and formal acceptance unnecessary, under the rule announced in *Issitt v. Dewey*, *supra*.

The appellants further contend that, even if it be found that the mortgage deed had become effective previous to the levy of their attachments, still they should have priority with respect to one of the lots included therein because of an alleged agreement between the plaintiff and William I.

Fryer, whereby the former agreed, in consideration of the payment of a substantial portion of <sup>301</sup> the mortgage debt, to reconvey such lot and release it from the lien of the mortgage. There is no evidence tending, even remotely, to show such an agreement, save a bare claim to that effect put forward in a letter written by William I. Fryer to the plaintiff. And even were such claim given the force of evidence tending to establish the agreement, there is an utter want of evidence to show that William I. Fryer had complied with the conditions upon which the reconveyance was made contingent, according to his own letter in which his claim thereto was put forth for the first and only time.

The decree of the district court seems amply sustained by the evidence, and we recommend its affirmance.

Duffie and Jackson, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the decree of the district court is affirmed.

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*What Constitutes a Delivery of a Deed* is the subject of a note to Brown v. Westerfield, 53 Am. St. Rep. 537. The manual delivery of a conveyance is not required to work a transfer thereby when the acts of the grantee show an acceptance, and the purpose of the grantor was to treat the instrument as delivered: Atkins v. Atkins, 195 Mass. 124, 122 Am. St. Rep. 221.

*The Record of a Deed is Prima Facie Evidence of its Delivery*, but it is not conclusive evidence thereof: Napier v. Elliott, 146 Ala. 213, 119 Am. St. Rep. 17, and cases cited in the cross-reference note thereto.

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### WILSON v. WHITE.

[77 Neb. 351, 109 N. W. 367.]

**JURISDICTION OF SUBJECT MATTER**—Increase of on Appeal.—On appeal from the judgment of a county court rendered in an action originally brought before a justice of the peace, the appellate court cannot permit the complaint to be amended to a sum in excess of the jurisdiction of the county court and subsequently render judgment for such sum. (p. 853.)

**ANIMALS** Belonging to Different Owners, Joint Liability for Damages Due to.—If two or more persons create a herd of the cattle belonging to them in severalty, and permit such herd to range and trespass on the lands of another, the latter may maintain an action against the owners jointly for the injuries suffered by them. (p. 854.)

John M. Tucker, E. D. Clarke and Robert G. Easley, for the appellants.

Walcott & Morrissey, contra.

<sup>351</sup> AMES, C. This is an appeal from a judgment rendered in the district court on an appeal from a judgment of a county court in an action to recover damages for a trespass. It sufficiently appears from the transcript returned by the county judge that the suit was begun before him in his capacity as a justice of the peace. A copy of the summons is not included therein, but it appears that a bill of particulars praying judgment for two hundred dollars was filed on the twenty-eighth day of April, and that the process was issued on that day and made returnable on the seventh day of May following, and was duly served and returned within that time. The defendants appeared at the time named in the writ and proceeded to trial without pleadings on their part, and suffered a recovery for the amount demanded, from which they prosecuted an appeal to the district court. In the latter court the judge permitted a petition to be filed claiming damages in the sum of two hundred and forty-six dollars, for which amount <sup>352</sup> the plaintiff recovered a verdict and judgment, from which this appeal is prosecuted.

Due objection and exception was taken in a motion for a new trial to the order of the court permitting an amendment of the petition increasing the claim of damages beyond two hundred dollars and to the amount of the recovery in excess of that sum. We think the court erred in overruling the objection. The case falls clearly within the principle of *Union P. R. Co. v. Ogilvy*, 18 Neb. 638, 26 N. W. 464, and the cases there cited. It is evident that the county court upon the record before it was without jurisdiction to render a judgment in excess of two hundred dollars, and this limitation of power adhered to the case in the district court, and has been held to be, as to the excess, a want of jurisdiction over the subject matter.

The plaintiff, as administratrix of her deceased husband, was in possession of a tract of land upon which she was cultivating a forty-acre field of corn. The defendants were in the joint, or at least common, occupation of an adjoining cattle range, and each of them owned animals going to make up a herd that pastured the range, and that committed the trespass and inflicted the damages complained of and for which the recovery was had. There is practically no dispute as to these facts, but it is objected in this court for the first time that there is a misjoinder of parties defendant, or, in other words, that the trespasses were several because of the several ownership of the animals, and that a recovery cannot be

had against all the defendants in one action. We will not inquire whether the objection, if it had been valid, would have been waived by failure to make it in the lower courts, or either of them. It is clear to us that it would not have been valid if it had been so made. The defendants jointly created the herd, and jointly permitted it to depasture the range and to trespass upon the plaintiff's land. It is manifestly impossible to ascertain in what degree the animals of each contributed to the resulting injury: *Jack v. Hudnall*, 25 Ohio St. 255, 18 Am. Rep. 298.

<sup>353</sup> We recommend that the plaintiff be required to remit, as of the date of the rendition of the judgment in the district court, all in excess of two hundred dollars and interest thereon from the date of judgment in the justice's court, and that upon her failure so to do within thirty days from this date the judgment stand reversed and a new trial granted, but that upon her having filed with the clerk of this court within the time aforesaid a remittitur to that amount the judgment stand affirmed.

Oldham and Epperson, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, it is ordered that the plaintiff be required to remit, as of the date of the rendition of the judgment in the district court, all in excess of two hundred dollars and interest thereon from the date of judgment in the justice's court, and that upon her failure so to do within thirty days from this date the judgment stand reversed and a new trial granted, but that upon her having filed with the clerk of this court within the time aforesaid a remittitur to that amount, the judgment stand affirmed.

Judgment accordingly.

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*The Owner of Animals* is liable for their trespassing upon the land of others: *Monroe v. Cannon*, 24 Mont. 316, 81 Am. St. Rep. 439; *Morgan v. Hudnell*, 52 Ohio St. 552, 49 Am. St. Rep. 741. And tenants in possession may be sued jointly in an action for trespass committed by animals kept by them in common upon the premises, although the several animals are owned by them separately and individually: *Jack v. Hudnall*, 25 Ohio St. 255, 18 Am. Rep. 298.

## WEATHERINGTON v. SMITH.

[77 Neb. 363, 109 N. W. 381.]

**HOMESTEAD, Statutory Requirements for the Conveyance of.** The requirements of the statute for the conveyance of a homestead must be strictly adhered to. (p. 857.)

**HOMESTEAD—Estoppel.**—Neither husband nor wife can be estopped from asserting the homestead right as against a grant or mortgage not executed in the mode prescribed by law. (pp. 857, 858.)

**HOMESTEAD, Abandonment of by Removal During Insanity of the Husband.**—If a husband, because of his insanity, is confined in an asylum, and the wife removes to another state, his absence in the asylum and hers in the other state cannot operate, as against him, to an abandonment of their homestead. (p. 858.)

**CONVEYANCE, Secret Equities and Want of Notice Thereof.** If a party relies upon the record to establish his title to realty, and to relieve him of knowledge of secret equities known to his grantor, the record itself must show, or tend to show, a chain of conveyances disclosing perfect title in the grantor. (p. 858.)

**HOMESTEAD, Insanity of One Spouse and Conveyance by Another.**—The insanity of one spouse does not withdraw him or her from the protection of the homestead law, and a conveyance of the homestead by the other is void. (p. 860.)

Flansburg & Williams, for the appellant.

R. L. Keester, J. G. Thompson, Henry W. Pennock and J. E. Kelby, contra.

364 **OLDHAM, C.** This was an action to quiet title in a quarter section of land situated in Harlan county, Nebraska. There is no disputed fact in the record. Everything that is essential to the determination of the cause is either admitted in the pleadings or was testified to, without contradiction, at the trial in the court below. The facts established by the record are that plaintiff, William Weatherington, homesteaded the land in controversy in the year 1883, and resided thereon with his wife and minor children; that later in the same year, for the purpose of transferring the legal title from himself to his wife, he conveyed the premises to one Flansburg for the express consideration of six hundred dollars, and Flansburg, as a part of the same transaction, reconveyed the premises to the wife, Mrs. Eliza Weatherington; that in 1890 Mrs. Weatherington and her husband executed a mortgage on the premises to secure a loan of seven hundred and seventy dollars, due five years after date; that they continued to live with their family on the premises until 1891, when plaintiff Weatherington was adjudged insane by the board of insanity of Harlan county and committed to the asylum at Lincoln, where he remained until 1894, when he was trans-

ferred to the asylum at Hastings, where he was confined and treated until July, 1904, when he was adjudged sane and restored to his liberty; <sup>365</sup> that after the incarceration of Weatherington in the asylum his wife and family continued to reside on the homestead until 1894, when they removed to their friends and relatives in the state of Illinois, without any intention of returning to Nebraska, but with the intention of establishing a domicile in Illinois; that on the tenth day of October, 1896, Mrs. Weatherington, while residing in Illinois, made a warranty deed of the premises, subject to the mortgage and taxes then due, to Albert Cross and Alexander Johnston, for a consideration of five hundred dollars, which was a fair and reasonable consideration for the lands. This deed contained the following stipulation and recital: "Hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of this state, with the exception of the crops now on said land, which I hereby reserve. (Signed) Mrs. Eliza Weatherington." This deed was acknowledged before a notary public of Hancock county, Illinois, but neither in the deed nor in the acknowledgment thereof is Mrs. Weatherington referred to as being single or unmarried. The record also shows that Cross and Johnston had knowledge of the fact that plaintiff Weatherington was an inmate of the insane asylum at the time they received this conveyance; that they entered into possession of the premises under this conveyance, paid off and discharged the mortgage thereon, and later, in 1899, for a fair and valuable consideration conveyed the premises by warranty deed to defendant Smith, who had no actual knowledge of Weatherington's rights, but took the land relying on the record title thereof.

After plaintiff Weatherington had been discharged from the asylum, he was taken to his family in Illinois, but did no act indicating an adoption of the Illinois residence as his home. He went from there to the state of Ohio to transact some business, and then returned to Nebraska, and on the first day of December, 1904, instituted the case at bar, in which he asked to have the title to the land quieted in himself, and the deed from himself and wife to <sup>366</sup> Flansburg, and the deed from Flansburg to Mrs. Weatherington, and the deed from Mrs. Weatherington to Cross and Johnston, and the deed from Cross and Johnston to defendant Smith, canceled and held for naught, and for an accounting for the rents and profits of the premises. At the close of the testimony the court entered a decree canceling the deed from

Mrs. Weatherington to Cross and Johnston, and the deed from Cross and Johnston to defendant Smith, and rendered an accounting, in which defendant Smith was credited with the mortgage debt, and interest and taxes paid, and improvements made upon the land, and charged with the rents and profits actually received from the land. The decree quieted the title to the premises in Eliza Weatherington, subject to the homestead right of the plaintiff, and subject to the remainder due on the mortgage debt after deducting the rents and profits. From this decree defendant Smith has appealed to this court, and plaintiff Weatherington has filed a cross-appeal, in which he complains of the action of the trial court in refusing to cancel all the deeds alleged against and quiet the title to the premises in him.

Section 4, chapter 36, of the Compiled Statutes of 1903 provides: "The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife." The requirements of this section of the statute have been strictly adhered to in a long line of decisions in this court: See Aultman & Taylor Co. v. Jenkins, 19 Neb. 209, 27 N. W. 117; Swift v. Dewey, 20 Neb. 107, 29 N. W. 254; Larson v. Butts, 22 Neb. 370, 35 N. W. 190; Whitlock v. Gosson, 35 Neb. 829, 53 N. W. 980; Giles v. Miller, 36 Neb. 346, 38 Am. St. Rep. 730, 54 N. W. 551; Clarke v. Koenig, 36 Neb. 572, 54 N. W. 842; Violet v. Rose, 39 Neb. 660, 58 N. W. 216; Havemeyer v. Dahn, 48 Neb. 536, 58 Am. St. Rep. 706, 67 N. W. 489, 33 L. R. A. 332; Teske v. Dittberner, 63 Neb. 607, 88 N. W. 658. The appellant Smith, while conceding the trend of these decisions, contends that, as he was a purchaser for value from his grantors, who were then in possession of the land, and as he had no actual knowledge of the state of the title, other than such as the record disclosed, he took <sup>367</sup> the land free from the secret equities existing between his grantors and the plaintiff. In other words, his contention is that the record of title, on which he relied at the time of his purchase, estops the plaintiff from asserting his homestead right as against this defendant. In Whitlock v. Gosson, 35 N. W. 829, 53 N. W. 980, Post, J., speaking for the court, said: "Estoppel will not supply the want of power, or make valid an act prohibited by express provisions of law. The statute in effect declares a conveyance or encumbrance of the family homestead by the husband alone void not only as to the wife, but also as to the husband himself. Therefore, neither is

estopped from asserting the homestead right as against the grantee or mortgagee."

In *Blumer v. Albright*, 64 Neb. 249, 89 N. W. 809, it is held that a departure from the homestead for pleasure, business or health, does not constitute an abandonment thereof, and that neither spouse can abandon for the other without his, or her, free consent. In the still later case of *Palmer v. Sawyer*, 74 Neb. 108, 103 N. W. 1088, it is held that where a homestead right once exists, the person entitled to it cannot be divested thereof by any act or influence beyond his own volition.

Now, while it is clear from the evidence that Mrs. Weatherington departed from Nebraska with the intention of abandoning her homestead, and had such intention at the time she executed the deed to Cross and Johnston, it is equally clear that plaintiff Weatherington, at the time of the execution of such deed, was merely absent from the homestead for treatment for his mental disorder, without the legal capacity to contemplate an abandonment of his homestead right. As the wife could not abandon for the husband without his consent, his right remained unimpaired by her attempted change of domicile. Again, if we should concede that an estoppel by record could be invoked to defeat the homestead right of either spouse under the law of this state, it is a rule universally recognized that, if a party relies upon a record to establish his title to realty and to relieve him of <sup>his</sup> knowledge of secret liens known to his grantor, the record itself must show a chain of conveyances which discloses a perfect title in the grantor. Now, the record in this case showed, first, a patent from the general government to plaintiff Weatherington; second, a conveyance by Weatherington and his wife to Flansburg; third, a conveyance from Flansburg to Eliza Weatherington; fourth, a mortgage signed by Eliza Weatherington and plaintiff, as her husband; fifth, a deed from Eliza Weatherington to Cross and Johnston, executed in Illinois, in which she did not describe herself as being single or unmarried. This chain of title would, we think, have warned a prudent man relying upon it that Mrs. Weatherington had a living husband at the time of the conveyance made to her in 1883, and that this husband was still alive when the mortgage was executed in the year 1890, or six years before her conveyance to Cross and Johnston, which she executed as Mrs. Eliza Weatherington, without claiming to be single or unmarried. It seems to us that prudence would have suggested to one relying on this record an inquiry concerning



the whereabouts of Mrs. Weatherington's husband before making a purchase of the premises. We therefore conclude that the plaintiff's homestead right in the premises, never having been abandoned or waived by himself, remains intact and unaffected by the attempted abandonment by his wife and the record of the conveyance made by her.

As there is no complaint concerning the items contained in the accounting by either of the litigants, this disposes of the appellant's case; and with reference to the plaintiff's complaint in his cross-appeal, it is sufficient to say that the evidence clearly shows that he was in full possession of his mental powers at the time he conveyed the legal title to the land through a conduit to his wife. While, in fact, no consideration passed for this conveyance, it was made for the express purpose of vesting the legal estate in the wife, and as her deed to Cross and Johnston was absolutely void, neither she nor the plaintiff can be estopped by it.

<sup>369</sup> We therefore recommend that the judgment of the district court be affirmed.

Ames, C., concurs.

Epperson, C., dissents.

By the COURT. For the reasons given in the foregoing opinion, the judgment of the district court is affirmed.

The following opinion on rehearing was filed June 7, 1907:

BARNES, J. Our former opinion, ante, p. 855, fully states the facts in controversy in this case. We were urged on the rehearing to reverse our former judgment, and establish the rule that under our homestead law, where the wife becomes the head of the family by reason of the insanity of the husband, she may abandon the homestead, change the domicile, and convey the homestead to a purchaser without the knowledge or consent of the husband. Section 4, chapter 36 of the Compiled Statutes of 1905 provides: "The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife." It has ever been the policy of this court to strictly adhere to the letter and spirit of this statute. Speaking of this act the court said, in *Whitlock v. Gosson*, 35 Neb. 829, 53 N. W. 980: "Here is a plain prohibition against the encumbrance of the homestead without the joint act of both husband and wife. It contains no exception with respect to an absent or insane husband or wife." And it was held in that case that Mrs. Gos-

son, who was <sup>370</sup> confined in an asylum for the insane at Kankakee, in the state of Illinois, and had never been a resident of the state of Nebraska, was entitled to an interest in the husband's homestead, which he could neither encumber nor convey.

In *Palmer v. Sawyer*, 74 Neb. 108, 103 N. W. 1088, it was said: "A homestead is a parcel of land on which the family resides, and which is to them a home. It is constituted by the two acts of selection and residence, in compliance with the terms of the law conferring it. When these things exist bona fide, the essential elements of the homestead right exist, of which the persons entitled to it cannot be divested by acts or influences beyond their volition."

In the case of *Way v. Scott*, 118 Iowa, 197, 91 N. W. 1034, the plaintiff claimed title to the premises in question by virtue of a sheriff's deed based upon a mortgage executed by one Scott, the owner of the homestead, and in the execution of which Ann Scott, his wife, did not join. At the time the mortgage was executed the wife was confined in an insane asylum. The court said: "We think the evidence clearly shows an abandonment of the homestead by the father, but the wife was entitled to the same right therein until it was cut off by proper proceedings, and the fact that she was then in an insane asylum would not deprive her of this right."

The authorities seem to be unanimous that the insanity of one spouse does not withdraw him or her from the protection of the homestead law, and a conveyance of the homestead, and a conveyance by the other is void.

We are asked, however, to hold that the domicile of an insane husband may be changed by the wife from one state to another, without his knowledge or consent and without his bodily removal. The courts have been very reluctant to assent to involuntary changes of the domicile of minors, or of persons non compos mentis, and yet this rule would put it in the power of any woman, if her husband should be so unfortunate as to become insane, to sell the home, which he may have acquired by years of toil, against his will, remove him from the state of his domicile and require <sup>371</sup> him to spend his life among strangers in such place as she might select. If this is the law, the misfortune of the husband, or wife, as the case may be, would become the means of perpetrating a grave wrong and injustice upon such unfortunate. We are inclined to think that a greater evil is liable to result from a weakening of the barriers against the alienation of the homestead act than could accrue to pur-

chasers of real estate who have not sufficiently investigated the title thereto before their purchase. Indeed, such a rule would furnish an ingenious and convenient method of avoiding the effect of the homestead act, and would enable a husband, or a wife, to deprive an insane spouse of valuable property rights. We do not think a case can be found which supports the rule which we are asked to establish. It is said in *Dorrington v. Myers*, 11 Neb. 388, 9 N. W. 555: "Neither the death of the wife nor her abandonment of her husband, nor the arrival at full age and departure from the parental roof of all the sons and daughters, would have the effect of dismantling the homestead of the protection of the exemption law."

In the case at bar the wife apparently abandoned the husband, for she left him in the insane asylum and departed from the state of his residence. As was said in *Palmer v. Sawyer*, 74 Neb. 108, 103 N. W. 1088: "When a homestead has been selected by the head of a family, he becomes invested with a right or an estate in said homestead, which cannot be defeated by the death or abandonment of the home by other members of the family who occupy it at the time of its selection."

While it is possible that the homestead in question would have been lost by a foreclosure of the mortgage, which had been given thereon by both the husband and wife, if Mrs. Weatherington had not sold it, yet that contingency should not influence us in our decision of this question. If such an event had happened it would have been the result of the voluntary action of both husband and wife, and a failure to realize a sufficient sum from <sup>372</sup> the foreclosure sale, over and above the mortgage and taxes, to afford them their homestead exemption would have been one of the usual incidents connected with the fluctuations of property values. Again, it appears that at the time Mrs. Weatherington sold the homestead to Cross and Johnston, and when they sold it to Smith, she had acquired no other homestead, and there is no evidence that she then had any such intention. So the only homestead Weatherington could assert any right to was the original one, which he had selected and established upon the land in question.

For the foregoing reasons, we are of opinion that our former judgment is right, and it is therefore adhered to.

Affirmed.

**Chief Justice Sedgwick Dissented.** He admitted that if the property when conveyed was the homestead of the parties, there was no doubt that the statute respecting homesteads applied, and that the

conveyance made by the wife was void and the homestead continued until voluntarily abandoned by the husband or conveyed by the joinder of the husband and wife, but he insisted that the record showed that in 1894, and after Mr. Weatherington had been in the asylum for three years, he was considered incurably insane, and that thereupon, the wife, being unable to remain on the homestead and maintain the family, attempted to abandon it and establish another home; that two years later, being faced with the alternative of selling the land at its fair value, subject to a mortgage, or losing it altogether, she, being the holder of the legal title, was authorized in these circumstances to convey it, saying, "When it becomes manifest that through unfortunate circumstances the home must be abandoned or entirely lost to the family, common prudence dictates that so much of its value be saved as possible and invested in a new home. There is a provision of the statute which is of great importance in view of such conditions. The proceeds of a sale of the homestead retain the homestead character until, within a specified time, a new home may be obtained. The misfortune which drove Mr. Weatherington away from his home was one of the very many misfortunes which compelled the entire family to abandon it. There is no doubt that the head of a family may, under such circumstances, choose another home, and that it is the duty of all the members of the family to acquiesce in that choice." The judge reasoned that under these circumstances, the husband being insane, the wife became the head of the family, saying: "A liberal construction of our statutes for the purpose of preserving the home will consider the wife, who is supporting herself and her minor children, as the head of the family when for any reason the husband is entirely incapacitated to take that position. The head of a family whose spouse is utterly incapacitated may change the domicile of the family when circumstances beyond her control compel such action. When Mrs. Weatherington removed the family to Illinois, she changed the domicile of the family. Her husband had been incapacitated for three years. It was believed by those most capable of judging that he would never be competent to act rationally for himself or for the family. When the homestead had been abandoned for two years, and a new home was being procured, she sold her farm and made her home in Illinois for nearly ten years longer, before any question was raised as to her right to abandon the homestead. Five years after the farm was abandoned as a homestead, this plaintiff bought it in good faith, for full value, and without notice of latent claims. The title so purchased ought to be perfect.

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*The Effect of a Conveyance of a Homestead by one only of the spouses* is the subject of a note to *Jerdee v. Furbush*, 95 Am. St. Rep. 909. The general rule is that a deed of a homestead is ineffectual to convey title unless executed by both husband and wife: *Lininger v. Helpenstell*, 229 Ill. 369, 120 Am. St. Rep. 264; *McDonald v. Sanford*, 88 Miss. 633, 117 Am. St. Rep. 758; *Bolen v. Lilly*, 85 Miss. 344, 107 Am. St. Rep. 291.

*While a Homestead Exemption cannot originate without the existence of a family, still when the homestead character has once attached, it may persist for the benefit of either spouse after the abandonment, desertion or death of the other: Weaver v. First Nat. Bank, 76 Kan. 540, 123 Am. St. Rep. 155; Montgomery v. Dane, 81 Ark. 154, 118 Am. St. Rep. 37, and cases cited in the cross-reference note thereto.*

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### McCAGUE v. ELLER.

[77 Neb. 531, 110 N. W. 318.]

**A CONVEYANCE Intended as a Mortgage** conveys the legal title to the premises described therein. (p. 865.)

**FORECLOSURE Without Necessary Parties, Effect of.**—If a deed intended as a mortgage is foreclosed without making parties heirs of the grantor, the foreclosure conveys the legal title, but, as to heirs not parties to the suit, leaves them the equity of redemption, but the purchaser at the foreclosure sale obtains the right to demand and obtain such redemption or apply to a court of equity for its foreclosure. (p. 865.)

**MORTGAGE—Invalid Foreclosure, Effect of.**—If a foreclosure is defective because heirs of the mortgagor are not made parties thereto, their right of redemption is not affected, but the purchaser at the sale becomes subrogated to an unpaid residue of the mortgage debt in so far as requisite for the protection of his title. (p. 866.)

**MORTGAGE—Remedy of the Purchaser at a Foreclosure Defective for Want of Parties.**—If a mortgage transferring the legal title is foreclosed without making all the heirs of the mortgagor parties, the purchasers become subrogated to the interests of the mortgagees, and entitled to the sale of the mortgaged premises for the unpaid residue of the mortgaged debt. (p. 866.)

J. W. Eller, C. G. McDonald and Benjamin S. Baker, for the appellants.

Charles Battelle, contra.

<sup>531</sup> AMES, C. James W. Eller and Frances E., his wife, were the owners in severalty each of an undivided half of certain lots and a dwelling-house situated thereon, and were in joint occupancy of the same as a homestead. In May, 1892, they joined in the execution of a note and of a <sup>532</sup> mortgage of the premises for the sum of five thousand dollars, and interest, to the Globe Loan and Trust Company of Omaha. In February, 1896, they also joined in a warranty deed, then or soon afterward duly made of record, conveying the premises to Ida M. Dolan. In December, 1898, Mrs. Eller died, leaving surviving her certain minor children of the marriage, who, together with their father,

continued to occupy the premises. Afterward the Randolph Savings Bank, having become the owner of the note and mortgage by purchase and assignment, began an action of foreclosure, to which James W. Eller and Mrs. Dolan, as the apparent owner of the equity of redemption or fee title, and her husband, were made parties. The Dolans made default, but Eller answered, alleging, among other things, that the deed to Mrs. Dolan was executed and delivered by way of mortgage to secure an indebtedness. The action proceeded to a decree of foreclosure, but the order of sale was stayed for the statutory period at the request of Eller. After the expiration of the stay a stipulation was entered into between the plaintiff and Eller, by which the latter was released and discharged from liability to a deficiency judgment, and was permitted to retain possession of the premises for the term of one year, without payment of rent, in consideration of his agreement not to resist a sale of the premises, or a confirmation thereof, under the decree. A sale was thereafter had and duly confirmed for four thousand six hundred and sixty-seven dollars, leaving an unpaid residue of several hundred dollars of principal and interest, the plaintiff in foreclosure being the purchaser, to whom a sheriff's deed was issued.

The Randolph Savings Bank became insolvent and passed into the hands of a receiver, who sold the title acquired at the foreclosure sale to the plaintiff in this case, and executed and delivered to the latter a deed purporting to convey the premises to him. The note remained in the hands of the attorney, in the foreclosure suit, of the Randolph Savings Bank, and was delivered to the plaintiff McCague without further consideration. <sup>533</sup> Afterward the plaintiff successfully prosecuted a suit in forcible detainer against Eller and obtained a writ of restitution against him. Eller then departed from the premises, but the children of Mrs. Eller, some of whom had attained to their majority, remained in possession of the premises, claiming to be owners of an undivided half of the same as the heirs at law of their mother. It thus appears that the action of foreclosure was incomplete in the respect that the heirs at law of Mrs. Eller were not parties to, and their equity of redemption was not extinguished by, it. This is an action against the heirs to foreclose their equity of redemption in an undivided half of the premises for the unsatisfied portion of the mortgage debt. There was a decree for the plaintiff in the lower court, from which the defendants appeal.

So far as appears, the first actual notice that the Randolph Savings Bank, or its receiver, or the plaintiff had that the deed to Mrs. Dolan was intended as a mortgage only, or that the foreclosure was incomplete, was when the heirs set up their claim of ownership and right of possession, after Eller had personally vacated the premises in obedience to the writ of restitution issued in the forcible detainer suit. But notwithstanding the purpose for which the Dolan deed was executed and delivered, it was effectual to convey the legal title to the premises: *Dodge v. Omaha etc. R. Co.*, 20 Neb. 276, 29 N. W. 936; *Stall v. Jones*, 47 Neb. 706, 66 N. W. 653; *Gallagher v. Giddings*, 33 Neb. 222, 49 N. W. 1126. It follows as a matter of course, that the foreclosure decree, sale and deed operated to convey the legal title to the purchaser at the judicial sale, leaving in the heirs of Mrs. Eller nothing more than an equity of redemption of an undivided half of the premises, and in James W. Eller nothing at all. It follows equally, of course, that the deed from the receiver, which it is not sought in any way to impeach, conveyed the entire title to the plaintiff, subject only to the equity of redemption in the heirs, which it is sought in this action to foreclose. We can see no room for doubt, upon principle or authority, that it <sup>534</sup> also conveyed to the plaintiff the right to demand and obtain such redemption or to apply to a court of equity for its foreclosure. It is certain that no one else has that right. The effect of the transaction was to extinguish the mortgage by a merger of it in the legal title to the whole of the mortgaged premises, but a residue of the mortgage debt, for a payment of which the lands had been pledged, remains unsatisfied, and the equity of the heirs of Mrs. Eller to redeem an undivided half of the premises therefrom is still unextinguished. If this action had not been begun, and they had desired to enforce their right of redemption, against whom should their suit have been brought? Certainly against no one but the present plaintiff, in whom is vested the legal title which it would have been the sole object of such an action to recover. It would not be contended, we apprehend, that in such a case it would have been necessary for them to seek out the mortgagee, or his insolvent assignee, or the purchaser at the foreclosure sale, the rights, interests and titles of all of whom, as respects the realty, are united in the plaintiff. Nor can it be contended, we think, that the Randolph Savings Bank, or its representative, after having prosecuted the suit in foreclosure

to a sale purporting to convey the entire title, both legal and equitable, and after having conveyed the premises by a deed of like purport through its receiver, would be heard to assert any claim on account of the unpaid residue of the mortgage debt, to the prejudice of its grantee, the plaintiff. It is evident beyond dispute that the incompleteness of the foreclosure is due to accident and misapprehension, and not to the intent of the plaintiff therein, and it cannot be doubted that if the latter had remained solvent and was prosecuting this action it would be entitled to the decree appealed from.

The right of redemption and the right to extinguish that right by judicial foreclosure are mutual and reciprocal, and we have no doubt that the plaintiff has become subrogated to the unpaid residue of the mortgage debt, <sup>535</sup> in so far as the same is requisite for the protection of his title, of which it is in equity one of the muniments. As is said in *Emmert v. Thompson*, 49 Minn. 386, 32 Am. St. Rep. 566, 52 N. W. 31: "It has been well said that the doctrine of subrogation has been steadily growing and expanding in importance and becoming more general in its application to various subjects and classes of persons. It is not founded upon contract, but is the creation of equity, is enforced solely for accomplishing the ends of substantial justice; and, being administered upon equitable principles, it is only when an applicant has an equity to invoke, and where innocent persons will not be injured, that a court can interfere. It is a mode which equity adopts to compel the ultimate payment of a debt by one who in justice and good conscience ought to pay it, and is not dependent upon contract, privity or strict suretyship": See, also, *Brobst v. Brock*, 77 U. S. 519, 19 L. ed. 1002; *Rogers v. Benton*, 39 Minn. 39, 12 Am. St. Rep. 613, 38 N. W. 765; *Givins v. Carroll*, 40 S. C. 413, 42 Am. St. Rep. 889, 18 S. E. 1030; *Jackson v. Bowen*, 7 Cow. (N. Y.) 13.

The judgment in this case is the ordinary decree of mortgage foreclosure and sale of the undivided half of the premises for the satisfaction of the unpaid residue of the mortgage debt. In our opinion it is right, and we recommend that it be affirmed.

Oldham and Epperson, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be affirmed.



*The Right to Subrogation* is the subject of a note to American Bonding Co. v. National etc. Bank, 99 Am. St. Rep. 474.

*Though an Attempted Foreclosure is Abortive* and ineffectual, as such, it may take effect as a transfer of the rights of the mortgagee to the purchaser at the sale, and to those who claim under him by conveyance of the interest in the premises apparently acquired by such purchaser at the foreclosure sale: Rogers v. Benton, 39 Minn. 39, 12 Am. St. Rep. 613. See, also, Cooke, v. Cooper, 18 Or. 142, 17 Am. St. Rep. 709; Bowen v. Brogan, 119 Mich. 218, 75 Am. St. Rep. 387.

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MERRIMAN v. GRAND LODGE DEGREE OF HONOR,  
A. O. U. W.

[77 Neb. 544, 110 N. W. 302.]

**INSURANCE, LIFE—Married Women—Pregnancy.**—A married woman who is an applicant for life insurance is under no duty, after her application is approved, and a policy issued to notify the insurer of any subsequently discovered evidence that she is pregnant. (p. 871.)

**INSURANCE, LIFE—Married Women—Pregnancy—Application.**—A statement by a married woman in her application for life insurance made at a time when she is pregnant, and upon which insurance subsequently issues, that she is in sound bodily health is not a false representation by reason of such pregnancy. (p. 871.)

T. J. Doyle, for the appellant.

A. G. Greenlee, for the appellee.

**544** OLDHAM, C. This was an action on a fraternal benefit certificate issued by the defendant to Katherine Merriman, deceased, payable at her death to her husband, plaintiff in this action. The death of Katherine Merriman, her initiation into the order, the issuance of the certificate, and the payment by the deceased of all dues and assessments in conformity with the by-laws of the order and the provisions of the policy are all admitted. The sole defense relied on is that the deceased made false representations in her application for the benefit certificate in the order, it being alleged that she falsely represented that she had not had paralysis prior to making her application for membership, and that she had falsely represented that she was not pregnant at the time of such application. Defendant's testimony was all directed to the support of these two **545** alleged false representations. On a trial of these issues to the court and jury there was a verdict and judgment for the defendant, and the plaintiff appeals to this court.

For an intelligent review of the assignment of error in the plaintiff's brief, which, we think, is worthy of serious consideration, it is essential to review the admitted as well as the disputed questions at issue in this case. The defendant society, the Degree of Honor of the Ancient Order of United Workmen of Nebraska, is primarily a social organization for women bearing certain relationship to the members of the Ancient Order of United Workmen. Any woman bearing the required degree of relationship to a member of the parent order is eligible to social membership in defendant's order, but there is also within the order a benefit department for the purpose of providing life insurance for those of the members who may be found to come within the requirements as to age and health. On the eleventh day of September, 1902, Katherine Merriman made application for membership in the Mistletoe Lodge, No. 104, of Lincoln, Nebraska, a subordinate lodge of the defendant order, and, on the eighteenth day of October she signed an application for membership in the benefit department and submitted to a physical examination by the examining physician of the department under the rules of the order. This application could not be acted upon until the applicant had been initiated into the order, and on November 27th following she presented herself and was initiated. After her initiation, her application and the report of the examining physician thereon and the certificate of membership were presented to the grand medical examiner of the order and approved, and forwarded to the Grand Recorder, and on the seventeenth day of December the benefit certificate sued on was issued and sent to the deceased. Between the time of making application and the time of final issuance of the certificate there had been a lapse in payment of dues and assessments, which required, under the rules of the order, <sup>546</sup> a certificate of health before the back dues could be received and the benefit certificate be made effective. The Society accordingly forwarded to the applicant the following health certificate, which she signed and returned before the policy was issued:

"I, Katherine Merriman, a member of Mistletoe Lodge, No. 104, located at Lincoln, in the state of Nebraska, to whom benefit certificate No. — was issued in the beneficial department of the Grand Lodge Degree of Honor, A. O. U. W. of Nebraska, having been suspended from all the rights, benefits and privileges of the said department, by reason of nonpayment of assessment No. —, which suspension and forfeiture occurred within a period of three months prior

to the date of this certificate, and desiring to be reinstated in said department as provided by the laws thereof, do hereby certify and warrant that I am, at this date, in sound bodily health, and that I agree that the reinstatement of myself as a member of the department based upon this certificate shall be valid and binding only upon the condition that the statement herein contained, relating to my bodily health, is true in every respect upon the day and date recorded on this certificate.

“(Signed) KATHERINE MERRIMAN.”

In the application for membership there are two lists of questions or interrogatories, one list to be answered by the applicant, and the other to be answered by the examining physician from his personal examination of the applicant. Among the questions propounded to and answered by the applicant was the interrogatory, “Have you ever had paralysis?” This question appears from the application to have been answered, “No.” Among the questions which the examining physician was required to answer, when the applicant was a married woman, is, “Is she now pregnant?” The physician answered this question, “No.” Now, it is without dispute in the record that plaintiff's wife died on the tenth day of April, 1903, from placenta praevia, or hemorrhage in childbirth. There was evidence <sup>547</sup> in the record, offered by the defendant, tending to show that the deceased had suffered from a partial stroke of paralysis about eighteen months before making her application for membership in the order, but, on the other hand, it was contended by plaintiff that her ailment at that time was of a temporary character, a mere prelude to childbirth, and a symptom caused by pregnancy and of temporary duration, and plaintiff introduced testimony strongly tending to show that after the applicant's confinement she recovered her normal robust health, and engaged in hard labor, and was, at least apparently, in excellent physical condition until the day before her death.

As there is little or no competent testimony in the record pointing to paralysis as a contributing cause of Katherine Merriman's death, it is highly probable that the jury returned a verdict for defendant on the theory that the applicant had fraudulently concealed her condition of pregnancy from defendant's examining physician. While the examining physician testified that he made a careful physical examination of deceased, yet he said that he saw no outward signs of pregnancy, and relied on deceased's statement

that she was not in that condition. He also testified that from his examination he believed her to be a first-class risk for insurance. Now, from the fact that a fully developed child was born to the deceased about six months after the examination, it is clearly established that she was about three months pregnant when the examination was made, so that the material question is whether or not she fraudulently and knowingly misrepresented her condition. The testimony of the medical experts in this case shows that before the quickening period pregnancy cannot be detected from general symptoms, and that the quickening period ordinarily occurs during the fourth or fifth month of pregnancy. Consequently, the evidence is very slight that tends to show that the deceased knew of her pregnancy on the eighteenth day of October, 1902, but it is much stronger on the probability of her having knowledge of such fact on the 1st <sup>548</sup> of December following, for that date was probably, under the testimony, within the quickening period.

At the trial of the cause plaintiff asked for an instruction which, in substance, confined the applicant's knowledge of the truth of her answers to the question to the time when the application was signed. The court refused to give this instruction, and told the jury in paragraph 3 of instruction on its own motion: "In considering the question whether any statement made by the deceased, Katherine Merriman, was true or false, you should consider it as of the time she signed the application, up to and including the time when the contract between her and the defendant company was completed, being the time of the final approval of the application by the company, to wit, December 17, 1902. This is true, for the reason that up to the time of the final approval of the application it would be her duty to correct any statement contained in her application made by her which she subsequently learned was false." The learned trial court evidently gave this instruction on the theory that the health certificate signed on the first day of December amounted to a reaffirmation of each of the answers to the questions contained in the original application. To our minds this would extend the scope of the certificate much beyond what might reasonably have been within the mind of the party signing it: *American Order of Protection v. Stanley*, 5 Neb. (Unof.) 132, 97 N. W. 467, and *Geare v. United States Life Ins. Co.*, 66 Minn. 91, 68 N. W. 731. This certificate should be construed so as to resolve all doubts and ambiguities contained in it, if any there be, in favor

of the insured or her beneficiary, and, so construed, it simply warrants that the applicant was in sound bodily health at the time she signed it. It will not do, in sound morals, for an insurance company to issue risks on the lives of married women between the ages of eighteen and forty-five years, without anticipating the probability of the holders of such policies obeying the divine mandate to be fruitful and multiply and replenish the earth, and a condition, either in the by-laws, <sup>549</sup> articles of association, or certificate of benefit, providing for a forfeiture in the event that the holder should become pregnant at any time would be clearly void as against the highest principles of religion, morality, and common decency. . Consequently, when an application is made and approved, there is no duty on the holder of the certificate issued on such application to notify the company of any subsequently discovered evidence of pregnancy, nor would the fact, if subsequently discovered, prevent her from certifying that she was in sound bodily health, if such certificate is otherwise true. The only representation here is as to her apparent state of health, and all the evidence in the record shows that at that time she was, to all appearances, a robust and healthy woman. We are therefore impressed with the opinion that the learned trial judge erred in refusing the instruction asked by the plaintiff, as well as in giving the third paragraph of instructions above set out, for under this instruction the jury might have found the evidence insufficient to carry knowledge of pregnancy to the deceased when she made application on October 18th, and still sufficient to apprise her of such fact two months later, December 17th, when the certificate was issued.

We therefore recommend that the judgment of the district court be reversed and the cause be remanded for further proceedings.

Ames and Epperson, CC., concur.

By the COURT. For the reasons given in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

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*If an Applicant for Life Insurance is afflicted with an occult ailment, unknown to her, her failure to communicate it cannot be regarded as a fraud upon the insurance company: March v. Metropolitan Life Ins. Co., 186 Pa. 629, 65 Am. St. Rep. 887.*

*If Accident Insurance is Applied for and a policy subsequently issues and is delivered, it is based on the status of the insured at the time of the application for insurance, and the insurer assumes the risk after the date of the policy: Rayburn v. Pennsylvania Casualty Co., 138 N. C. 379, 107 Am. St. Rep. 548.*

**STEHR v. MASON CITY AND FORT DODGE RAILWAY COMPANY.**

[77 Neb. 641, 110 N. W. 701.]

**EMINENT DOMAIN—Use of Streets—Special Damages—Effect of Ordinance.**—An ordinance granting the use of public streets to a railroad company for the construction and operation of its road does not prevent an abutting owner from recovering damages to his property caused by such construction, although the ordinance contains a provision vacating the portions of the streets to be so used. (p. 875.)

**EMINENT DOMAIN—Special Damages—Closing of Street.**—The right of the owner of an abutting lot to damages for the whole or partial closing of a street is not restricted merely to a recovery for an interference with the right of ingress and egress in front of his property, and with the right to light and air, but he is entitled to recover for all such damages, direct and consequential as he may suffer by reason of the interference with his right of property. (pp. 875, 876.)

**EMINENT DOMAIN—Special Damages.**—If there has been a disturbance of a right which the owner of real estate possesses in connection with his estate, and which gives it additional value, by reason of which disturbance he sustains special injury, in respect to such property in excess of that sustained by the public at large, he is entitled to recover all the damages, both direct and consequential, resulting therefrom, including all damages arising from the exercise of the right of eminent domain, which cause a diminution in the value of the property. (p. 876.)

A. G. Briggs and W. D. McHugh, for the appellant.

Baldrige & De Bord and J. B. Trudenburg, for the appellee.

**642 LETTON, J.** The plaintiff is the owner of the west one-third of lot 3, block 12, Kuntze & Ruth's addition to the city of Omaha, being a strip of ground forty-eight feet wide and fifty feet long fronting west upon Nineteenth street in that city. The defendant has recently built and put in operation certain railroad tracks and a terminal freight station near the plaintiff's property. The tracks leading from the main line to the terminal station are constructed parallel with Nineteenth street for a distance of about one thousand feet upon land belonging to the railroad company to a point nearly across the street from plaintiff's property, from thence curving in a northeasterly direction across Nineteenth street and Mason street and extending to the terminal station, which is situated about three blocks east and two blocks north of the plaintiff's property. Directly opposite the property there are four tracks. These tracks are situated in the bottom of a deep cut or excavation, which is partly upon the land belonging to the railroad company and

partly in Nineteenth street and in Mason street, which intersects Nineteenth street about fifty feet north of the plaintiff's lot. About one-half of the width of Nineteenth street has been cut away in front of the premises. The plaintiff complains that by the construction of these tracks the defendant has largely changed the natural surface of the ground immediately in front of and near her property; that it has cut off the access to the property upon Sixteenth, Seventeenth, Eighteenth and Nineteenth streets, and that she is deprived of ready access to the business part of the city of Omaha and to a schoolhouse which is near by; that her property is residence property; that it has been damaged and will continue to be damaged from jars and concussions caused by passing cars and engines, and that the occupants of the property are and will be annoyed by smoke, cinders and soot and by the noise of whistles, bells and passing trains.

643 The contention of the defendant railway company is that, since the plaintiff has no property right in the surface of the lot across Nineteenth street upon which the defendant built its railway, the excavation of the lot did not invade any property right which she enjoyed in connection with her property and hence she has no right to recover; that, since a lot owner could excavate, provided he preserved the lateral support of the lot of his neighbor, without being liable for damages, so also could the railway company, and though such excavation might affect the value of the plaintiff's property, still this would be *damnum absque injuria* and no recovery permitted.

The questions at issue are substantially the same as were considered by the court in the case of *Chicago etc. R. Co. v. Hazels*, 26 Neb. 364, 42 N. W. 93. In that case, as in this, the tracks were laid upon land belonging to the railway company, and the plaintiff's damage was caused in part by the closing of certain streets and the partial obstruction of others, thus depriving him of convenient ingress and egress to and from his property, and, by the construction and operation of the railway, smoke, soot and dust from the engines were thrown thereon, and, by the ringing of bells, sounding of whistles and noise of trains, the property was damaged and rendered undesirable for residence purposes. Several of the cases cited in that case are again cited by defendant's counsel in this case, with later cases holding the same doctrine. However, after full consideration and exhaustive discussion, the court in the *Hazels* case held that "the words 'or damaged' in section 21, article 1 of the con-

stitution, includes all damages arising from the exercise of eminent domain which causes a diminution in the value of private property," and that in arriving at the diminution in the value it is proper to take into consideration all elements of damage caused by such construction which tend to diminish the value of the property. The doctrine of this case was in harmony with *Burlington etc. R. R. Co. v. Reinhackle*, 15 Neb. 279, 48 Am. Rep. 342, 18 N. W. 69; *Republican Valley R. Co. v. Fellers*, 16 Neb. 169, 20 N. W. 217; *City of Omaha v. Kramer*, 25 Neb. 489, 13 Am. St. Rep. 504, 41 N. W. 295, and *Omaha Belt R. Co. v. McDermott*, 25 Neb. 714, 41 N. W. 648, decided previously, and it has been cited and followed in *Omaha etc. R. Co. v. Janecek*, 30 Neb. 276, 27 Am. St. Rep. 399, 46 N. W. 478; *Atchison etc. R. Co. v. Boerner*, 34 Neb. 240, 33 Am. St. Rep. 637, 51 N. W. 842; *Jaynes v. Omaha Street R. Co.*, 53 Neb. 631, 74 N. W. 67, 39 L. R. A. 751; *Chicago etc. R. Co. v. Sturey*, 55 Neb. 137, 75 N. W. 537, and *Chicago etc. R. Co. v. O'Connor*, 42 Neb. 90, 60 N. W. 326.

The defendant quotes and relies on the following language in the opinion in *Gottschalk v. Chicago etc. R. Co.*, 14 Neb. 550, 16 N. W. 475, 17 N. W. 120: "The evident object of the amendment was to afford relief in certain cases where, under our former constitution, none could be given. It was to grant relief in cases where there was no direct injury to the real estate itself, but some physical disturbance of a right which the owner possesses in connection with his estate, by reason of which he sustains special injury in respect to such property in excess of that sustained by the public at large." It further cites and relies on the case of *Rigney v. City of Chicago*, 102 Ill. 64, which is largely quoted in the *Gottschalk* case (14 Neb. 550, 16 N. W. 475, 17 N. W. 120), and is a leading case upon the subject. The vacation of the streets mentioned, and the cutting down and narrowing of that part of Nineteenth street immediately in front of plaintiff's property, is shown by the testimony to have been a direct injury to the property, by cutting off the plaintiff's means of access by way of Nineteenth street, or the other vacated streets, to the business portion of the city, and by rendering more inconvenient the ingress and egress of others to the property, and is further shown to have directly depreciated the value of the property. She was entitled to the use of the whole of Nineteenth street in front of her property and to the use of that portion thereof north of the center line of Mason street. Further than this,



the evidence shows that, on account of the proximity of the railway, smoke and soot is blown upon her property to such an extent as to make the property less desirable as a place of residence, to lessen its value in the <sup>645</sup> market and to depreciate its rental value. It is not a direct physical injury to the real estate itself, but it is a special injury to the property in excess of that sustained by the public at large, and the owner of the property suffers damage to her right of access and to her right of free and undisturbed enjoyment. The facts in this case bring it within the rule of the Gottschalk case (14 Neb. 550, 16 N. W. 475, 17 N. W. 120), and the rule adopted by this court is substantially the same as that adopted in the Rigney case (102 Ill. 64), and which is now applied by the supreme court of Illinois in like cases: See *Pittsburg etc. R. Co. v. Reich*, 101 Ill. 157; *Chicago etc. R. Co. v. Nix*, 137 Ill. 141, 27 N. E. 81; *Chicago etc. R. Co. v. Darke*, 148 Ill. 226, 35 N. E. 750; *Chicago v. Taylor*, 125 U. S. 161, 8 Sup. Ct. Rep. 820, 21 L. ed. 638.

It appears that the city council of the city of Omaha passed an ordinance granting the use of a portion of certain streets, the obstruction of which is complained of by the plaintiff, to the defendant railway company, for the operation of its road, and vacating the same, and the defendant now contends that, since the streets were vacated prior to its occupancy of them, the plaintiff is not entitled to recover for damages to her right of ingress and egress, the same having been taken away by the vacation before the railroad was built. It appears, however, that the grant of the use of the streets and the attempted vacation were made for the benefit of the defendant, and were made at the same time and by the same ordinance. Under the rule laid down in *Burlington etc. R. Co. v. Reinhackle*; 15 Neb. 279, 48 Am. Rep. 342, 18 N. W. 69, these facts do not in any way militate against the right of the plaintiff to compensation from the defendant for the damages she may have sustained.

The issues presented do not require the enunciation of any new doctrine. The instructions requested by the appellant and refused were properly refused under the facts shown, and the instructions given by the court, when considered in connection with the evidence, were not prejudicial. The question as to the right of the owner of <sup>646</sup> an abutting lot to damages for the whole or partial closing of a street is differently answered in different states, but the law is settled here. The right to damages is not restricted merely to a recovery for an interference with the right of ingress and

egress in front of the property and with the right to light and air, but the owner of such property is entitled to recover for all such damages, direct and consequential, as he may suffer by reason of the interference with his right of property. Where there has been a disturbance of a right which the owner of real estate possesses in connection with his estate and which gives it additional value, by reason of which disturbance he sustains special injury in respect to such property in excess of that sustained by the public at large, he is entitled to recover all the damages, both direct and consequential, which may result from such invasion of his property rights. The plaintiff, therefore, was entitled to recover in this case for both direct and consequential damages.

What has been said disposes of all points raised in the requests for instructions by the appellant, except that in which the court was requested to instruct the jury "not to allow any damages based upon the diminution in the value of her property caused solely by the fact that the railway company, defendant, made the cut and excavation upon its own property west of the property of plaintiff." As to this, it may be said that the instruction does not properly reflect the evidence, since the cut and excavation were not in fact entirely upon the railway company's own property, but also in Nineteenth and Mason streets; and, further, it would be impossible for a jury to separate and distinguish the damage accruing to the property from that part of the excavation on the street and that portion on the company's own premises. The court did not err in refusing this instruction.

The judgment of the district court is affirmed.

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*Elements of Damages Allowable in Eminent Domain Proceedings* are discussed in the note to *Board of Trade Tel. Co. v. Darst*, 85 Am. St. Rep. 291.

*The Right of Property Owners to Compensation for Damages for property injured where there is not a physical invasion of the premises* is discussed in the note to *Smith v. St. Paul etc. Ry. Co.*, 109 Am. St. Rep. 904.

## GUIOU v. RYCKMAN.

[77 Neb. 833, 110 N. W. 759.]

**MECHANICS' LIENS—Liability of Vendor.**—If a vendor and vendee co-operate in plans for the erection of improvements upon real estate covered by their agreement, the interest of the vendor, as well as that of the vendee, is bound for the payment of liens for labor and material furnished for such improvements. (p. 880.)

**MECHANICS' LIENS—Statement of Account.**—If a contract entered into for a specific sum for labor or material, and is complete within itself, and is filed with the statement of the lien, a more detailed statement of the account is unnecessary. (p. 881.)

**MECHANICS' LIENS—Affidavit for—Description of Property.** If, in an affidavit for a mechanic's lien enough appears in the description to enable a person familiar with the locality to identify the premises intended to be described with reasonable certainty, it will be sufficient. (p. 881.)

E. W. Westerfield, for the appellant.

F. A. Brogan, D. W. Merrow, N. C. Pratt, B. G. Burbank, E. C. Hodder and Baldrige & De Bord, for the appellee.

<sup>834</sup> **OLDHAM, C.** This action was instituted by the plaintiffs in the court below for the purpose of foreclosing mechanics' and materialmen's liens upon two lots situated in the city of Omaha, Nebraska. The record title to these lots was in defendant Mary A. Wallace, and Daniel W. Ryckman was in possession of the lots in controversy under an executory contract for the purchase thereof. A number of defendants were joined as holders of mechanics' and materialmen's liens, and they each filed answers and cross-petitions. Defendant Mary A. Wallace filed an answer, denying the validity of these various liens, and by way of cross-petition alleged that she was the owner of the lots in dispute, and that certain of the liens filed by plaintiffs and cross-petitioners were a cloud upon her title, which she asked to have canceled and removed from the record. Defendant Daniel W. Ryckman appeared, but does not seem to have asked for any affirmative relief in his answer. On issues thus joined there was a trial to the court, and judgment in favor of the plaintiffs and cross-petitioners, <sup>835</sup> in which the claims for work done and material furnished for the buildings on the lots by the plaintiffs and cross-petitioners were decreed to be a first lien on the premises, and the claim of defendant Mary A. Wallace for the purchase price of the premises under her contract with defendant Ryckman was decreed to be a second lien, and an order of sale was directed under this decree, which provided that, after the payment of the

mechanics' and materialmen's liens and the payment of the amount due on the purchase price to defendant Mary A. Wallace, the remainder, if any, should be paid to defendant Daniel W. Ryckman. To reverse this judgment defendant Mary A. Wallace appeals to this court.

The facts underlying this controversy are that at and prior to the twenty-eighth day of July, 1904, the defendant Mary A. Wallace was the owner of the lots in dispute, which were described as lots 1 and 3, in Wallace's subdivision of Omaha, Nebraska. Prior to the day last mentioned defendant Ryckman negotiated through G. G. Wallace, a real estate agent in Omaha and son of the defendant Mary A. Wallace, for the purchase of the lots. As a result of these negotiations defendant Mary A. Wallace, who was not a resident of Omaha, came to Omaha, and entered into the following written agreement with defendant Ryckman:

"It is hereby agreed, by and between the parties hereto, that Mary A. Wallace, party of the first part, will convey by a good and sufficient warranty deed, with perfect title, all taxes due and payable at this date to be paid, lots 1 and 3, Wallace's subdivision, City of Omaha, Douglas county, Nebraska, to D. W. Ryckman, party of the second part, on completion, by said party of the second part, of a house of not less than five rooms, on each of said lots. Said houses to be constructed in a good and workmanlike manner, and to be completed on or before November 1, 1904. The consideration for said lots to be \$700 to be paid on or before November 1, 1904, or on completion of said houses. The party of the first part further agrees that should the party of the second part not be <sup>sue</sup> able to secure a loan sufficient to erect said houses, she will take a second mortgage on both houses and lots, not to exceed \$200, payable \$5 a month, with interest at 7 per cent, payable monthly from this date. The total indebtedness not to exceed \$1,700, and all labor and material to be paid by the party of the second part. Permission is given to begin erection of said houses any time within 30 days.

"Signed this 28th day of July, 1904.

"M. A. WALLACE,

"D. W. RYCKMAN.

"(Witness) G. G. WALLACE."

After the signing of this contract Mrs. Wallace left the city, and did not return before the present suit was instituted. Defendant Ryckman entered upon the premises in the month of October, and began the erection of a building

on lot 1. It is to the claims for material furnished and labor performed on the building erected on this lot that our attention will be directed, since it is stated in appellant's brief, and conceded by counsel for the appellees, that the claims which were decreed liens on lot 3 have all been settled by the parties.

The first objection urged against the decree by the appellant is as to so much of it as grants affirmative relief to defendant Daniel W. Ryckman, by directing the payment to him of the surplus, if any, arising from the sale of the premises, after the liens have been satisfied. It is urged in support of this objection that defendant Ryckman did not ask for any affirmative relief from the court, and that there is no evidence in the record that shows that he did anything under the contract, except to take possession of the lot in controversy and proceed with the erection of the building, without paying or offering to pay for any of the labor performed or material furnished thereon, or paying or offering to pay any part of the purchase price agreed upon in the contract. The transcript of the pleadings and the bill of exceptions, containing the testimony introduced at the trial of the cause, fully sustain this contention. While the evidence shows that Ryckman moved into the house on lot 1 after it was partially completed, and was residing there at the time of the trial in the court <sup>837</sup> below, yet neither in his pleadings nor in his testimony taken at the trial did he claim any right to affirmative relief, but, on the contrary, his evidence was more in the nature of a disclaimer, for he says that he did not know that he had any interest in the contract for the property.

It is not urged that the title of the appellant Mary A. Wallace in the premises is not liable for the liens of either plaintiffs or cross-petitioners for material furnished to defendant Ryckman and labor performed at his instance in the erection of the building. This contention rests on the theory that the agreement before set out between Mrs. Wallace and Mr. Ryckman was not a contract binding on either party thereto, but was only an option agreement, and that the lienors were bound at their peril to know the terms of the agreement under which the contractor was operating. While the contract by its terms gives defendant Ryckman the right to enter upon the premises, which were at that time vacant lots, within thirty days and proceed with the construction of the buildings contemplated in the contract, time was nowhere made of the essence of the contract by its

terms. And the evidence shows that G. G. Wallace, son and agent of the appellant, knew of the fact of the construction of the buildings and the purchase of material therefor at the time they were furnished Ryckman in the month of October, 1904. The contract was plainly entered into by the parties for the purpose of having buildings erected on the lots, and this places it within the line of decisions of this court that hold that, where the vendor and vendee co-operate together in plans for the erection of improvements upon real estate covered by their agreement, the interest of the vendor, as well as that of the vendee, is bound for the payment of liens for labor and material which have been furnished for such improvements: *Bohn Mfg. Co. v. Kountze*, 30 Neb. 719, 46 N. W. 1123, 12 L. R. A. 33; *Millsap v. Ball*, 30 Neb. 728, 46 N. W. 1125; *Pickens v. Plattsmouth Investment Co.*, 37 Neb. 272, 55 N. W. 947; *Cummings v. Emslie*, 49 Neb. 485, 68 N. W. 621.

Objections are urged to the sufficiency of the proof of <sup>838</sup> the filing of certain of the liens on which judgments were rendered in the court below. One of these objected to is the lien of defendant and cross-petitioner George W. Jones. The evidence with reference to the filing of this lien is as follows: "Q. I hand you a mechanic's lien, and ask you, if that is your signature attached to it, and you caused it to be filed in the register of deeds' office? A. Yes, sir. By Mr. Burbank: This may be marked 'Exhibit 9,' and I will offer it in evidence together with the indorsements thereon." The indorsements showed the filing mark of the register of deeds, and the date of filing and place of registry. This was clearly sufficient.

Similar objections are interposed to the sufficiency of the proof of filing of the liens of cross-petitioners S. F. Davis, Carl Smith, C. A. Kauffold, and J. B. Benjamin. Each of these lienors testified that they had paid the filing fee to the register of deeds, and that the liens bore their respective signatures, but the offer of the indorsements on the liens was not specifically tendered. While there was a technical inaccuracy in the proof of the registry of these liens, yet it was aided by the allegations of the answer and cross-petition of the appellant, who alleged in her cross-petition that these liens had been filed with the register of deeds of Douglas county, Nebraska, and that they constituted a cloud upon her title, which she asked to have removed by affirmative decree of the court.

Objection is urged to the sufficiency of the lien filed by cross-petitioner J. W. Robbins, in that it does not contain a sufficient description of the property which it seeks to charge, nor an itemized statement of the material furnished. The lien alleges an amount due on a contract, which is attached to and made a part of the affidavit. Where a contract is entered into for a specific sum for labor or material, and is complete within itself, and it is filed with the statement of the lien, a more detailed statement of the account is unnecessary: *Doolittle v. Plenz*, 16 Neb. 153, 20 N. W. 116. The description of the lots contained in the lien is: "The southeast corner and third lot from <sup>839</sup> corner on the south, being lots 1 & 3 in Wallace's Sub., Mary A. Wallace being the owner." As there are no rights of third parties, who have purchased relying on the record, involved in this controversy, a liberal rule as to the sufficiency of description in the affidavit for a mechanic's lien should be applied, and, "if there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, it will be sufficient": *White Lake Lumber Co. v. Russell*, 22 Neb. 126, 3 Am. St. Rep. 262, 34 N. W. 104. The description may also be aided by any extrinsic evidence furnished by the instrument which is filed as such notice of the lien: *Drexel v. Richards*, 50 Neb. 509, 70 N. W. 23. The notice filed bears the date, "Omaha, Neb., Dec. 1, 1904." and the venue of the affidavit is laid in Douglas county, Nebraska. We think that, thus aided, the description is sufficient.

We therefore recommend that so much of the judgment and decree of the district court as provides that the surplus, if any arising from the sale of lot 1 be paid to defendant Ryckman be set aside, and that a judgment and decree be entered directing the payment of such surplus, if any, to defendant Mary A. Wallace, and that the judgment and decree so modified be affirmed.

Ames and Epperson, CC., concur.

By the COURT. For the reasons given in the foregoing opinion, it is ordered that so much of the judgment and decree of the district court as provides that the surplus, if any, arising from the sale of lot 1, after the payment of the liens thereon, be paid to defendant Ryckman be set aside, and that defendant Mary A. Wallace is the owner in fee of the lot in question, and that the surplus, if any, be paid to

defendant Mary A. Wallace, and that the judgment and decree of the district court so modified be affirmed.

Decree modified.

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*Mechanics' Lien Laws* are liberally construed so far as the property to which the lien attaches is concerned: *Nanz v. Park Co.*, 103 Tenn. 299, 76 Am. St. Rep. 650. As to the right of a mechanic's lien on property which is under an executory contract of sale, see *Sheehy v. Fulton*, 38 Neb. 691, 41 Am. St. Rep. 767; *Paulsen v. Manske*, 126 Ill. 72, 9 Am. St. Rep. 532; *Althen v. Tarbox*, 48 Minn. 18, 31 Am. St. Rep. 616.

*A Description of Property Sufficient for Identification* is indispensable to a mechanic's lien: *Fernandez v. Burleson*, 110 Cal. 164, 52 Am. St. Rep. 75; but if the description is sufficiently defined to enable a person familiar with the locality to identify the premises as the only one corresponding with the description, this is sufficient: *Hughes v. Torgerson*, 96 Ala. 346, 38 Am. St. Rep. 105; *Maynard v. East*, 13 Ind. App. 432, 55 Am. St. Rep. 238. An imperfect description of the property in a mechanic's lien notice may be aided by extrinsic evidence; that is certain which can be made certain: *Coburn v. Stephens*, 137 Ind. 683, 45 Am. St. Rep. 218.



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**NEVADA.**

**STATE v. GRIMES.**

[29 Nev. 50, 84 Pac. 1061.]

**PUBLIC RECORDS—To What Extent Open for Examination.**

The records in the office of a county recorder are public only to the extent that they may be freely examined by all persons having any interest in the property affected by them, or under the ordinary rules of agency by the attorney or representative of persons so interested. (p. 907.)

• **PUBLIC RECORDS—Who may Examine.**—Persons having, or seeking to acquire, an interest in property may examine for themselves the records in the office of a county recorder, or exercise their choice in employing an attorney or some one to search for them, or they may have an abstracting company furnish an abstract or guarantee the title. (p. 910.)

**PUBLIC RECORDS—Right of Abstractor to Examine and Copy.**

A corporation organized to furnish abstracts and guarantee titles may, free of charge, during regular business hours, inspect and make memoranda and copies of all files and records in the office of the county recorder so far as they relate to current transactions in which it is authorized or employed by persons having or seeking to acquire an interest in property, the examination and copying to be made at such times and under such circumstances as will not prevent the recorder from discharging his duties or interfere with the right of other persons to have access to the records; but such corporation has no right to inspect and copy all the records of the office for the purpose of compiling an independent set of abstract-books covering all the property to which the records relate in order to equip its own office. (p. 911.)

George S. Green, Alfred Chartz and T. A. A. Siegfriedt,  
for the relator.

William Forman, for the respondent.

<sup>55</sup> **TALBOT, J.** To what extent is a company engaged in the business of furnishing abstracts and guaranteeing titles allowed to inspect, examine and copy the records in the of-

fice of the county recorder, without the payment of fees, is the question presented.

From the petition, answer and agreed statements of facts it appears that the respondent, as county recorder, has refused, and unless ordered by this court will continue to refuse, to allow the relator, or its duly authorized secretary and general manager, either for itself or as agent for the owner of the property, to inspect, copy or make memoranda <sup>56</sup> of the record of a specified certificate of mining location. and of a certain deed and the other records in the office of the county recorder of Nye county; that the relator seeks, and has demanded, to inspect and copy these records free of charge for the purpose of compiling an independent set of abstract-books covering all the property pertaining to these records with the intention of supplying and selling abstracts to its customers.

Respondent was and is willing to permit relator's agent to inspect the records for his personal use and information, provided that he does not take any compensation or fees from any other person for so doing, but refuses to allow him or the relator to inspect or copy the records for the use of relator in preparing abstracts, except upon payment of the fees allowed by law for making abstracts.

The relator, in the pursuit of its abstracting, record searching, and title guaranty business, and for the purpose of preparing a set of abstract-books, had engaged one man continuously for three or four months in searching these records, taking memoranda and making copies, and, if permitted, will continue for three or four months to keep one or more men engaged in copying, searching and taking memoranda, and, when the abstract-books of relator are completed, relator will demand the right to inspect and take memoranda from the records of all conveyances thereafter filed, for the purpose of keeping up to date its abstract-books and for its use in compiling abstracts of title.

Relator claims that under our statutes and also under the common law it has a right to examine and copy all these records. Respondent challenges both these contentions, and asserts that, as no such privilege is conferred by statute, the common law controls and limits the right of inspection to persons having an interest in the subject matter to which the record relates.

In seeking light and authority on these propositions, we first turn to the statutes, and find provided in the Compiled Laws:

Sections 2663 and 2664: Every conveyance of real estate, and every instrument of writing setting forth an agreement <sup>57</sup> to convey any real estate, or whereby any real estate may be affected, proved, acknowledged, certified and recorded in the manner prescribed, "shall from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof; and subsequent purchasers and mortgagees shall be deemed to purchase and take with notice."

Section 2715: "A mortgage upon possessory claims to public lands, all buildings and improvements upon such lands, all quartz and mining claims, and all such personal property as shall be fixed in its structure to the soil, acknowledged in manner and form as mortgages upon real estate are required by law to be acknowledged and recorded in the office of the county recorder in which the property is situated, shall have the same effect against third persons as mortgages upon real estate."

Section 2705 directs the several county recorders to procure suitable books at the expense of the county in which all chattel mortgages shall be recorded, and provides that "such books shall, at all times, be open to the public for inspection."

Section 2718: "All instruments of writing now copied into the proper books of record of the office of the county recorders of the several counties of this territory, shall, after the passage of this act, be deemed to impart to subsequent purchasers, and all other persons whomsoever, notices of all deeds, mortgages, powers of attorney, contracts, conveyances or other instruments, notwithstanding any defect, omission, or informality existing in the execution, acknowledgment or certificate of recording the same."

Section 2730 provides that certain officers, including recorders, "authorized by law to take the proof or acknowledgment of the execution of conveyances of real estate or other instrument required by law to be proved or acknowledged, shall keep a record of all their official acts in relation thereto in a book to be provided by them for that purpose, in which shall be entered the date of the proof or acknowledgment thereof, the date of the instrument, the name or character of the instrument proved or acknowledged, and the names of each of the parties thereto, as grantor, grantee, or otherwise. Said records shall, during business hours, be open to public inspection without fee or reward."

<sup>58</sup> Section 2736: "All instruments of writing relating to mining claims now copied into books of mining or other records, now in the office of the county recorders of the several counties of this state, shall, after the passage of this act, be deemed to impart to subsequent purchasers and encumbrancers, and all other persons whomsoever, notice of the contents thereof."

Section 3364 provides for notice of the pendency of an action, and "that from the time of the filing it shall be notice to all persons."

Section 3396 makes the record of conveyances in partition suits a bar against persons interested in the property.

Section 2453 provides that filing with the recorder shall be deemed notice of the appointments and revocations of deputy county officers.

Section 3304 provides that a transcript of the original docket of judgments in the district court certified by the clerk may be filed with the recorder of any other county, "and from the time of the filing, the judgment shall become a lien upon the property of the judgment debtor in such county," but does not direct the method or extent of inspection there; by section 3652 it is enacted that "no judgment rendered by a justice of the peace shall create any lien upon the lands of the defendant unless a transcript of such judgment certified by the justice is filed and recorded in the office of the county recorder."

Section 2348 directs that certain newspapers be preserved by the recorders, and that strangers and inhabitants of the county "shall have access to the same at all times during business hours, free of charge."

Section 2753 provides that the record of partnership certificates shall be "open to public inspection," and section 755 that estray notices "shall be subject to examination by all persons making application to the recorder."

Statutes of 1905, page 221, makes it the duty of the county and district recorders to keep a receiving-book in which they shall enter the name of each document in the order in which it is filed, its number and date of filing, and the amount of fees collected for its recording or filing, and the same is made <sup>59</sup> the fee-book of the recorder open to anyone desiring to inspect.

There are other sections providing for the filing or recording in the office of the county recorder of mining location notices (210, 232, and 238); proof of annual labor on mines (217); notice of location of tunnel rights (228); location

of mill sites (224); inventories of the separate property of married women (512 and 513); marriage settlements (539); orders relating to the rights and property of sole traders (546 and 547); certificates of tax sales (1112); declarations of homestead (550); decrees setting apart homesteads (3040); copies of writs of attachment (3223); certificates of sale on execution (3326); certificates for construction of ditches and flumes (425); affidavits of service of notice to delinquent co-owners of mines (218); liens to mechanics, miners and others (2885); state engineer's list of priorities of appropriations of water (Stats. 1903, p. 28, c. 4).

Section 1613 provides that certain records and papers pertaining to elections "shall be subject to the inspection of any elector."

Section 2483 requires officers to keep fee-books "open to the inspection of anyone desiring to inspect the same."

Under section 1212 the books of revenue officers are "open to any person whomsoever to inspect or copy, without any fee or charge."

There are provisions relating to other officers, for illustration, section 2110, directing that the books, records and accounts of the boards of county commissioners "shall be kept by the clerk, during business hours, open to public inspection free of charge"; section 303, providing that the plats, papers and documents in the office of the state land register "shall be open to public inspection during office hours without fee therefor," and that county assessors "shall keep copies of township plats subject to the inspection of all persons interested in examining the same"; section 2114, requiring county auditors to keep a complete set of books showing every money transaction of the county, "which shall be open to the inspection of the public free of charge"; section 2148, providing for publicity by publication of the allowance of bills against the county; section 2328, requiring county treasurers "at all times to keep their books and office subject to the inspection and examination of the boards of county commissioners"; section 4177 entitles grand juries "to the examination without charge of all public records"; section 3303 requires that the docket of judgments in the district courts "shall be open at all times during office hours for the inspection of the public without charge," and that the clerk shall arrange the docket in such a manner as to facilitate inspection.

We have no statute similar to section 131 of the county government act in California (Stats. 1897, p. 488, c. 277),

which provides that "all books of record, maps, charts, surveys and other papers on file in the recorder's office, must, during business hours, be open for inspection by any person, without charge; and the recorder must arrange the books of record and indices in his office in such suitable places as to facilitate their inspection." Nor have we any general act, such as prevails in a number of states, directing that all records in the offices of county and township officers shall be open for inspection by the public. The provisions regarding county recorders, sections 2340 to 2344, inclusive, are silent concerning such examination.

Sections 2459 and 2471 designate the fees "for abstracts of title for each document embraced thereby," and "for searching records and files for each document necessarily examined," but contain no words either authorizing or prohibiting the making of abstracts or searches by others than the recorder, or specifying whether he shall be entitled to compensation if the work is not performed by himself or his deputies.

The decisions on similar questions in other jurisdictions rest largely upon statutes not in uniformity with ours or with each other, and there is a lack of harmony among the opinions not only in different states, but of the court and judges in the same state. We will consider some of these cases more particularly, owing to the especial reliance placed by relator upon *Burton v. Tuite*, 78 Mich. 363, 44 N. W. 282, 72 L. R. A. 73, and *Lum v. McCarty*, 39 N. J. L. 287.

In *Webber v. Townley*, 43 Mich. 534, 38 Am. Rep. 213, 5 N. W. 971, decided in 1880, all the justices, including those of <sup>61</sup> such high and widely recognized reputations as Cooley and Campbell, held that there is no common-law right to make copies or abstracts of public records for speculative purposes, as for the compilation of a set of abstract-books for selling abstracts of title; and that no such right was given by an act providing "that the registers of deeds shall furnish proper and reasonable facilities for the inspection and examination of the records and files in their respective offices, and for making memoranda or transcripts therefrom during the usual business hours, to all persons having occasion to make examination of them for any lawful purpose; provided, that the custodian of such records and files may make such reasonable rules and regulations with reference to the inspection and examination of them as shall be necessary for the protection of said records and files, and to prevent the interference with the regular discharge of the duties of said register; and provided further, that said register of deeds may prohibit the use

of pen and ink in making copies of records and files": Pub. Acts Mich. 1875, p. 51, No. 54.

In *Webber v. Townley*, 43 Mich. 534, 38 Am. Rep. 213, 5 N. W. 971, speaking for the court, Marston, C. J., said: "We are of the opinion that under the common law relators have not the right claimed. The right to an inspection and copy or abstract of a public record is not given indiscriminately to each and all who may, from curiosity or otherwise, desire the same, but is limited to those who have some interest therein. What this interest must be we are not called upon in the present case to determine. The question has usually arisen where the right claimed was to inspect or obtain a copy of some particular document, or those relating to a given transaction or title. We have not been referred to any authority which recognizes the right of a person under the common law to a copy or abstract of the entire records of a public office in which he had no special interest; the object in view being simply private gain from the possession and use thereof. Relators do not ask for an inspection of a record or abstract thereof relating to lands in which they claim to have any title or interest, or concerning which they desire information in contemplation of acquiring <sup>62</sup> some right or interest, either by purchase or otherwise. It is not as the agents or attorneys of parties seeking information because interested or likely to become so. On the contrary, the right is based upon neither a present nor prospective interest in the lands, but is for the future private gain and emolument of relators in furnishing information therefrom to third parties for a compensation then to be paid. It is a request for the law to grant them the right to inspect the record of the title to every person's land in the county, and obtain copies or abstracts thereof, to enable them hereafter, for a fee or reward, to furnish copies to such as may desire the same."

Relator contends that this opinion was reversed by the same court in the leading case of *Barton v. Tuite*, 78 Mich. 363, 44 N. W. 282, 7 L. R. A. 73, determined in 1889. Such is conceded to be the effect in the language there, and in a number of decisions made later in that and other states; but in reality and stripped of dicta, it was held that sales-books kept by the receiver of taxes, containing a statement of the sales of delinquent tax lands, and by him turned over to the city treasurer, who noted therein redemption and sales, were public records, and that relator, who had been employed by the owner of the property to examine in regard to tax sales, or where these sales were liens upon property to which he was

furnishing abstracts, had the right to make such examinations of the public records as the necessity of his business might require, and that this right was assured to him under Act No. 205, page 286, Laws of Michigan of 1889, which provides: "That the officers having the custody of any county, city or town records in this state shall furnish proper and reasonable facilities for the inspection and examination of the records and files in their respective offices, and for making memoranda of transcripts therefrom, during the usual business hours, to all persons having occasion to make examination of them for any lawful purpose," subject to conditions similar to those quoted in the act of 1875 relating to registers.

In delivering the opinion, Morse, J., said: "I do not think that any common law ever obtained in this free government that would deny to the people thereof the right of free access <sup>as</sup> to, and public inspection of, public records. They have an interest always in such records, and I know of no law, written or unwritten, that provides that, before an inspection or examination of a public record is made, the citizen who wishes to make it must show some special interest in such record. I have a right, if I see fit, to examine the title of my neighbor's property, whether or not I have any interest in it, or intend to have. I have also the right to examine any title that I see fit, recorded in the public offices, for the purposes of selling such information, if I desire. No one has ever disputed the right of a lawyer to enter the register's office and examine the title of his client to land as recorded, or the title of the opponent of his client, and to charge his client for the information so obtained. This is done for private gain, as a part of the lawyer's daily business, and by means of which, with other labors, he earns his bread. Upon what different footing can an abstracter be placed, within the law, without giving a privilege to one man or class of men that is denied to another? The relator's business is that of making abstracts of title, and furnishing the same to those wanting them, for compensation. In such business it is necessary for him to consult and make memoranda of the contents of these books. His business is a lawful one, the same as is the lawyer's, and why has not he the right to inspect and examine public records in his business as well as any other person? It is plain to me that the legislature intended to assert the right of all citizens, in the pursuit of a lawful business, to make such examinations of the public records in public offices as the necessity of their business might require, subject to such rules and restrictions as are reasonable and proper



under the circumstances. The respondent in this case is the lawful custodian of these sales-books, and is responsible for their safekeeping, and he may make and enforce proper regulations, consistent with the public right, for the use of them. It follows that he has no right to demand any fee or compensation for the privilege of access to the records, or for any examination thereof not made by himself or his clerks or deputies. He has no exclusive right to search the records against any other citizen: *Lum v. McCarty*, 39 N. J. L. 287; *Boylan v. Warren*, 39 Kan. 301, 7 Am. St. Rep. 551, 18 Pac. 174; *State v. Rachac*, 37 Minn. 372, 35 N. W. 7; *People v. Richards*, 99 N. Y. 620, 1 N. E. 258; *Hanson v. Eichstaedt*, 69 Wis. 538, 35 N. W. 30."

Apparently these remarks met the approval of Chamberlin, J., who concurred without qualification, but not of the majority of the court, for Campbell, J., whose concurrence in the judgment made it effective, confined his opinion to the point that the relator had such an interest under the act mentioned as entitled him to see the books in question. Sherwood, C. J., and Long, J., did not sit, and these statements may be considered as sanctioned by only two of the five justices. The case rested upon the Michigan statute. No English or other decision was cited that supported the assertion of Justice Morse that he knew of no common law that denied the right of free inspection or required the citizens desiring to make it to show some interest in the record. Although this language is interesting as a statement of the opinion of an able member of a court of high standing, it was not only unnecessary for the determination of the case as controlled by legislative enactment, and unsupported by any authority excepting the concurrence of one of the justices, but it was a begging of the question, for, if no common law prevails in this country which prevents, and there is no decision sustaining the right of an abstract company or others to inspect or copy all the records in which it, or they, have no interest as owner or agent, it is evident that no such right exists unless granted by statute. With no decision conceding or denying such right, nothing appears on which to base the assumption that it is authorized by common law. The same may be said regarding the force of similar expressions quoted in the brief from other opinions.

In *Day v. Button*, 6 Mich. 600, 56 N. W. 3, it was held that the right to examine the records in the office of the register of deeds, and to make memoranda therefrom, for the purpose of making a set of abstract-books, was established by

Burton v. Tuite, 78 Mich. 363, 44 N. W. 282, 7 L. R. A. 73; but, as we have seen, the majority of the court did not go so far in the earlier of these cases. This doctrine as broadened is better warranted by the statute in that state.

<sup>65</sup> Distinguishing those cases and the records in the office of the register from those in suits between individuals, subsequently, in *Burton v. Reynolds*, 110 Mich. 354, 68 N. W. 217, the court refused a writ of mandate to compel the clerk of the circuit court to permit one engaged in making abstracts of title to examine and copy a file in an action relating to land between private parties, upon a petition which negatived constructive notice of the pendency of the action, and did not assert actual notice, nor state that the examination and copying of the file was necessary to the interest of his employer, although it did state that it was necessary to the completion of the relator's work.

In *Brown v. County Treasurer*, 54 Mich. 132, 52 Am. Rep. 800, 19 N. W. 778, the citizen seeking and refused inspection of liquor bonds filed with the county treasurer, and wishing information that would aid in a prosecution for an infraction of the law, had a different interest than one man has in the title to another's property.

In *Lum v. McCarty*, 39 N. J. L. 287, a leading case cited to support the opinion in *Burton v. Tuite*, 78 Mich. 363, 44 N. W. 282, 7 L. R. A. 73, above, the court overruled *Flemming v. Clerk of Hudson County*, 30 N. J. L. 280, and held that county clerks were not entitled to fees for searches not made by themselves or assistants of the records in their offices, of deeds, mortgages and judgments. The statute provided for access to the records excepting those of judgments in the circuit court. The action was for the recovery of fees paid by the plaintiff's attorney under protest, when he was refused inspection until he paid the same fees for the privilege of examining the records that the clerk would have been entitled to charge if he had made the examination. In justification of, and by way of distinguishing, a subsequent decision by the supreme court of New Jersey, to which we shall refer later, it is proper to observe that the issue presented did not relate to the right of an abstract company or person without interest to copy or examine all the records. This should be borne in mind in considering the weight to which the opinion is entitled as bearing on the different issue with which we are confronted.

The case is more directly applicable to the question whether  
<sup>66</sup> one authorized by statute under the designation of "all

persons" and having an interest in property, may have his attorney search the records without the payment of fees. The court said: "By the third section of the 'Act to regulate fees' (Nix. Dig., p. 322), provision is made for the compensation of county clerks for certain services, among which is the searching of the records in their offices. The provision cannot be extended by construction, so as to authorize a demand by the clerk for pay for services not in fact rendered by him or his assistants. The defendant, therefore, was not entitled to the fees in question, under that provision. The only other provisions which are claimed to have a bearing on the question are the ninth section of the 'Act respecting conveyances,' which, after providing for the recording of deeds in books to be furnished for the purpose, adds 'to which books every person shall have access, at proper seasons, and be entitled to transcripts from the same, on paying the fees allowed by law' (Nix. Dig., p. 146), and the first section of the 'Act to register mortgages,' which, after like provision for registering mortgages of lands in proper books, adds 'to which books every person shall have access, at all proper seasons, and may search the same, paying the fees allowed by law' (Nix. Dig., p. 610). It is also suggested that the absence of any provision for access by the public to the records of judgments of the circuit court favors the charge, so far as the records of those judgments are concerned. No authority for taking fees for searches not made by himself or his assistants is to be derived by the clerk from either of the above-quoted provisions. The first, while it provides for compensations for transcripts, contains no qualification of the right of the public thereby declared to access to the records, and it authorizes no charge whatever in connection with the exercise of that right. Though the language of the other may seem to qualify the right to search with the necessity of paying fees, yet the obvious construction of the provision is that the fees for search are to be paid only when the search is made by the clerk or his assistants. The right of the public to free access to the records carries with it the right to search without charge for the privilege. Nor can a claim on the <sup>67</sup> part of the clerk to fees for a search not made by himself or his assistants, in the records of the judgments of the circuit court in his office, be justified by the fact that no special provision is made for access by the public to those records. They are no less free to the public, by reason of the absence of a provision declaring the right. They are, in fact, public records, and are public property, kept in a public place, at

the public expense, for the public benefit. For the convenience of the public in examining them, the law provides for the making of proper indexes of their contents: Nix. Dig., 'Practice Act,' p. 729, par. 77. The law expressly provides for free access by the public to the records of attachments, notices of lis pendens, circuit court judgments docketed in the supreme court, and judgments of justices' courts docketed in the courts of common pleas: Nix. Dig., pp. 39, 112, 442, 474. The clerk is the lawful custodian of the records, and indexes thereto, and is responsible for the safekeeping thereof. His powers over them are such as are necessary for their protection and preservation. To that end, he may make and enforce proper regulations consistent with the public right for the use of them. But they are public property, for public use, and he has no lawful authority to exclude any of the public from access to, and inspection and examination thereof, at proper seasons and on proper application. The clauses which declare the public right in this behalf employ the most comprehensive and general language: 'All persons desiring to examine the same.' 'Every person shall have access.' It follows that the clerk has no right to demand any fee for the privilege of access to the records and indexes, or for any examination thereof not made by himself or by his assistants."

In *Ferry v. Williams*, 41 N. J. L. 332, 32 Am. Rep. 219, it was held that every person is entitled to the inspection of documents of a public nature, provided he has the requisite interest. The court enforced by mandamus in favor of a citizen the right of inspection of letters of recommendation filed as a basis for the issuing of licenses. In principle the case is in some respects like the one before us, because the New Jersey statutes did not provide for the examination of <sup>es</sup> these letters, but did for the inspection of many other records as we have seen. The following extracts from the opinion are also instructive regarding the controlling and disputed point in the common law: "The documents in question are of a public nature, and the rule is that every person is entitled to the inspection of such instruments provided he shows the requisite interest therein. And, as Lord Denman remarks, in *Rex v. Justices of Staffordshire*, 6 Ad. & E. 84, the court is by no means disposed to narrow its authority to enforce by mandamus the production of every document of a public nature in which any citizen can prove himself to be interested. For such persons, indeed, every officer appointed by law to keep records ought to deem himself for that purpose

a trustee. The relator asserts no interest to be subserved by an inspection of these letters, except that common interest which every citizen has in the enforcement of the laws and ordinances of the community wherein he dwells. In England, the occasions which generally have required the exercise of the power of the court to enforce inspection of public documents have been those where a party has sought evidence for the prosecution or defense of his rights in pending litigation. In such cases, when the custodian of the documents was a party in the cause, the court usually intervened by rule, otherwise by mandamus. But the existence of a suit was not a *sine qua non* for the exertion of a power. In *Rex v. Lucas*, 10 East, 235, a mandamus was sought to compel the steward of a manor to permit one claiming certain copyhold lands within the manor to inspect the court rolls and take copies. The lord, claiming himself to be the owner of the lands, resisted, on the ground that there was no cause depending, but the court of king's bench granted the writ, notwithstanding the opinion before expressed in *Rex v. Allgood*, 7 Term Rep. 742; Lord Ellenborough saying: 'I do not know why there should be any cause depending in order to found an application of this sort. This is not the impertinent intrusion of a stranger, but the application of one who is clearly entitled to the copyhold, unless there be a conveyance of it by those under whom he claims; he may therefore well require to see <sup>69</sup> whether there appears upon the rolls to be any such conveyance.' So in *Rex v. Tower*, 4 Maule & S. 162, on a controversy, but without suit, between a tenant of the manor and the lord, as to the cutting underwood, the court granted a mandamus to inspect the court rolls so far as related to that subject. Likewise in *Rex v. Justices of Leicester*, 4 Barn. & C. 891, a mandamus was granted that certain rate-payers be allowed to inspect and take copies of the proceedings and documents relating to the parish rates, although no suit was pending; and while this case is disapproved in *Rex v. Vestryman of St. Marylebone*, 5 Ad. & E. 268, and overruled in *Rex v. Justices of Staffordshire*, 6 Ad. & E. 84, yet in neither case is it suggested that it was erroneous because no action had been brought. The disapprobation turns upon the principle that the rate-payers had no interest to be subserved by the inspection, since no information to be obtained from the documents could aid them in the enforcement or protection of any lawful claim; Lord Denman saying, in the case last cited, that the subject matter was not one which the rate-payer could bring before the court as a

litigant, and hence there was not that direct and tangible interest which is necessary to bring persons within the rule on which the court acts in granting inspection of public documents. In *Rex v. Merchant Tailors' Co.*, 2 Barn. & Adol. 115, although a mandamus was refused to members of the company seeking an inspection of all the records, books, papers and muniments of the company, because of the generality of the application, it was conceded by all the judges that, if the application had been limited to some legitimate and particular purpose in respect of which the examination became necessary, it would have been allowed, and that there was no rule that to warrant an order to inspect corporation documents there must actually have been a suit instituted. But whenever the subject was, by reason of his relation to the common interest, permitted to litigate for its protection, the right of inspection was fully secured to him. Thus, in *Rex v. Shelly*, 3 Term Rep. 141, where some of the burgage tenants were testing by quo warranto the right of the defendant to be a burgess, a full inspection of the court rolls, not limited to the evidence <sup>70</sup> of their own titles, was granted them. In *Rex v. Babb*, 3 Term Rep. 579, on an information by three aldermen to inquire into the right of Woolmer to be mayor of Great Grimsby, the relators had a rule for the inspection and copies of all the public books, records and papers of the borough of Great Grimsby regarding the subject in dispute."

In *West Jersey Title and Guaranty Co. v. Barber*, 49 N. J. Eq. 474, 24 Atl. 381, it was held that an abstract company has the same rights as an attorney or individuals to search the county records for others, and, when employed to examine the title to any particular piece of property, becomes subrogated to the right of the employer to have access to them, notwithstanding it contemplates making a contract of guaranty of the title.

In *Barber v. West Jersey Title and Guaranty Co.*, 53 N. J. Eq. 158, 32 Atl. 222, decided in 1894, five years after *Burton v. Tuite*, 78 Mich. 363, 44 N. W. 282, 7 L. R. A. 73, the complainant claimed the right to have free access to the records and files daily during business hours for the purpose of inspecting and making abstracts and memoranda. It was held that every person has the right to examine the public records relating to any title in which he is interested, without the payment of fees, subject to reasonable rules and regulations, and that the abstract company has this privilege when employed to examine and guarantee the title to a particular piece of property, but has not the right to occupy the office

of the clerk for the purpose of making an abstract of the records in order to set up a rival business to the clerk. In considering the following portion of the opinion, it is well to remember the New Jersey statutes providing for inspection, as before noted: "The case of *Lum v. McCarty*, 3 N. J. L. 287, is relied upon to support this decree. In that case Lum was employed to search a specific title, and this court held that he had a right of access to the records in the clerk's office, for that purpose, without the payment of fees to the clerk. But that case is not authority for the contention that anyone may occupy the offices of the county clerk until he has made copies of all the records in the care of the clerk for the purpose of setting up a rival office, whereby he will be deprived of the emoluments of his office. It is conceded <sup>71</sup> that the corporation complainant is entitled to the same right of access to, and examination of, the public records of the county as an individual would be. Our act respecting conveyances, after providing for the recording of deeds in books to be furnished for that purpose, adds, 'to which books every person shall have access at proper seasons, and be entitled to transcripts from the same on paying the fees allowed by law.' *Lum v. McCarty*, 39 N. J. L. 287, construed this provision to mean that fees were to be paid to the clerk only when he made searches himself, and did not preclude a person interested from making searches for himself. The law makes it the duty of the clerk to take care of the public records in his office, but gives him no special fees for such service. The only compensation to him are the fees he receives in the ordinary course of his business for searches. To extend the right of search by others beyond this limit will deprive the clerk of the only remuneration he can have for the performance of this duty. In the absence of clear expression, it should not be so enlarged by construction. In other states where the statutory provisions are less favorable to the public officer, the courts have denied the right of anyone to make at will an abstract of the official records. The respondent, by force of its incorporation, has the same right to inspect the public records which may lawfully be exercised by an individual. Every person, without legislative authority, may engage in the business of examining and guaranteeing title as fully as this company is empowered to do by its act of incorporation. When such a person or a company, with such authority, is empowered to examine and guarantee a particular title, the clerk, upon demand, is bound to give

access to the records for that purpose, subject to reasonable rules and regulations."

In *Fidelity Trust Co. v. Clerk*, 65 N. J. L. 495, 47 Atl. 451, the court sustained the refusal of the clerk to permit an examination of certain indices in the supreme court relating to judgments which were a lien upon lands.

In *Newton v. Fisher*, 8 N. C. 23, 3 S. E. 822, it was said in the opinion: "All persons have the right to inspect these records freely and without charge, and all persons, who may <sup>72</sup> desire to do so, can get copies by paying the prescribed fees. It is the duty of the register to keep them open to the inspection and examination of all who may desire to inspect and examine them, and for this there is no fee; it is his duty to furnish copies to all who require them and will pay the fees allowed. Perhaps, in addition to this, so long and so universal has been the custom, that it may be said to be the right of lawyers, and others needing them, to take such reasonable memoranda as may not interfere with the rights and duties of the register, and we have never known this refused. We know of no law that requires the register, in this respect, to do more. No one has the right, to use the language of the learned judge in the court below, 'to make copies or abstracts of the entire record of the office, including those instruments in which the person so desiring to make abstracts is not at the time interested, but simply anticipates that he will at some time be interested, and abstracts of which he desires to make for merely speculative purposes. In this view the plaintiff would be entitled to every facility for the legitimate prosecution of his business by access to the records for the examination of instruments registered, but the court is not satisfied of his right to make an abstract to all transfers of real and personal property for the year 1886, without having an interest in the same, for the prosecution of his business, or paying any fee therefor.'"

In *Randolph v. State*, 82 Ala. 527, 60 Am. Rep. 761, 2 South. 714, following *Brewer v. Watson*, 71 Ala. 299, 46 Am. Rep. 318, and *Phelan v. State*, 76 Ala. 49, it was held that section 698 of the Code of 1876, providing that "the records of the judge of probate's office must be free for the examination of all persons, when not in use by him," conferred the right of free examination of the records, by any person having an interest, his agent, or attorney, and the right to make memoranda or copies, but did not extend to attorneys or other persons engaged in negotiating loans on real estate, and who desired to make an abstract from the



records of conveyances of the titles to all the lands in the county, for future use when required in their business. Stone, C. J., speaking for the court, said: "It is not the <sup>73</sup> unqualified right of every citizen to demand access to, and inspection of, the books or documents of a public office, though they are the property of the public, and preserved for public uses and purposes. The qualification of the rule is that no person can demand the right save those who have an interest in the record, their lawful agents, or attorneys. We must not, however, be understood as intending to abridge the right, conferred by statute, of 'free examination,' by all persons having an interest, of the records of the probate judge's office. Nor will we confine this right to a mere right to inspect. He may make memoranda, or copies, if he will, and, to this end, may employ an agent or attorney. The limitation is that he must not obstruct the officers in charge in the performance of their official duties, by withholding records from them, when needed for the performance of an official function. Nor is this right of examination confined to persons claiming title, or having a present pecuniary interest in the subject matter. It will embrace all persons interested, presently or prospectively, in the chain of title, or nature of encumbrance, proposed to be investigated. The right of free examination is the rule, and the inhibition of such privilege, when the purpose is speculative, or from idle curiosity, is the exception."

In *State v. King*, 154 Ind. 621, 57 N. E. 535, it was held that a citizen and taxpayer of the county has such an interest as entitles him to examine the records and papers in the county auditor's office for the purpose of ascertaining the condition of the fiscal affairs of the county. The court stated: "The general rule which obtained at common law was that every person was entitled to an inspection of public records, by himself or agent, provided he had an interest in the matters to which such records related. Where, however, the inspection desired was merely to gratify idle curiosity, or motives which were purely speculative, the right of inspection, under the common law, was denied. The right to inspect the records in question also impliedly awards to the person entitled to it sufficient time, under the circumstances, in which to make the inspection for the purpose contemplated. We are constrained, therefore, to conclude <sup>74</sup> that the relator in this case, under the facts, is entitled to the inspection which he demands, and also entitled to make such copies and ab-

stracts of the records as may avail him in carrying out the purpose of his examination."

Under the Code of Georgia of 1873 (section 14), declaring that all books kept by any public officer shall be subject to the inspection of all citizens, within office hours, and the fee bill (section 3695), providing, "for each inspection, when the clerk's aid is required, twenty-five cents; for examination of books and abstract of result, one dollar," the right to make an abstract of the books for publication was denied. The court said in *Buck v. Collins*, 51 Ga. 391, 21 Am. Rep. 236: "Under these laws, the complainant insists that he has a right to go into the clerk's office, during office hours, from day to day and from month to month, at his pleasure, copy from the books, when they are not in use, at his option, and thus collect material for a book which he proposes to publish for sale. As he is able, by employing an expert to do this inspection and compilation himself, without the assistance of the clerk, he insists that no fee is required, and as the clerk refuses to permit him to go on with his enterprise, except upon the payment of a fee for each separate investigation of a title, he prays that the clerk may be enjoined. We agree with Judge Hopkins. We think the complainant has no such right as he insists upon. The necessities of society, and the protection of those dealing with property, require that these records shall exist. That the title to land, the fact that mortgages or judgments exist, shall be capable of being inquired into by those interested. The character of one's title, and whether one has mortgages or judgments against him, is thus of necessity open to inquiry, and the public, by providing books and records, meets this necessity. The object of the record is to furnish to those needing it the information the record contains. That object is attained when its books are open to inquiries as these occasions present themselves. All laws are to be reasonably construed in view of the object of them, and in view of other laws. It is contemplated that lawyers, public officers, and persons familiar with the books, by having frequent occasion to use <sup>75</sup> them, may not need the clerk's assistance for the purpose. The clerk cannot charge a fee for a mere inspection, where his aid is not required. But no person has a right to examine or inspect the records of his office, except in his (the clerk's) presence, and under his observation."

In *Clay v. Ballard*, 87 Va. 787, 13 S. E. 262, the contention was regarding the right of a citizen to take copies of the registration books under a statute providing for public in-

spection. It was held that, although the registrar was allowed no compensation for time lost in so doing, yet he would be compelled by mandamus to allow any citizen to inspect and take copies of these books, and that every citizen had an interest in them. The court said: "These books, undoubtedly, are of a public nature, and therefore, upon general principles, independently of any statute on the subject, any person having an interest in them would have a right to inspect them. But the legislature, out of abundant caution, and with an unmistakable object in view, has seen fit to enact expressly that they 'shall at all times be open to public inspection': Code 1887, sec. 84; Va. Code, 1904, p. 51. The case turns upon the construction of this statute. At common law, the right to inspect public documents is well defined and understood. The authorities on the subject are very numerous, and they uniformly hold that such a right includes the right, when necessary to the attainment of justice, to take copies. Greenleaf, than whom there is no more accurate text-writer in modern times, lays it down that the inspection and exemplification of the records of the king's court is, and from a very early period has been, the common right of the subject. And, as to other public documents, the custodian of them, he says, will, upon proper application, be compelled by mandamus to allow the applicant to inspect them, and, if desired, to take copies: 1 Greenleaf's Evidence, secs. 471, 478. "Tidd, in his Practice, gives it as a general rule, well settled, that a party has a right to inspect and take copies of all such books and records as are of a public nature wherein he has an interest: 1 Tidd's Practice, 593."

Under a statute providing that "all books and papers required to be in the office of county officers shall be open <sup>76</sup> for the examination of any person," it was held, in *Cormack v. Wolcott*, 37 Kan. 391, 15 Pac. 245, and in *Boylan v. Warren*, 39 Kan. 301, 7 Am. St. Rep. 551, 18 Pac. 174, that the register of deeds would not be compelled to permit any person to make copies of the entire records for the purpose of making a set of abstract-books for private use or speculation. A similar decision was made upon a similar act in *Bean v. People*, 7 Colo. 200, 2 Pac. 909, and later this rule was changed in that state by an explicit statute allowing copies to be so taken: *Stocknan v. Brooks*, 17 Colo. 248, 29 Pac. 746.

Under chapter 74, Compiled Statutes of Nebraska of 1903, declaring that "all citizens of this state and all other persons interested in the examination of the public records are hereby fully empowered and authorized to examine the same,

free of charge," during office hours, it was held that an attorney in fact of a party to a suit had a right to examine the entries relating to a judgment of a justice of the peace, and had such an interest as entitled him to a transcript.

By statute, in New York, abstract companies are entitled to free access to, and to copy, the records: *People v. Reilly*, 38 Hun, 429; *People v. Richards*, 99 N. Y. 620, 1 N. E. 258.

Under section 700, Revised Statutes of Wisconsin of 1898, providing that the "register of deeds shall open to the examination of any person all books and papers required to be kept in his office, and permit any person so examining to take notes and copies of such books, records or papers, or minutes therefrom," it was held that this right was not limited to lands in which such person or his clients were pecuniarily interested, and that any person might examine and take notes and copies of the record for use in making abstract books. The court said: "In so far as the Alabama and Michigan courts may have indicated that a statute giving certain enumerated rights respecting records to 'any person' is a mere confirmation of a rule at common law, giving similar rights to only a particular class of persons, we must decline to follow them."

*State v. Rachac*, 37 Minn. 373, 35 N. W. 7, is a fair sample of the class of cases which uphold the right of abstract companies to copy all the records, and illustrative of the fact <sup>77</sup> that this privilege is conferred only by plain legislative enactment. The court said: "The counsel for appellant plants himself squarely upon the broad proposition that respondents are not entitled to any such privileges, because they have no interest in the records which they desire to examine. His contention may be briefly stated thus: (1) At common law no person had a right to examine or copy the records in a public office in which he had no interest, present or prospective; (2) that the statute does not extend this right to others, but merely regulates its exercise by those who already possessed it at common law. Conceding that the rule at common law was as stated, the question is, How far has this been changed by General Statutes of 1878, chapter 8, section 179, as amended by Laws of 1885, page 108, chapter 116? We think the matter is entirely put at rest by the amendment of 1885. It is a matter of common knowledge that, at the time this amendment was passed, in a large majority of counties in this state, persons had engaged in the 'abstract' business, and at much expenditure of time and money had prepared, or were preparing these abstract-books

or tract 'indexes.' These abstract offices, if properly conducted, are of great public convenience. Under this state of affairs, the legislature enacted the amendment referred to, which throughout bears clear evidences of being intended to define and fix the right of all who might desire to make copies of or abstracts from any of these records. The original statute gave to everyone demanding it the right to 'inspect' these records. But, as there might be a doubt as to what the right of inspection included, the amendment adds 'either for examination, or for the purpose of making or completing an abstract or transcript therefrom.' "

In Vermont, under a statute providing that the "books of record of justices of the peace should at all times be subject to the inspection of any person interested in such record," it was held that a citizen was not entitled to see the complaint and warrant in a criminal proceeding: *Perkins v. Cummings*, 66 Vt. 486, 2 Atl. 675.

By statute, in Connecticut, coroners are required to reduce to writing, and return to the clerk of the superior court, the testimony of witnesses at inquests, with his findings. The court held, three of the justices concurring and two dissenting, that these documents in the hands of the clerk were open to inspection by the defendant charged with the crime, and by all persons interested: *Daly v. Dimock*, 55 Conn. 579, 12 Atl. 405.

In *State v. Hoblitzelle*, 85 Mo. 620, the court stated: "While we regard the poll-books as belonging to that class of public records open to inspection when the applicant who desires to inspect them shows that the purpose of the inspection is to vindicate some public or private right, the courts will by mandamus compel the inspection, on condition that the inspection be made 'under such reasonable rules and regulations as the court or officer having them in charge may impose.' Whether mandamus will or will not lie to compel an inspection of poll-books, when it is sought simply for the gratification of curiosity without any purpose to vindicate either a private or public right, is not necessary to determine in this proceeding, as it does not present such a case. The relator claims that, by reason of his receiving a majority of the votes cast at the election, he acquired a right to the office of city marshal, and desires the inspection asked for as a means of enforcing this right."

In *Payne v. Staunton*, 55 W. Va. 202, 46 S. E. 927, decided in 1904, it was sought to inspect the poll-books of a special election, and the court held that a pecuniary interest in an

individual in the act sought to be compelled by mandamus must exist to maintain it, that inspection is not a right vested in every person or under all circumstances, and that the person asking it must have an interest in the record or paper of which examination is sought.

In *Marsh v. Sanders* (1903), 110 La. 726, 34 South. 752, it was held that the right to inspect the book in which the sheriff was required to enter names of all persons paying poll taxes carried with it the right to make copies from the book, and that, while the sheriff was entitled to make reasonable rules for the orderly conduct of his office, he could not make a rule which would deny or abridge the right to inspect and make copies.

<sup>79</sup> In *State v. Reed*, 36 Wash. 638, 79 Pac. 306, it was held that a general demand by a citizen for an inspection of "any and all books of public records" in the office of the county treasurer could not be made the basis for a writ of mandate.

In Pennsylvania, it has been held that, in the absence of legislation, records, although public in their nature, are not open to inspection except to those who have a definite interest in them: *Owens v. Woolridge*, 8 Pa. Dist. R. 305.

In *Herbert v. Ashburner*, 1 Wils. 297, the court said that the books of the sessions of the corporation of Kendale were public, and that everybody had a right to see them, and, in *Rex v. Chapham*, 1 Wils. 305, that the books of the poor's rates were public and ought to be delivered by one overseer to another, that all the parishioners might have access to them. It is apparent that in these cases members of the body politic had, and were deemed to have, an interest which entitled them to see these books.

In *King v. Shelley*, 3 Term Rep. 142, and *Talbot v. Villebeys*, M. 23 Geo. III, B. R., it was said: "That the defendant was not entitled to an inspection, for one man has no right to look into another's title deeds and records, when he has no interest in the deeds or rolls himself, as tenants of a manor have."

In *King v. Babb*, 3 Term Rep. 580, Lord Kenyon, C. J., said: "This, therefore, is like the case of an application by a stranger to the corporation. And in such a case I think we should transgress the line of our duty if we were to grant a general unlimited inspection of all papers respecting the corporation."

Inspection of records in criminal cases was refused in *King v. Purnell* and *King v. Cornelius*, 1 Black. 27, 1 Wils. 239.

In *Sloan Filter Co. v. El Paso Co.* (C. C.), 117 Fed. 504, it was held that users of machines claimed to infringe a patent had such an interest in a suit between other parties in which the validity of the patent is in issue as entitled them to inspect and to have a copy of the court records. Hallett, J., said: "If strangers to the suit can be in any manner or to any extent bound by the result, they ought to be at liberty <sup>so</sup> to inquire how the controversy is carried on. At the bar it was said that this petition is without precedent. This may be true in respect to the circumstances of this case, but the matter of inspecting and taking copies of public records is as old in the law as the records are old. In English law tenants of a manor could always inspect the court rolls and books of the manor in order to ascertain their title: *Rex. v. Shelley*, 3 Term Rep. 141. So, also, where the authority of a mayor was in question, citizens could inspect the books and papers of the borough in order to determine the fact: *Rex v. Babb*, 3 Term Rep. 579. These cases and others support the common-law rule that a party may have inspection of any document or paper in which he may be interested: 1 Wharton on Evidence, par. 745."

Act Cong. Aug. 12, 1848, c. 166, 9 Stat. 292, provides that all books in the office of the clerks of the circuit and district courts of the United States, containing the docket of the judgments or decrees, shall, during office hours, be open to the inspection of any person desiring to examine the same without any fee or charge therefor. Act Feb. 26, 1853, c. 80, 10 Stat. 163, allows the clerk a certain fee for searching the records for judgments or decrees. Act Aug. 1, 1888, c. 729, 25 Stat. 357, provides that the indices and records of judgments, that the clerk is by that act required to keep, shall at all times be open to the inspection and examination of the public.

In *Re Chambers* (C. C.), 44 Fed. 786, it was held that these provisions secure to the citizens the right to examine these records free of charge, and the clerk is entitled to the fee only when he is required to make the search himself.

Under the acts of Congress mentioned it was held that a corporation engaged in the business of insuring titles had the right to examine the indices and cross-indices of judgments kept by the clerks of United States circuit and district courts, when such examination relates to current transactions, and does not interfere with the right of other persons who have access to them: *Commonwealth Title and Trust Co. v. Bell* (C. C.), 105 Fed. 548, affirmed, *Bell v. Commonwealth*

Title and Trust Co., 110 Fed. 828, 49 C. C. A. 208, affirmed <sup>81</sup> (1903), 189 U. S. 131, 23 Sup. Ct. Rep. 569, 47 L. ed. 741. It was said (110 Fed. 829, and 49 C. C. A. 209): "We do not regard it at all material that the words 'without any fees or charges therefor' are not repeated in the act of 1888." Under the decree the title insurance company was given no general access to the judgment indices, but simply the right of inspection and examination in particular transactions at the time current or pending.

Although the opinions in such cases as *State v. Donovan*, 10 N. D. 203, 86 N. W. 709, *State v. Cummins*, 76 Iowa, 133, 40 N. W. 124, and *Johnson v. Wakulla Co.*, 28 Fla. 720, 9 South. 690, cited by relator, contain statements which seem germane here, the issues in those cases were different, and did not relate to the right of inspection, nor of the recorder or officer to collect fees. There is room for a controlling distinction between the admissibility in evidence of original or certified copies of public records, and the right to examine and copy them without charge by abstracting companies or others, without interest in the property or authority from the owners, for the purpose of duplicating the records and equipping an office in rivalry to the recorder. Nor are *Nash v. Lathrop*, 142 Mass. 35, 6 N. E. 559, *Banks & Bros. v. West Pub. Co.* (C. C.), 27 Fed. 50, and other cases cited upholding free inspection of legislative enactments, strictly apropos. It is apparent that reasons and necessities exist for the open examination and speedy publications of laws in which all are interested, and by which all are bound, that do not prevail in regard to private titles, and uniformly the courts have allowed inspection of public laws. Records of court proceedings concerning private affairs, the publication of which could only serve to satiate a thirst for scandal, constitute another class regarding which there are often stronger reasons for denying examination by disinterested persons, than of instruments pertaining to land: *Burton v. Reynolds*, 110 Mich. 354, 68 N. W. 217; *In re Caswell's Request*, 18 R. I. 835, 49 Am. St. Rep. 814, 29 Atl. 259, 27 L. R. A. 82. See *Colnon v. Orr*, 71 Cal. 43, 11 Pac. 814.

Again, there is reason for distinguishing from the case at bar that of *People v. Cornell*, 47 Barb. 329, reversing 32 <sup>82</sup> How. Pr. 149, and the English cases cited in connection therewith, upon which so much reliance is placed. A member of a municipal corporation may have an interest, not special, but in common with others, that entitles him to inspect its records, which is quite different from what one



man has in the private land titles of others, and the English cases we have mentioned, a part of which are relied upon by relator, indicate this distinction.

It is said that during the memory of us all it has been the custom in this state to allow free inspection of the records. This is undoubtedly true, but the examinations have generally been limited in their nature and made by persons having some interest in the property to serve, or by attorneys or others acting in their behalf. It has not been customary for anyone to inspect, copy or duplicate all the records in the offices of the county recorders, and, with one exception, so far as we are aware, no one but relator has ever sought this privilege in this commonwealth. From a review of the cases it is apparent that there is much conflict as to whether, under statutes such as we are seen to have relating to some records and providing for inspection by the public, or by all persons desiring, the right of examination should be limited to those having some interest, present or prospective, in the property to which the record relates, or should be freely extended to all. It may be noted that our statutes relating to the records of deeds, real estate mortgages, and most conveyances do not contain provisions for inspection which bring them under either class of these conflicting decisions. The principle involved has been befogged by many inadvertent statements of judges, but no case is found in the common law, and none in this country, which sustains the right of an abstract or title guaranty company or of an individual to copy or examine all the records relating to private land titles, excepting decisions based on statutes clearly giving that right and containing terms which do not prevail in this state.

The juridical assertions that records such as these were public and open to the inspection of all persons were in states with legislative enactments so declaring, or were in actions where inspection was denied to the owner or his <sup>83</sup> agent, or to some one claiming a common or public interest in the record, or which related to evidence or questions of public policy, or issues not involving the right to examine or copy all the records relating to lands. And, further, if it be conceded that these records are public and open to public inspection, as has been said, it may still be held that they are public only to that extent that they may be freely examined by all persons having any interest in the property affected by them, or under the ordinary rules of agency by the attorney or representative of persons so interested.

The filing and recording of documents relating to private titles is at private expense, and, although the records regarding them are public, they may not be considered so in that broad sense in which books and entries relating to elections, revenues, fees and the acts and conduct of officials of more general concern or interest, are considered public. As regards the needs of inspection, records may be divided into four or more classes. It is most important to have free examination and speedy publication of the statutes and decisions which make the law by which the people are governed, and by which they are charged with notice in their conduct. It is also essential to the public welfare that records relating to revenues, elections, fees and official acts generally be open to inspection. Access to the files and copies of documents relating to titles to property by persons who have, or are about to acquire, an interest, is necessary for their protection. Proceedings in civil suits are sometimes of such a scandalous nature that closed doors are justified and publicity is better suppressed.

As we have seen, where the statutes provide for inspection by all persons, unless the language was broad in allowing the taking of copies and memoranda by anyone desiring, the courts have generally refused to compel the recording officer to allow the inspection of all records, and limited the examinations to those made by, or on behalf of, persons having some interest in the property, or what is generally the same thing, to current calls for abstracts or pending negotiations. Under fee bills substantially analogous to ours, and at common law, persons having an interest in the property, and <sup>84</sup> attorneys and abstracters representing them, have been allowed to examine and copy records relating to their holdings free of charge, excepting in Maryland: *Belt v. Prince George's Co. Abstract Co.*, 73 Md. 289, 20 Atl. 982, 10 L. R. A. 212. The official fees for recording are higher than the usual rates for copying, and there is no language in the fee bill which warrants the recorder in charging anything further for searches made or copies taken by others on behalf of anyone having or seeking to acquire an interest in the property.

A number of common-law decisions limited the right of inspection to persons who had an interest in the property. The conflict of these with other cases is more apparent than real, for, where it was held that the records were open to the inspection of any person, they were of such a public nature that the members of the community had some interest in

them in general with other citizens, and different from what one man ordinarily has in records relating to the private property of others. An examination of these English authorities, and of the expressions of the courts in this country regarding them, which agree with few exceptions, tends to the belief that at common law a party could not compel an inspection of the records relating to titles in which he had no personal or public interest. The times are changed, and these old cases are not so applicable to our present conditions, or to the rights or needs of abstracting and title guaranty companies, which are of modern origin. The most of the realty in England was held in large estates by the nobility and landed proprietors, and more frequently was retained by the owner through life and passed to the oldest son or other heirs. There was not so large a proportion of small holdings in fee, nor the activity of sales and frequency of transfer, that exist in this country.

During the crystallization of the early common law the records in England were in the official language which had been inflicted upon that country by the Caesars, and which was not discernible to the uneducated masses or to many excepting officials and professional conveyancers. The part of that language which is still used in conveyancing, and which has come to us from the Romans through the mother <sup>85</sup> country, has been Anglicized or Americanized, and is within the ordinary knowledge of people possessing our advanced common education. There are other words, phrases, and legal terms still intelligible to few excepting lawyers and Latin scholars. In England judgments were not a lien upon land, and the seller of realty was required to furnish an abstract which relieved the purchaser from the necessity of examining the records, while the reverse is true in this country: *Brown v. Bellows*, 4 Pick. 179; *Espy v. Anderson*, 14 Pa. 312; *Easton v. Montgomery*, 90 Cal. 307, 25 Am. St. Rep. 123, 27 Pac. 280; *In re Pearsons Estate*, 98 Cal. 603, 33 Pac. 451; *Dwight v. Cutler*, 3 Mich. 566, 64 Am. Dec. 105, and cases cited.

Caveat emptor being the rule with us in the absence of a special agreement, it is just and essential to the protection of persons intending to purchase or take encumbrances that they be allowed the right of inspection. Sections 2663 and 2664, before quoted, and *Grellet v. Heilshorn*, 4 Nev. 526; *Wilson v. Wilson*, 23 Nev. 267, 45 Pac. 1009, and *McCabe v. Grey*, 20 Cal. 509, charge subsequent purchasers and mortgagees with notice of every recorded conveyance or writing

affecting real estate, and when the statute imposes notice and liability, it must by implication extend the right of examination of the records for the protection of any who are in a position to be injured without such inspection. To charge any who may sustain injury with notice of the contents of records, and then deny free access to those contents with which they are charged, would be an intolerable mockery in this day and generation, comparable to that perpetrated by the emperor who published his decrees in letters so small on tablets posted so high that they could not be read by the people, and punished for a disobedience of them.

We assume that there is no material dispute between the parties here in relation to the inspection of any record, the examination of which by the public is provided for by the language of the statute, such as those relating to chattel mortgages or newspapers, but the real issues are regarding the rights of relator to examine and copy without charge all records relating to deeds, mortgages, liens and the titles to <sup>as</sup> realty, concerning the inspection and copying of the most of which our statutes are silent, and, secondly, pertaining to the right of relator to have free access to these, when employed by persons interested, to make searches or furnish abstracts. Relator concedes that the recorder may make proper rules for the conduct of his office. There appears to be a dispute concerning the right to inspect documents filed before they are recorded. As the statute makes these notice upon filing, they are open to examination as soon as filed, the same as records generally, and subject to the same limitations. The business of furnishing abstracts prepared by professional and expert searchers, and of guaranteeing titles, is a legitimate one, and meets a want of cautious purchasers desiring to be well assured and guaranteed regarding titles. The tendency in large communities is to concentrate the service which previously was performed by attorneys and conveyancers.

Persons having or seeking to acquire an interest in property may examine the records for themselves or exercise their choice in employing an attorney or some one to search for them, or they may have the abstracting company furnish an abstract or guarantee the title; but, in the absence of any statute conferring the right, and of any common law or other decision warranting it, it is apparent that relator is not entitled to copy or examine all the records as sought by its petition. Whether changed conditions and growing demands of the community make it desirable to extend to abstract companies the privilege of copying all the records relating

to titles and of duplicating all of these in the offices of the county recorders, is a question of policy and expediency for the legislature, and not for the courts to determine. The fact that the statutes provided for the inspection of some records by any person, as indicated, does not authorize us to interpolate similar provisions into other sections relating to the record of conveyances and documents affecting private titles.

It is ordered that a writ of mandate issue directing the defendant and respondent, as county recorder of Nye county, to allow the petitioner and relator, and its agents and employes, free of charge, during regular business hours, to inspect and make memoranda and copies of all files and <sup>87</sup> records in the office of the county recorder of that county, in so far as they relate to any current or depending transactions in which relator is authorized or employed to make searches, furnish abstracts, or guarantee titles, by persons owning, having any encumbrance or lien upon, or interest in, or seeking to acquire by purchase, bond, contract, attachment, execution, mortgage, lien, or encumbrance any interest in property; the examination and taking of memoranda or copies to be made at such times and under such circumstances as will not prevent the respondent or his assistants from discharging their duties, or interfere with the right of other persons to have access to the records. The privilege sought by relator, of inspecting or copying all the records for the purpose of compiling an independent set of abstract-books, covering all the property to which the records relate, is denied.

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#### **RIGHT OF ABSTRACTERS TO HAVE ACCESS TO PUBLIC RECORDS.**

##### **I. Citizen's Right of Access in General, 911.**

##### **II. Abstracter's Right to Examine Records in Relation to Current Transactions, 912.**

##### **III. Abstracter's Right to Copy all Records, 913.**

##### **I. Citizen's Right of Access in General.**

Public records are open to the inspection of all citizens and other persons interested in their examination: *State v. Elsworth*, 61 Neb. 444, 85 N. W. 439; *Sloan Filter Co. v. El Paso Reduction Co.*, 117 Fed. 504. And this right of inspection carries with it, as a necessary incident to its advantageous exercise, the right to make reasonable memoranda, abstracts, and copies of the contents of the books and files: *Boylan v. Warren*, 39 Kan. 301, 7 Am. St. Rep. 551, 18 Pac. 174; *State v. King*, 154 Ind. 621, 57 N. E. 535; *Marsh v. Sanders*, 110 La. 726, 34 South. 752; *Clay v. Ballard*, 87 Va. 787, 13 S. E. 262.

The inspection, however, is subject to such reasonable regulations as the custodian of the records may prescribe, and cannot be insisted upon to an unreasonable extent, at unreasonable hours, or without regard to the rights of others: *Phelan v. State*, 76 Ala. 49; *State v. McMillan*, 49 Fla. 243, 38 South. 666; *Belt v. Prince George's County Abstract Co.*, 73 Md. 289, 20 Atl. 982, 10 L. R. A. 212; *Lum v. McCarty*, 39 N. J. L. 287. And an inspection cannot be insisted upon except for a legitimate purpose and by a person having some interest to be subserved; mandamus will not lie to aid an individual who has no interest in the matters to which the records relate to gain access thereto in order merely to gratify his curiosity or for idle purposes. Courts will not aid the idle and curious to obtain an examination of public records: *Brewer v. Watson*, 71 Ala. 299, 46 Am. Rep. 318; *Colnon v. Orr*, 71 Cal. 43, 11 Pac. 814; *Marsh v. Sanders*, 110 La. 726, 34 South. 752; *State v. McCubrey*, 84 Minn. 439, 87 N. W. 1126; *In re Caswell's Request*, 18 R. I. 835, 49 Am. St. Rep. 814, 20 Atl. 259, 27 L. R. A. 82; *Payne v. Staunton*, 55 W. Va. 202, 46 S. E. 927. But the fact that a person is a "tax-title sharp" does not bar his right to reasonable facilities to examine the tax-books and make memoranda therefrom: *Aitcheson v. Huebner*, 90 Mich. 643, 51 N. W. 634.

## II. Abstracter's Right to Examine Records in Relation to Current Transactions.

Persons having a present or prospective interest in real estate may themselves examine public records in order to ascertain the state of the title to the property and to make an abstract thereof, or they may exercise this right through an attorney or an abstract company. And a corporation organized to furnish abstracts and insure titles has a right to examine the records and take abstracts therefrom in so far as they relate to current and depending transactions in which the corporation is employed by persons having or seeking to acquire an interest in the property, the examination and copying to be made at such times and under such regulations as will not prevent the custodian of the records from discharging his duties or interfere with the right of other persons having a similar privilege of access to the records: *State v. Grimes*, 29 Nev. 50, ante, p. 883, 84 Pac. 1061; *West Jersey Title etc. Co. v. Barber*, 49 N. J. Eq. 474, 24 Atl. 381. Such corporations are entitled to inspect judgment records and indexes kept by the clerk of the United States circuit court, and take extracts therefrom, in relation to depending and current transactions, under proper regulations and restrictions: *In re Chambers*, 44 Fed. 786; *Commonwealth Title Ins. Co. v. Bell*, 87 Fed. 19, 105 Fed. 543, 49 C. C. A. 208, 110 Fed. 828, affirmed in 189 U. S. 131, 23 Sup. Ct. Rep. 569, 47 L. ed. 741. But where it does not appear that an action pending in a state circuit court is in any way connected with land that an abstracter has been employed to abstract the title, he cannot compel the county clerk by mandamus to allow him to inspect and copy the proceedings on file: *Burton v. Reynolds*, 110 Mich. 354, 68 N. W. 217.

Under the Maryland statutes the officers and employes of an abstract company have no legal right to examine and make abstracts of records in the county clerk's office without paying the fees which the law allows him: *Belt v. Prince George's County Abstract Co.*, 73 Md. 289, 28 Atl. 982, 10 L. R. A. 212. The Minnesota statutes do not authorize an examination of the records of the clerk of the district court by any person in order to complete and certify abstracts or title; when such is the purpose of an examination the clerk may refuse to permit it to be made. A person desiring an examination of records for that purpose is required to apply to the clerk therefor: *State v. McCubrey*, 84 Minn. 439, 87 N. W. 1126. Persons furnishing abstracts to others for compensation are entitled to access to the records for the purpose of making or completing their "tract indexes," subject to reasonable rules: *State v. Bachac*, 37 Minn. 372, 35 N. W. 7.

### III. Abstracter's Right to Copy All Records.

Neither abstract companies nor individuals have any common-law right to inspect and copy all the records of the county clerk, of the register of deeds, and other public records for the purpose of compiling a complete set of abstract-books covering all the property to which the records relate, in order to equip their own offices and place themselves in a position thereafter to furnish abstracts and guarantees of title therefrom: *Bean v. People*, 7 Colo. 200, 2 Pac. 909; *Land Title Warranty etc. Co. v. Tanner*, 99 Ga. 470, 27 S. E. 727; *Cormack v. Wolcott*, 37 Kan. 391, 15 Pac. 245; *Webber v. Townley*, 43 Mich. 534, 38 Am. Rep. 213, 5 N. W. 971; *State v. Grimes*, 29 Nev. 50, ante, p. 883, 84 Pac. 1061; *Newton v. Fisher*, 98 N. C. 20, 3 S. E. 822; and perhaps setting up a business rivaling that of the custodian of the records or of the county itself: *Davis v. Abstract Const. Co.*, 121 Ill. App. 121; *Barber v. West Jersey Title & Guaranty Co.*, 53 N. J. Eq. 158, 32 Atl. 222.

A statutory provision that "the records of the judge of probate's office must be free for the examination of all persons, when not in use by him," and limited to any person having an interest, his agent or attorney, gives the right to take memoranda or copies; but it does not confer on attorneys, or other persons, who are engaged in the business of negotiating loans on mortgages of real estate, the right to make an abstract from the records of conveyances, of the titles to all the lands in the county, for future use in their business when required: *Randolph v. State*, 82 Ala. 527, 60 Am. Rep. 761, 2 South. 714. "We must not, however, be understood," said the court in this case, "as intending to abridge the right, conferred by statute, of 'free examination,' by all persons having an interest, of the records of the probate judge's office. Nor will we confine this right to a mere right to inspect. He may make memoranda or copies, if he will, and to this end may employ an agent or attorney. The limitation is, that he must not obstruct the officers in charge in the performance of their official duties, by withholding records from them, when needed for the performance of an official function. Nor is this

right of examination confined to persons claiming title, or having a present pecuniary interest in the subject matter. It will embrace all persons interested, present or prospectively, in the chain of title, or nature of encumbrance, proposed to be investigated. The right of free examination is the rule, and the inhibition of such privilege, when the purpose is speculative, or from idle curiosity, is the exception": Approved in *Boylan v. Warren*, 39 Kan. 301, 7 Am. St. Rep. 551, 18 Pac. 174.

In Georgia, where by statute all books kept by any public officer are subject to the inspection of all citizens, and where in case the officer's aid is required in making an inspection he is entitled to a fee, it has been held that no one is entitled, without payment of the fee, to examine the public records of deeds to make abstracts for publication: *Buck v. Collins*, 51 Ga. 391, 21 Am. Rep. 236.

The legislature is competent to throw restrictions about the right to inspect public records: *State v. McCubrey*, 84 Minn. 439, 87 N. W. 1126; and, on the other hand, the legislature is competent to extend the right of inspection so as to authorize persons to have access to records in order to transcribe them for such purposes as the public interest may require: *Silver v. People*, 45 Ill. 224. The common-law right of inspection has been materially enlarged in some jurisdictions: *Stocknan v. Brooks*, 17 Colo. 248, 29 Pac. 746; *Burton v. Tuite*, 78 Mich. 363, 44 N. W. 282, 7 L. R. A. 73; even to the extent of permitting abstract companies to go so far as to make a copy of all public records relating to land titles in a given county in order to make up a set of abstract-books for their own use: *Hanson v. Eichstaedt*, 69 Wis. 538, 35 N. W. 30; *State v. McMillan*, 49 Fla. 243, 38 South. 666. "Under the terms and provision of our statute," said the Florida court in the above case, "the public generally, including any person or firm who may be engaged in the enterprise of compiling a complete set of abstract-books of the titles to all the real estate in a county, have the continuous right at all reasonable hours and times, by themselves or their agents, to inspect and make extracts from any and all of the public records in the offices of clerks of the circuit courts; and that where such inspection and extracting is done by the parties themselves, or by their agents or assistants, without any service or assistance from the clerk or his deputies in connection therewith, other than that general supervision and watchfulness as to what is going forward in his office that is necessary to the safekeeping of such records, then such clerk is not entitled to any fees or compensation."

But even when the statutes confer this extensive right on abstracters, they must exercise it reasonably, with due regard to the rights and duties of the custodian of the records and of the right of others having similar privileges of access; and the right can be exercised only upon the payment of the fees prescribed by law, and upon a compliance with such reasonable regulations as the law and the custodian of the records may prescribe: *State v. McMillan*, 49 Fla. 243, 38 South. 666; *Scribner v. Chase*, 27 Ill. App. 36; *Day v.*



Button, 96 Mich. 600, 56 N. W. 3; Burton v. Reynolds, 102 Mich. 55, 60 N. W. 452; State v. Rachac, 37 Minn. 372, 35 N. W. 7. Thus, where an abstract company contemplates putting a dozen or more men in the office of the register of deeds in order to copy the records there he may limit their number to three: People v. Richards, 99 N. Y. 620, 1 N. E. 258. And a register of deeds may refuse admittance to employes of an abstract company who are insolent in their behavior: People v. Reilly, 38 Hun, 429.

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### IN RE CHARTZ.

[29 Nev. 110, 85 Pac. 352.]

**CONTEMPT—Offensive Petition for Rehearing in the Supreme Court.**—Where an attorney in a petition for rehearing in a case in which the supreme court has upheld the constitutionality of a statute limiting the hours of labor, states that in his opinion the decisions favoring the power of the state to limit the hours of labor are all wrong, and written by men who have never performed manual labor, or by politicians and for politics, who do not know what they write about, he is guilty of contempt, which is not purged by an apology and a disavowal of any intent to commit contempt, and the offensive petition should be stricken from the files and the attorney reprimanded and directed to pay the costs of the contempt proceeding. (p. 925.)

Alfred Chartz, in propria persona.

<sup>111</sup> TALBOT, J. Respondent was commanded to show cause why he should not be adjudged guilty of contempt for having, as an attorney of record in the Matter of the Application of Peter Kair for a Writ of Habeas Corpus, filed in this court a petition for rehearing in which he made use of the following statement:

“In my opinion the decisions favoring the power of the state to limit the hours of labor, on the ground of the police power of the state, are all wrong, and written by men who have never performed manual labor, or by politicians and for politics. They do not know what they wrote about.”

Respondent appeared in response to the citation, filed a brief, and made an extended address to the court in which he took the position that the words in question were not contemptuous, disavowed any intention to commit a contempt of court, and, further, that, if the language was by the court deemed to be objectionable, he apologized for its use and asked that the same be stricken from the petition.

In considering the foregoing statement, it is proper to note that in the briefs filed by respondent upon the hearing of

the case in the first instance he used language of similar import, which the court did not take cognizance of, attributing its use to overzealousness upon the part of counsel, but which was of such a nature that the attorney general in his reply brief referred to it as insinuating that the legislature in enacting, and this court in sustaining, the law, were being<sup>112</sup> "impelled or controlled by some mythical political influence or fear which exists only in the pyrotechnic imagination of counsel." Also, the case and its condition at the time the objectionable language was used should be taken into consideration. The proceeding in which this petition was filed had been brought to test the constitutionality of a section of an act of the legislature limiting labor to eight hours per day in smelters and other ore-reduction works, except in cases of emergency, where life or property is in imminent danger: Stats. 1903, p. 33, c. 10. This act had passed the legislature almost unanimously and had received the governor's approval.

At the time of filing the petition respondent was aware that this court had previously sustained the validity of this enactment as limiting the hours of labor in underground mines (*Re Boyce*, 27 Nev. 299, 75 Pac. 1, 65 L. R. A. 47), and in mills for the reduction of ores, smelters, etc. (*Re Kair*, 28 Nev. 127, 113 Am. St. Rep. 817, 80 Pac. 463, 82 Pac. 453), and that similar statutes had been upheld by the supreme court of Utah and the supreme court of the United States in the cases of *State v. Holden*, 14 Utah, 71, 96, 46 Pac. 757, 1105, 37 L. R. A. 103, 108; *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. Rep. 383, 42 L. ed. 780; *Short v. Bullock-Beck & C. Min. Co.*, 20 Utah, 20, 57 Pac. 720, 45 L. R. A. 603, and by the supreme court of Missouri, in *State v. Cantwell*, 179 Mo. 245, 78 S. W. 569. It may not be out of place here, also, to note that the latter case has since been affirmed by the supreme court of the United States, and more recently the latter tribunal, adhering to its opinion therein and in the Utah cases, has refused to interfere with the decisions of this court in *Re Kair*.

It would seem, therefore, a natural and proper, if not a necessary, deduction from the language in question, when taken in connection with the law of the cases as enunciated by this and other courts, that counsel, finding that the opinion of the highest court in the land was adverse, instead of favorable, to his contentions, in that it specifically affirmed the Utah decision in *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. Rep. 383, 42 L. ed. 780, which sustained the statute from

which ours is copied, and that all of the courts named were adverse to the views he advocated, had resorted <sup>113</sup> to abuse of the justices of this and other courts, and to imputations of their motives. The language quoted is tantamount to the charge that this tribunal and the supreme courts of Utah, Missouri, and of the United States, and the justices thereof who participated in the opinions upholding statutes limiting the hours of labor in mines, smelters and other ore-reduction works, were misguided by ignorance or base political considerations.

Taking the most charitable view, if counsel became so imbued and misguided by his own ideas and conclusions that he honestly and erroneously conceived that we were controlled by ignorance or sinister motives, instead of by law and justice, in determining constitutional or other questions, and that these other courts and judges and the members of the legislature and the governor were guilty of the accusation he made because they and we failed to follow the theories he advocated, and that his opinions ought to outweigh and turn the scale against the decisions of the four courts named, including the highest in the land, with nineteen justices concurring, nevertheless it was entirely inappropriate to make the statement in the brief. If he really believed or knew of facts to sustain the charge he made, he ought to have been aware that the purpose of such a document is to enlighten the court in regard to the controlling facts and the law, and convince by argument, and not to abuse or vilify, and that this court is not endowed with power to hear or determine charges impeaching its justices.

On the other hand, if he did not believe the accusation, and made it with a desire to mislead, intimidate or swerve from duty the court in its decision, the statement would be the more censurable. So that taking either view, whether respondent believed or disbelieved the heinous charge he made, such language is unwarranted and contemptuous. The duty of an attorney in his brief or argument is to assist the court in ascertaining the truth pertaining to the pertinent facts, the real effect of decisions and the law applicable to the case, and he far oversteps the bounds of professional conduct when he resorts to misrepresentation, false charges, or vilification. He may fully present, discuss, and argue the evidence and the <sup>114</sup> law, and freely indicate wherein he believes that decisions and rulings are wrong or erroneous, but this he may do effectually without making bald accusations against the motives and intelligence of the court, or being discourteous or

resorting to abuse which is not argument nor convincing to reasoning minds. If respondent has no respect for the justices, he ought to have enough regard for his position at the bar to refrain from attacking the tribunal of which he is a member, and which the people through the constitution and by general consent have made the final interpreter of the laws which he, as an officer of the court, has sworn to uphold and protect. These duties are so plain that any departure from them by a member of the bar would seem to be willful and intentional misconduct.

The power of courts to punish for contempt and to maintain decency and dignity in their proceedings is inherent, and is as old as courts are old. It is also provided by statute. By analogy we note the adjudications and penalties imposed in a few of the many cases.

Lord Cottingham imprisoned Edmund Lechmere Charlton, a barrister and member of the house of commons, for sending a scandalous letter to one of the masters of the court, and a committee from that body, after an investigation, reported that, in their opinion, his "claim to be discharged from imprisonment by reason of privilege of parliament ought not to be admitted": 2 Mylne & C. 317.

When the case of *People v. Tweed*, in New York City, came up a second time before the same judge, before the trial commenced, the prisoner's counsel privately handed to the judge a letter, couched in respectful language, in which they stated, substantially, that their client feared, from the circumstances of the former trial, that the judge had conceived a prejudice against him, and that his mind was not in the unbiased condition necessary to afford an impartial trial, and respectfully requested him to consider whether he should not relinquish the duty of presiding at the trial to some other judge, at the same time declaring that no personal disrespect was intended toward the judge or the court. The judge retained the letter, and went on with the trial. At the <sup>115</sup> close of the trial he sentenced three of the writers to a fine of two hundred and fifty dollars each, and publicly reprimanded the others, the junior counsel, at the same time expressing the opinion that if such a thing had been done by them in England, they would have been "expelled from the bar within one hour." The counsel at the time protested that they intended no contempt of court, that they felt and intended to express no disrespect for the judge, but that their action had been taken in furtherance of what they deemed the vital interests of their client and the faithful and con-

scientious discharge of their duty. The judge accepted the disclaimer of personal disrespect, but refused to believe the disclaimer of intention to commit a contempt, and enforced the fines: 11 Alb. Law Jour. 408; *In re Pryor*, 18 Kan. 72, 26 Am. Rep. 747.

For sending to a district judge out of court a letter stating that "the ruling you have made is directly contrary to every principle of law, and everybody knows it, I believe, and it is our desire that no such decision shall stand unreversed in any court we practice in," an attorney was fined fifty dollars and suspended from practice until the amount should be paid. In delivering the opinion of the supreme court of Kansas (*In re Pryor*, 18 Kan. 72, 26 Am. Rep. 747), Brewer, J., said: "Upon this we remark, in the first place, that the language of this letter is very insulting. To say to a judge that a certain ruling which he has made is contrary to every principle of law, and that everybody knows it, is certainly a most severe imputation. We remark, secondly, that an attorney is under special obligations to be considerate and respectful in his conduct and communications to a judge. He is an officer of the court, and it is therefore his duty to uphold its honor and dignity. The independence of the profession carries with it the right freely to challenge, criticise and condemn all matters and things under review in evidence. But with this privilege goes the corresponding obligation of constant courtesy and respect toward the tribunal in which the proceedings are pending. And the fact that the tribunal is an inferior one, and its rulings not final and without appeal, does not diminish in the slightest degree this obligation of courtesy and respect. A justice of the peace before whom <sup>116</sup> the most trifling matter is being litigated is entitled to receive from every attorney in the case courteous and respectful treatment. A failure to extend this courtesy and respectful treatment is a failure of duty; and it may be so gross a dereliction as to warrant the exercise of the power to punish for contempt. It is so that in every case where a judge decides for one party he decides against another; and oftentimes both parties are beforehand equally confident and sanguine. The disappointment, therefore, is great, and it is not in human nature that there should be other than bitter feeling which often reaches to the judge as the cause of the supposed wrong. A judge, therefore, ought to be patient, and tolerate everything which appears but the momentary outbreak of disappointment. A second thought will generally make a party ashamed of such outbreak. So an

attorney sometimes, thinking it a mark of independence, may become wont to use contemptuous, angry or insulting expressions at every adverse ruling, until it becomes the court's clear duty to check the habit by the severe lesson of a punishment for contempt. The single insulting expression for which the court punishes may, therefore, seem to those knowing nothing of the prior conduct of the attorney, and looking only at the single remark, a matter which might well be unnoticed; and yet, if all the conduct of the attorney was known, the duty of interference and punishment might be clear. We remark, finally, that while, from the very nature of things, the power of a court to punish for contempt is a vast power, and one which in the hands of a corrupt or unworthy judge may be used tyrannically and unjustly, yet protection to individuals lies in the publicity of all judicial proceedings, and the appeal which may be made to the legislature for proceedings against any judge who proves himself unworthy of the power intrusted to him.

Where a contention arose between counsel as to whether a witness had not already answered a certain question, and the court, after hearing the reporter's notes read, decided that she had answered it, whereupon one of the attorneys sprang to his feet, and, turning to the court, said in loud tones and insulting manner: "She has not answered the question"—<sup>117</sup> held that "the attorney was guilty of contempt, regardless of the question whether the decision of the court was right or wrong": *Russell v. French*, 67 Iowa, 102, 24 N. W. 741.

In *Sears v. Starbird*, 75 Cal. 91, 7 Am. St. Rep. 123, 16 Pac. 531, a brief reflecting upon the trial judge was stricken from the record in the supreme court because it contained the following: "The court, out of a fullness of his love for a cause, the parties to it, or their counsel, or from an over-zealous desire to adjudicate 'all matters, points, arguments and things,' could not, with any degree of propriety under the law, patch and doctor up the case of the plaintiffs, which, perhaps, the carelessness of their counsel had left in such a condition as to entitle them to no relief whatever." In reference to this language, it was said in the opinion: "Here is a distinct intimation that the judge of the court below did not act from proper motives, but from a love of the parties or their counsel. We see nothing in the record which suggests that such was the case. On the contrary, the action complained of seems to us to have been entirely proper: See *Sill v. Reese*, 47 Cal. 294. The brief, therefore, contains

a groundless charge against the purity of motive of the judge of the court below. This we regard as a grave breach of professional propriety. Every person on his admission to the bar takes an oath to 'faithfully discharge the duties of an attorney and counsel.' Surely such a course as was taken in this case is not a compliance with that duty. In *Friedlander v. Sumner G. & S. M. Co.*, 61 Cal. 116, the court said: 'If, unfortunately, counsel in any case shall ever so far forget himself as willfully to employ language manifestly disrespectful to the judge of the superior court, a thing not to be anticipated, we shall deem it our duty to treat such conduct as a contempt of this court, and to proceed accordingly.' And the briefs in the case were ordered to be stricken from the files."

In *United States v. Church of Jesus Christ of Latter Day Saints*, 6 Utah, 9, 21 Pac. 503, language used in a petition filed, in effect accusing the court of an attempt to shield its receiver and his attorneys from an investigation of charges of gross misconduct <sup>118</sup> in office, and containing the statement that "we must decline to assume the functions of a grand jury, or attempt to perform the duty of the court in investigating the conduct of its own officers," was held to be contemptuous.

In *Re Terry*, 13 Saw. 440, 36 Fed. 419, an extreme case, for charging the court with having been bribed, resisting removal from the courtroom by the marshal acting under an order from the bench, and using abusive language, one of the defendants was sent to jail for thirty days and the other for six months. Judge Terry, who had not made any accusation against the court, sought release and to be purged of the contempt by a sworn petition in which he alleged that in the transaction he did not have the slightest idea of showing any disrespect to the court. It was held that this could not avail or relieve him, and it was said: "The law imputes an intent to accomplish the natural result of one's acts, and, when those acts are of a criminal nature, it will not accept, against such implication, the denial of the transgressor. No one would be safe if a denial of a wrongful or criminal intent would suffice to release the violator of law from the punishment due to his offenses."

In an application for a writ of habeas corpus, growing out of *Re Terry*, 13 Saw. 440, 36 Fed. 419, Harlan, speaking for the supreme court of the United States, said: "We have seen that it is a settled doctrine in the jurisprudence, both of England and of this country, never supposed to be in con-

flict with the liberty of the citizen, that for direct contempts committed in the face of the court, at least one of superior jurisdiction, the offender may, in its discretion, be instantly apprehended and immediately imprisoned, without trial or issue, and without other proof than its actual knowledge of what occurred, and that according to an unbroken chain of authorities, reaching back to the earliest times, such power, although arbitrary in its nature, and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions. Without it, judicial tribunals would be at the mercy of the disorderly and violent, who respect neither the laws enacted for the vindication of public and private rights nor the <sup>119</sup> officers charged with the duty of administering them": *Ex parte Terry*, 128 U. S. 289, 9 Sup. Ct. Rep. 77, 32 L. ed. 405.

In *Re Woolley*, 74 Ky. (11 Bush) 95, it was held that to incorporate into a petition for rehearing the statement that "your honors have rendered an unjust decree," and other insulting matter, is to commit in open court an act constituting a contempt on the part of the attorney; and that, where the language spoken or written is of itself necessarily offensive, the disavowal of an intention to commit a contempt may tend to excuse, but cannot justify the act. From a paragraph in that opinion we quote: "An attorney may unfit himself for the practice of his profession by the manner in which he conducts himself in his intercourse with the courts. He may be honest and capable, and yet he may so conduct himself as to continually interrupt the business of the courts in which he practices, or he may, by a systematic and continuous course of conduct, render it impossible for the courts to preserve their self-respect and the respect of the public and at the same time permit him to act as an officer and attorney. An attorney who thus studiously and systematically attempts to bring the tribunals of justice into public contempt is an unfit person to hold the position and exercise the privileges of an officer of those tribunals. An open, notorious and public insult to the highest judicial tribunal of the state for which an attorney contumaciously refuses in any way to atone may justify the refusal of that tribunal to recognize him in the future as one of its officers."

In *Re Cooper*, 32 Vt. 258, the respondent was fined for ironically stating to a justice of the peace: "I think this magistrate wiser than the supreme court." *Redfield, C. J.*, said: "The counsel must submit in a justice court, as well as in this court, and with the same formal respect, however



difficult it may be either here or there. We do not see that the relator has any alternative left him but the submission to what he no doubt regards as a misapprehension of the law, both on the part of the justice and of this court. And in that respect he is in a condition very similar to many who have failed to convince others of the soundness of their own views, or to become convinced themselves of their fallacy."

<sup>120</sup> In *Mahoney v. State* (Ind. App.), 72 N. E. 151, an attorney was fined fifty dollars for saying: "I want to see whether the court is right or not. I want to know whether I am going to be heard in this case in the interest of my client, or not"—and making other insolent statements.

In *Redman v. State*, 28 Ind. 205, the judge informed counsel that a question was improper, and the attorney replied: "If we cannot examine our witnesses, he can stand aside." This language was deemed offensive, and the court prohibited that particular attorney from examining the next witness.

In *Brown v. Brown*, 4 Ind. 627, 58 Am. Dec. 641, the lawyer was taxed with the cost of the action for filing and reading a petition for divorce which was unnecessarily gross and indelicate.

In *McCormick v. Sheridan* (Cal.), 20 Pac. 24: "A petition for rehearing stated that 'how or why the honorable commissioner should have so effectually and substantially ignored and disregarded the uncontradicted testimony, we do not know. It seems that neither the transcript nor our briefs could have fallen under the commissioner's observation. A more disingenuous and misleading statement of the evidence could not well be made. It is substantially untrue and unwarranted. The decision seems to us to be a travesty of the evidence.' Held, that counsel drafting the petition was guilty of contempt committed in the face of the court, notwithstanding a disavowal of disrespectful intention. A fine of two hundred dollars was imposed, with an alternative of serving in jail."

The chief justice, speaking for the court in *State v. Morrill*, 16 Ark. 384, said: "If it were the general habit of the community to denounce, degrade and disregard the decisions and judgments of the courts, no man of self-respect and just pride of reputation would remain upon the bench, and such only would become the ministers of the law as were insensible to defamation and contempt. But happily, for the good order of society, men, and especially the people of this country, are generally disposed to respect and abide the decisions of the tribunals ordained by government as the common arbiters of

their rights. But where isolated individuals, in violation of the better instincts of human nature, and disregarding of law<sup>121</sup> and order, wantonly attempt to obstruct the course of public justice by disregarding and exciting disrespect for the decisions of its tribunals, every good citizen will point them out as proper subjects of legal animadversion. A court must naturally look first to an enlightened and conservative bar, governed by a high sense of professional ethics, and deeply sensible, as they always are, of its necessity to aid in the maintenance of public respect for its opinions."

In *Sommers v. Torrey*, 5 Paige (N. Y.), 54, 28 Am. Dec. 411, it was held that the attorney who put his hand to scandalous and impertinent matter stated against the complainant and one not a party to the suit is liable to the censure of the court and chargeable with the cost of proceedings to have it expunged from the record.

In *State v. Grailhe*, 1 La. Ann. 183, the court held that it could not consistently with its duty receive a brief expressed in disrespectful language, and ordered the clerk to take it from the files.

Referring to the rights of courts to punish for contempt, Blackford, J., in *State v. Tipton*, 1 Blackf. (Ind.) 166, said "This great power is intrusted to those tribunals of justice for the support and preservation of their respectability and independence. It has existed from the earliest period to which the annals of jurisprudence extend; and except in a few cases of party violence, it has been sanctioned and established by the experience of ages."

See, also, *Lord Mayor of London's Case*, 3 Wils. 188; opinion of Kent, C. J., in *Case of Yates*, 4 Johns. (N. Y.) 317; *Johnston v. Commonwealth*, 1 Bibb (Ky.), 598.

.At page 206 of *Weeks on Attorneys*, second edition, it is said: "Language may be contemptuous, whether written or spoken, and, if in the presence of the court, notice is not essential before punishment, and scandalous and insulting matter in a petition for rehearing is equivalent to the commission in open court of an act constituting a contempt. When the language is capable of explanation, and it is explained, the proceedings must be discontinued; but where it is offensive and insulting per se, the disavowal of an intention to commit a contempt may tend to excuse, but cannot justify, the<sup>122</sup> act. From an open, notorious and public insult to a court, for which an attorney contumaciously refused in any way to atone, he was fined for contempt, and his authority to practice revoked."

Other authorities in line with these we have mentioned are cited in the note to *Re Cary* (D. C.), 10 Fed. 622, and in 9 Cyc. 20, where it is said that contempt may be committed by inserting in pleadings, briefs, motions, arguments, petitions for rehearing, or other papers filed in court insulting or contemptuous language, reflecting on the integrity of the court.

By using the objectionable language stated, respondent became guilty of a contempt which no construction of the words can excuse or purge. His disclaimer of any intentional disrespect to the court may palliate, but cannot justify, a charge which under any explanation cannot be construed otherwise than as reflecting on the intelligence and motives of the court, and which could scarcely have been made for any other purpose unless to intimidate or improperly influence our decision. As we have seen, attorneys have been severely punished for using language in many instances not so reprehensible, but in view of the disavowal in open court we have concluded not to impose a penalty so harsh as disbarment or suspension from practice, or fine or imprisonment. Nor do we forget that, in prescribing against the misconduct of attorneys, litigants ought not to be punished or prevented from maintaining in the case all petitions, pleadings and papers essential to the preservation and enforcement of their rights.

It is ordered that the offensive petition be stricken from the files, that respondent stand reprimanded and warned, and that he pay the costs of this proceeding.

NORCROSS, J. I concur.

FITZGERALD, C. J., Concurring. In this matter my concurrence is special and to this extent: The language used by the respondent in his petition for a rehearing, and on which this contempt proceeding was based, was, in my opinion, contemptuous of this court, and, of <sup>123</sup> course, should not have been used. The respondent, however, in response to the order of the court to show cause why he should not be punished therefor, appeared and disclaimed any intention to be disrespectful or contemptuous, and moved that, if the court deemed the language contemptuous, the said language be stricken out of his petition. Respondent not only contended and said that he had no intention to be disrespectful or contemptuous, but he also earnestly contended that the language charged against him and which he admitted having used was not disrespectful or contemptuous. In this last contention, I think, he was plainly in error.

The duty of courts in matters of this kind is indeed an unpleasant one, such, at least, has it always appeared to me. Yet it must sometimes be done.

Therefore, I concur in the conclusion reached, and in the order stated in the opinion of Justice Talbot, to wit: "It is ordered that the offensive petition be stricken from the files, that respondent stand reprimanded and warned, and that he pay the costs of this proceeding."

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*Offensive Language in Briefs and Other Papers Filed* as constituting a ground for the disbarment of an attorney is discussed in *In re Philbrook*, 105 Cal. 471, 45 Am. St. Rep. 59, and note. It has been held that a letter by an attorney to a judge out of court stating: "The ruling you have made is directly contrary to every principle of law, and everybody knows it, I believe"; and "it is our desire that no such decision shall stand unreversed in any court we practice in," is a contempt of court which can be summarily punished: *In re Pryor*, 18 Kan. 72, 26 Am. Rep. 747. See, however, *Neel v. State*, 9 Ark. 259, 50 Am. Dec. 209.

*As to What Courts, Tribunals and Persons are Authorised to punish contempts*, see the note to *Farnham v. Colman*, 117 Am. St. Rep. 950.

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## PHENIX v. FRAMPTON.

[29 Nev. 306, 90 Pac. 2.]

**INJUNCTION Against Erection of Building Where Title is in Dispute.**—A court may properly restrain the completion of a building of a substantial, permanent character, pending the final determination of an action wherein the right and title to the land upon which the building stands is in issue; but the injunction should not be so broad as to prohibit the builder from entering the premises to do whatever is necessary for the preservation of the structure. (pp. 927, 931, 932.)

Charles S. Wilson, William B. Ogden and James K. Redington, for the appellant.

Thompson, Morehouse & Thompson, for the respondents.

**813 TALBOT, C. J.** This is an appeal from an order refusing to dissolve a temporary injunction. In the complaint it is alleged that the plaintiffs are the owners and in possession of lots 1 and 2 in block 12 in Phenix's north addition to the town of Goldfield; that the same are a part of the Montezuma mining claim; that the defendant, disregarding the possession of the plaintiffs, on or about the first day of October, 1906, entered upon the premises and commenced to dig up and sink and excavate a cellar, and to build and construct, and

at the time of filing the complaint was building and constructing, a large and commodious dwelling-house thereon of a permanent character, with the intention to occupy and possess the same without the consent of the plaintiffs, which improvements, when completed, would become in time an easement, and affect the title and right of possession of the plaintiffs to the premises, and be the foundation of an adverse claim; that defendant threatens to continue to dig up and disturb and excavate the soil, and to continue the erection of the building, and to dispossess plaintiffs and set up an adverse title. Following the demand in the complaint, and upon the giving of an undertaking in the sum of five thousand dollars, the district court made a temporary order restraining defendant from entering upon <sup>314</sup> the premises, and from digging or excavating on the land, and from building or constructing any dwelling-house or other structure or fixture thereon, and from committing any act of trespass. Defendant filed a verified answer denying that the plaintiffs were the owners or entitled to possession of the land, and alleging that the defendant was the owner and in the actual, undisturbed, peaceful possession of these lots under sections 2387 and 2389, inclusive, of the Revised Statutes of the United States (U. S. Comp. Stats. 1901, pp. 1457, 1458), and by reason of an application for a townsite upon the public domain made by the defendant and numerous other persons through the district judge as trustee, which application had been entertained by the commissioner of the general land office. It is also averred in the answer that the defendant entered upon and took possession of the premises in 1905, and erected thereon a store building and dwelling-house of the value of about one thousand dollars; that about the first day of October, 1906, he moved this building back to the alley line; and that, as averred in the complaint, he commenced the erection upon the lot in dispute of a large and commodious dwelling-house to consist of two stories and basement, the basement constructed with stone walls in size twenty by thirty feet, the superstructure two stories high, thirty by eighty feet, lathed and plastered, to cost six thousand dollars, and that about four thousand dollars had been expended thereon at the time of filing the complaint and issuance of the injunction. It is admitted in the answer that these improvements are of a permanent character. The defendant moved to dissolve the preliminary restraining order upon affidavits following partly the denials and allegations of the answer and relating to the condition and value of the improvements, to which counter-

affidavits were filed, and the appeal is from the order denying this motion.

It will be seen that the question involved is whether the court may properly restrain the completion of a building of a substantial, permanent character pending the final determination of the action, when the right and title to the land upon which it stands are clearly in issue. On behalf of the appellant it is urged that the plaintiffs are out of possession, that if they are entitled to any relief they have a full and <sup>315</sup>adequate remedy at law, that the injury to the property is not irreparable, that all the material averments contained in the complaint are fully denied by the answer, and that from the facts in the record and those of which the court below took judicial notice the claim of the defendant is at least presumptively valid, and that for any one of these reasons the injunction should have been dissolved. The claim that respondents are out of possession is contrary to the allegations of the complaint, and cannot be assumed by the court until this question—the same as others in issue—has been determined upon the trial: *Rose v. Richmond M. Co.*, 17 Nev. 25, 27 Pac. 1105.

As to the contention that appellants were entitled to have the restraining order dissolved on the denials in the answer, the facts warranting the injunction, if one is proper to restrain the erection of permanent buildings, are shown and admitted by the pleadings. That the opposing parties are claiming the right and title to, and possession of, the land is clear. Both the complaint and answer allege, and neither denies, that this extensive building is under construction, and that, unless restrained, the defendant will bring it to completion. It may be said, then, that all the facts essential to the granting of the temporary injunctions are undisputed. However squarely the issue may be drawn with regard to the ownership and possession, and regardless of whether the affidavits presented on the motion to dissolve be ignored, the uncontroverted showing that the title and right of possession are contested, and that unless restrained the defendant will erect a building of a substantial, permanent character on these lots, is sufficient to support an order for the preservation of the property and enjoining the erection of the building until the title and right to the land can be adjudicated. This may enable the prevailing party, whoever he may be, to finally come into his own without further change or alteration. If facts are alleged which, if established on the trial, would warrant a permanent injunction, it would seem that generally the

conditions which would make the final injunction effective ought to be maintained until trial can be had.

It is a well-recognized rule that courts of equity will preserve <sup>316</sup> the status of the property in dispute pending litigation, and the authorities generally hold that equity will restrain extensive excavations and the erection of walls and permanent buildings. The legal principle involved is well expressed by the following extracts from decisions in other jurisdictions:

*Southmayd v. McLaughlin*, 24 N. J. Eq. 181: "The defendant has not only pulled down the fence, but has proceeded to excavate the land, and drive piles there for his foundation. . . . It is within the province of this court to arrest his progress in the trespass, at least until he shall have established his right at law: *Varick v. Corporation of New York*, 4 Johns. Ch. 53; *Jerome v. Ross*, 7 Johns. Ch. 315; *Farron v. Van Sittart*, 1 Eng. R. & C. Cas. 602; *High on Injunctions*, 477, 483. . . . In *Farron v. Van Sittart* the court restrained the defendants from committing a trespass, though it was merely the leveling of farm land for the laying of a railway track, or, as the lord chancellor expressed it, 'making level ground of that of which there is at present no portion level.' In the present case, the trespass goes to the destruction of the inheritance. The defendant is not only proceeding to dig away the soil of the land in possession of the complainants, but is about to take exclusive possession of it with a permanent structure."

*Chicago etc. Ry. Co. v. Porter*, 72 Iowa, 426, 34 N. W. 286: "It is further claimed that injunction is not the proper remedy; that the action should have been at law for damages. We do not think this position is well taken. There can be no doubt that equity will enjoin encroachments upon land by making excavations, erecting permanent buildings, and the like."

*Long v. Ragan*, 94 Md. 462, 51 Atl. 181: "It is clear, we think, that a trespass of this character works a destruction of the property as it had been held and enjoyed by the owner, and that full and adequate relief could not be had at law. In *Herr v. Bierbower*, 3 Md. Ch. 456, the chancellor said: 'Taking possession of a portion of their lot and digging upon it a foundation for a building and erecting a building upon that foundation, thereby reducing the front of the lot <sup>317</sup> so as to prevent their building upon it themselves, in the mode which would be most advantageous, surely goes to the

destruction, pro tanto, of the estate, and injures the just enjoyment of the property in the future.' "

In the latter case it was held that an injunction will not be granted to restrain a mere trespass, where the injury is not irreparable and destructive to the plaintiff's estate, but is susceptible of perfect pecuniary compensation, in the ordinary course of law; that if the trespass goes to the destruction of the inheritance, or the mischief be not susceptible of perfect and adequate pecuniary compensation at law, or if the acts done or threatened to the property be ruinous, or irreparable, or impair its just enjoyment in future, the courts of equity will, without hesitation, interfere by injunction.

In *Church v. Joint School District*, 55 Wis. 399, 13 N. W. 272, the school board were enjoined from erecting a school-house. The court said: "The principle of these cases is 'that an attempt to enter upon and take permanent possession of land for public use without the assent of the owner, and without the damages having been ascertained and paid or tendered, is, or would be, if consummated, in the nature of an irreparable injury, for the prevention of which the writ of injunction constitutes the proper remedy.' This principle was first applied in a case closely analogous to this, in which a town threatened to take land for the purposes of a highway: *Norton v. Peck*, 3 Wis. 714. Then it was applied by analogy to the threatened taking of land by a railroad company for the use of its road in *Shepardson v. Milwaukee etc. R. R. Co.*, 6 Wis. 605, and again applied in *Powers v. Bears*, 12 Wis. 213, 78 Am. Dec. 733, and lastly in *Diederichs v. Northwestern etc. Ry. Co.*, 33 Wis. 219."

In *Clayton v. Shoemaker*, 67 Md. 216, 9 Atl. 635, it was held that there should be a temporary injunction prohibiting the defendant from proceeding with the erection of his building until the title had been decided in a court of law.

In *Newell v. Sass*, 142 Ill. 104, 31 N. E. 176, an injunction was granted to prevent the completion of a threatened injury which had been commenced by excavating and starting to<sup>318</sup> build a fence. At section 707, *High on Injunctions*, third edition, it is said: "Where the trespass complained of consists in the erection of buildings upon complainant's land, a distinction is taken between the buildings when in an incomplete and when in a finished state. And while the jurisdiction is freely exercised before the completion of the structures, yet if they have been completed the relief will generally be withheld, and the person aggrieved will be left to his rem-



edy by ejectment": *Sherman v. Clark*, 4 Nev. 138, 97 Am. Dec. 516.

Other citations may be found in 22 Cyc., which sustain the statement in the text at page 760, that if the act sought to be enjoined and the injury resulting are continuing in their nature, or if the injurious act has not been completed, an injunction is proper, but not so against an ordinary or naked trespass (page 827), and at page 834: "Encroachment on the land of another by erecting permanent buildings or walls is such a destruction of the inheritance as may be enjoined." Decisions also applicable are: *Miller v. Lynch*, 149 Pa. 460, 20 Atl. 80; *Kaiser v. Dalto*, 140 Cal. 167, 73 Pac. 828; *More v. Massini*, 32 Cal. 590; *Baron v. Korn*, 127 N. Y. 220, 27 N. E. 804; *Switzer v. McCulloch*, 76 Va. 777.

In line with other cases holding that mere trespass and occupation without acts injurious to the inheritance will not be temporarily restrained, it was held in *White v. Booth*, 7 Vt. 130, that the use of a church already completed would not be enjoined pending trial of title to the land: *Amelung v. Seekamp*, 9 Gill & J. 468. In *Waddingham v. Robledo*, 6 N. M. 347, 28 Pac. 663, the defendants were allowed to retain the possession and use of ditches and improvements, but restrained from making others *pendente lite*.

In view of the denials and allegations of the answer, until it is ascertained upon the trial whether the defendant is the owner or entitled to the possession of the premises, it is premature to assume that his entry would be a trespass. It would be otherwise if the answer admitted that plaintiffs were the owners and entitled to the possession of the land. The order properly enjoined the erection of the building, but it is too broad in restraining defendant from entering the premises in dispute. The court may properly prohibit either <sup>319</sup> or both parties from erecting permanent buildings, or committing waste, or doing acts which may cause irreparable injury, but under the facts as shown there is no more reason for enjoining one of the parties from entering the premises than for restraining all. The defendant likewise is entitled to have the property protected until the determination of the suit, and may wish to enter the premises for the preservation of the structure, which he has partly erected at the alleged expense of four thousand dollars, and in the protection of which he may be more interested than the respondents who object to its completion. In *Silver Peak Mines v. Hanchett*, 93 Fed. 78, with citation of authorities, it was said that the rule is well settled that an injunction prohibiting any inter-

ference with the status of property pending litigation does not prevent any party having an interest from doing whatever is reasonably necessary for its preservation.

We realize that the temporary restraining order prohibiting the defendant from completing the building until trial can be had and the title and right of possession to the land determined may result in considerable damage to the defendant if he succeeds in establishing his claim to the lots, but, as no suggestion is made to the contrary, we assume that the five thousand dollar bond given is ample for his protection in this regard. The Nevada cases upon which appellant relies did not relate to town lots or buildings, and may be distinguished in other ways from the one now before the court. The same reasons do not exist for enjoining the construction of a ditch across barren and rocky land in the country not shown to be valuable for building or agricultural purposes, and when the ditch had been partly built by consent, and the damage to the land was only five dollars, as in *Hoye v. Sweetman*, 19 Nev. 376, 12 Pac. 504, or steps had been taken to condemn a right of way for a ditch for supplying water to the inhabitants of a city, which would only nominally injure land of little value, as in *Thorn v. Sweeney*, 12 Nev. 251, 22 Cyc. 829; *Waldron v. Marsh*, 5 Cal. 119; *Crescent M. Co. v. Silver King M. Co.*, 17 Utah, 444, 70 Am. St. Rep. 810, 54 Pac. 244.

The district court is directed to so modify the temporary injunction that it will not prohibit the defendant from entering, <sup>320</sup> but will restrain him from digging, excavating, building, or constructing any dwelling-house or other structure or fixture, or committing any injury, on the premises described in the complaint. The costs of this appeal are to abide the final result of the action.

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*The Erection of Buildings or the Making of Excavations may be enjoined at the suit of the land owner when they are in the nature of trespass on his property: See the note to Moore v. Halliday, 99 Am. St. Rep. 743.*

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**NEW HAMPSHIRE.**

**SHACKETT v. BICKFORD.**

[74 N. H. 57, 65 Atl. 252.]

**DECEIT—Misrepresentations—Fraud.**—In an action for deceit in the sale of personalty, a suspicion by the seller that his representations as to the quality of the thing sold are false is the legal equivalent of knowledge of their falsity, and is fraudulent. (p. 933.)

**DECEIT—Misrepresentations—Fraud.**—If, in an action for deceit in the sale of personalty, it is shown that representations as to the quality of the thing sold made by the seller were untrue, and he knew it, or he made them without belief in their truth, or with a conscious indifference, not caring whether they were true or false, the fraudulent character of his act is established. (p. 936.)

J. M. Barton, for the plaintiff.

H. F. Hollis, for the defendant.

**57** BINGHAM, J. The important question in this case arises on the defendant's exception to the charge of the court to the jury. The action was deceit in the sale of a horse, and the ground upon which the trial proceeded was that the defendant knew his representations were false. The court charged the jury "that it was enough, upon the question of the defendant's knowledge, if he knew or if he suspected that the representations were not true"; in other words, that suspicion by the maker that his representations are false is the legal equivalent of knowledge of their falsity, and fraudulent.

What will constitute fraud in such an action has recently been considered by the English courts. The leading case upon the <sup>58</sup> subject is *Derry v. Peek*, 14 App. Cas. 337, decided in the house of lords in 1889. The complainant in that case charged the defendants with knowingly making false representations. It was found in the court of first instance that the representations had been honestly made, believing them

to be true; and the court of appeal (37 Ch. D. 541) held that, notwithstanding this fact, the representations must be taken to be fraudulent, because the defendants had no reasonable ground for that belief. The question, therefore, which was presented for the consideration of the house of lords, when the case came before that body in 14 App. Cas. 337, was whether a statement honestly made and believed to be true should be treated as fraudulent because those who made it had no reasonable ground for entertaining that belief. In the house of lords the decision of the court of appeal was reversed, and it was held, in conformity with the universally recognized rule, that an action of deceit is based upon fraud; that an action for negligent misrepresentation, as distinguished from fraudulent misrepresentation, could not be maintained; that want of reasonable ground for believing a representation to be true might be evidence of fraud, if the circumstances indicated such recklessness or negligent disregard for the truth as to be incompatible with the idea of honesty, but that even gross negligence, in the absence of dishonesty, did not of itself amount to fraud; that notwithstanding a court or jury might find that the speaker had no reasonable ground for believing his representations were true, he may nevertheless have honestly entertained such belief, and consequently that fraud could not be predicated upon such a finding. Lord Herschell, who delivered the leading judgment in the case, said (page 374): "I think the authorities establish the following propositions: First, in order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second; for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground; for one who knowingly alleges that which is false has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made."

In *Angus v. Clifford*, [1891] 2 Ch. 449, Lindley, L. J.,  
59 in commenting upon this statement of Lord Herschell,

said: "You may have . . . a false statement made, but without the matter being present to your mind, and made carelessly; and if that is the fact, that is not fraud, but carelessness, for which an action will not lie. . . . The passages about knowledge—knowingly making it, and making a statement without believing its truth—are based upon the supposition that the matter was really before the mind of the person making the statement; and if the evidence is that he never really intended to mislead, that he did not see the effect, or dream that the effect of what he was saying could mislead, and that that particular part of what he was saying was not present to his mind at all, that I should say is proof of carelessness rather than of fraud. I base my judgment . . . on the . . . ground that . . . an action of this kind cannot be supported without proof of fraud, an intention to deceive, and that it is not sufficient that there is blundering carelessness, however gross, unless there is willful recklessness, by which I mean willfully shutting one's eyes, which is, of course, fraud."

In *Le Lievre v. Gould*, [1893] 1 Q. B. 491, 498, Lord Esher, M. R., states: "A charge of fraud . . . against a man . . . cannot be maintained in any court unless it is shown that he had a wicked mind. . . . If a man tells a willful falsehood, with the intention that it shall be acted upon by the person to whom he tells it, his mind is plainly wicked, and he must be said to be acting fraudulently. Again, a man must be said to have a fraudulent mind if he recklessly makes a statement intending it to be acted upon, and not caring whether it be true or false. I do not hesitate to say that a man who thus acts must have a wicked mind." And Bowen, L. J., in the same case, says (pages 500, 501): "But his mind is wicked, not because he is negligent, but because he is dishonest in not caring about the truth of his statement. In the first case, it is the knowledge of the falsehood, in the second it is the wicked indifference which constitutes the fraud. There seems to have been some sort of an idea that . . . whether the man had made the representation not knowing and not caring whether his statement was true or false, the expression 'not caring' had something to do with his not taking care. But that expression did not mean not taking care to find out whether the statement was true or false; it meant not caring in the man's own heart and conscience whether it was true or false, and that would be wicked indifference and recklessness."

It is apparent from the views expressed by the judges in these cases that to establish fraud you must prove a dishonest mental state or condition of mind on the part of the speaker with reference to the truthfulness of his statement; that when he makes a <sup>60</sup> statement of fact intending it to be relied upon, he of necessity affirms his belief in its truth (*Smith v. Chadwick*, 9 App. Cas. 187, 203; *Angus v. Clifford*, [1891] 2 Ch. 449); that if his statement was untrue, and he knew it, or he made it without belief in its truth, or with a conscious indifference, not caring whether it was true or false, the wickedness of his mind is manifest and the fraudulent character of his act established.

Applying these principles to this case, it would seem to follow that when the defendant, with a view to effecting the sale, stated to the plaintiff that the horse was safe and just what he wanted, he thereby affirmed his belief in the truthfulness of his statement; and it being found that the horse was vicious, and that the defendant suspected that his statement was false, that his want of belief or conscious disregard for the truth or falsity of his statement was established; for a person who suspects that his statement is false does not entertain an honest belief that it is true, or is consciously and wickedly indifferent to its truth or falsity.

The conclusion here reached is in harmony with the decisions in this state and with the great weight of authority elsewhere: *Mahurin v. Harding*, 28 N. H. 128, 59 Am. Dec. 401; *Hanson v. Edgerly*, 29 N. H. 343; *Pettigrew v. Chellis*, 41 N. H. 95; *Springfield v. Drake*, 58 N. H. 19; *Rowell v. Chase*, 61 N. H. 135; *Stewart v. Stearns*, 63 N. H. 99, 56 Am. Rep. 496; *Spead v. Tomlinson*, 73 N. H. 46, 59 Atl. 376; *Pearson v. Howe*, 1 Allen, 207; *Litchfield v. Hutchinson*, 117 Mass. 195; *Cole v. Cassidy*, 138 Mass. 437, 52 Am. Rep. 284; *Andrews v. Jackson*, 168 Mass. 266, 60 Am. St. Rep. 390, 47 N. E. 412, 37 L. R. A. 402; *Salisbury v. Howe*, 87 N. Y. 128; *Haddock v. Osmer*, 153 N. Y. 604, 47 N. E. 923; *Cummings v. Cass*, 52 N. J. L. 77, 18 Atl. 972; *Lamberton v. Dunham*, 165 Pa. 129, 30 Atl. 716; *McKown v. Furgason*, 47 Iowa, 636; 1 Big. Fr. 509, 511, 513. In *Mahurin v. Harding*, 28 N. H. 128, 59 Am. Dec. 401, the court approved a charge to the jury that "if the affirmation [of the defendants] was known, or believed, or suspected by them to be false, and the event proved that it was so, it should be deemed fraudulent," and stated that the terms used to describe the scienter were "expressions of equivalent import." With this view we are content.

The defendant's motions for a nonsuit and verdict were properly denied. The evidence was sufficient to warrant the jury in finding that the representations were fraudulent.

Exceptions overruled.

All concurred.

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*One Who, Without Knowledge of the Truth or falsity of a material representation makes it with intent that another shall act thereon, which he does, is guilty of fraud in legal contemplation, if the representation turns out to be false, as much as if he knew it was untrue when he made it: Foulks etc. Motor Co. v. Thies, 26 Nev. 158, 99 Am. St. Rep. 684.*

*If a Person Either Knowingly or Ignorantly Makes a False Statement of fact in a business transaction, reasonably calculated to deceive another and induce him to do that which he would not do with knowledge of the truth, and it has that effect, the act of such other is attributable to fraud, and is not binding on him, unless he subsequently ratifies with knowledge of the facts, or in some other way precludes himself from rescinding: Standard Mfg. Co. v. Slot, 121 Wis. 14, 105 Am. St. Rep. 1016.*

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## BAKER v. BOSTON AND MAINE RAILROAD.

[74 N. H. 100, 65 Atl. 386.]

**CARRIERS OF MILK—Duties Required of.**—It is the public duty of a carrier of milk to provide reasonable facilities for its reception and delivery, including care during transportation. (pp. 939, 940.)

**CARRIERS OF MILK—Compliance with Public Duty—Question of Fact.**—The question as to what facilities and accommodations are a reasonable compliance with the public duty of a common carrier of milk to the shipper is one of fact. (p. 940.)

**CARRIERS OF MILK—Duties Required of.**—It is the duty of a common carrier of milk to provide suitable cars in which to transport it and to provide men to handle and care for it during its transportation. (p. 941.)

**CARRIERS—Limitation of Liability.**—A contract limiting a carrier's common-law liability is unreasonable and void when transportation according to the carrier's public duty is not afforded the shipper as an alternative, and no reduction of rates is made as a consideration for the limitation. (p. 941.)

**CARRIERS OF MILK—Contract Limiting Liability.**—A contract under which a shipper of milk agrees with a common carrier to provide men to care for the milk during transportation and to indemnify the carrier against all liability for damages to such men or the property, and under which the shipper is not afforded an opportunity of having the carrier perform its full duty in handling and caring for the milk during transportation, is unreasonable and void as an unlawful restriction upon the liability of the carrier. (p. 942.)

**CARRIERS—Contract Between Shipper and His Servant—Void Indemnity Contract.**—An agreement between a shipper and his servant engaged to care for freight during its transportation, and re

lating thereto, based upon a void indemnity contract between the shipper and the carrier, cannot avail the latter as a defense to an action by such servant to recover for injuries resulting from the carrier's negligence. (p. 942.)

**CARRIERS—Limitation of Liability.**—Common carriers cannot relieve themselves from the consequences of their own wrongful acts by special contract. (p. 943.)

**COMMON CARRIERS—Contracts Limiting Liability.**—A common carrier cannot by contract relieve himself from the performance of his common-law duty to use ordinary care to avoid injuring those with whom he knew or should have known his business would bring him in contact. (p. 943.)

Taggart, Tuttle, Burroughs & Wyman, for the plaintiff.

Burns & Burns and Johnson, Clapp & Underwood, for the defendants.

107 BINGHAM, J. The defendants are engaged in the carrying trade, as common carriers of freight and passengers. Whiting & Sons are milk contractors, who buy and sell milk, buying it of the producers on the line of the defendants' road and distributing it at different points along the same. In consideration of the defendants agreeing to furnish Whiting & Sons with cars provided with icing facilities for the transportation of their milk, Whiting & Sons agreed to pay them a stipulated sum, to furnish the ice, to provide men to do the work incident to handling and caring for the milk while in transit, and to indemnify the defendants against the claims of any employes of Whiting & Sons "on account of personal injury or damage to property received while on the cars or premises" of the road. In view of the provisions of this contract, and in consideration of his future <sup>108</sup> employment and other considerations, the plaintiff, an employé of Whiting & Sons engaged to handle and care for the milk, agreed with Whiting & Sons not to make or prosecute any claim against the defendants on account of injuries received by him during his employment, and to indemnify Whiting & Sons against all liability on account of any such claim. The plaintiff was injured through the defendants' negligence, while on their train in the performance of his duties under the contract; and the question we are called upon to consider is whether these contracts are valid and constitute a defense to this action.

The defendants say that both contracts are valid, and that they should be permitted to avail themselves of the benefits of the plaintiff's contract with Whiting & Sons to avoid circuity of action. But whether they can avail themselves of provisions of that contract to avoid circuity of action depends upon whether their contract with Whiting & Sons is one the



law will recognize and enforce. The defendants do not dispute the proposition that common carriers cannot by contract relieve themselves from liability arising from their own negligence in the performance of duties imposed upon them by law. Their first contention is, that upon the facts disclosed in the plea the shippers could not demand as of right that the defendants should furnish the cars called for in the contract for the transportation of milk; that neither the common law nor any provision of statute required them to do more than furnish ordinary freight-cars for that purpose; that this service was something which they were under no public duty to perform; and that in undertaking to render it they were private carriers and could lawfully impose such terms as they deemed proper as a condition to its performance.

Were the defendants common carriers of milk? Our statutes provide that "Every railroad corporation which shall contract with any person for the transportation of milk in large quantities over any portion of its road shall establish a tariff for the transportation of milk by the can over the same portion of its railroad with fairly proportionate advantages and facilities in every respect": Pub. Stats., c. 160, secs. 21, 22, 23; Laws 181, c. 81. And it would seem that when the defendants entered into the contract with Whiting & Sons, they thereupon and by force of the statute became common carriers of milk and were required to establish a tariff for its transportation. The same conclusion would be reached if we applied the principles of the common law as laid down in *McDuffee v. Portland etc. R. R.*, 52 N. H. 430, 13 Am. Rep. 72. It was there said: "A railroad corporation carrying one expressman, and enabling him to do all the express business on the line of their road, do hold themselves out as common carriers of expresses." But it is unnecessary to <sup>100</sup> further consider this question, as the defendants in their plea do not deny the allegation of the plaintiff's declaration that they are common carriers of milk, and in their brief practically concede this fact. Their contention as to this matter is simply this: that the furnishing of cars without icing facilities would have been a full compliance with their public duty as common carriers; and that Whiting & Sons, as shippers of milk, could not have required them to furnish cars with icing facilities for its transportation. In answer to this it may be said that, as incident to their business of common carriers of milk, it was the defendants' public duty to provide reasonable facilities for its reception and delivery, including care during transportation: *Flint v. Boston &*

M. R. R., 73 N. H. 141, 59 Atl. 938; *Sager v. Portsmouth etc. R. R. Co.*, 31 Me. 228, 1 Am. Rep. 659; *Steinweg v. Erie Ry.*, 43 N. Y. 123, 3 Am. Rep. 673; *Welsh v. Pittsburg etc. R. R. Co.*, 10 Ohio St. 65, 75 Am. Dec. 490; *Beard v. Illinois Cent. Ry. Co.*, 79 Iowa, 518, 18 Am. St. Rep. 381, 44 N. W. 800, 7 L. R. A. 280; *Potts v. Wabash etc. Ry. Co.*, 17 Mo. App. 394; *Merchants' Dispatch & T. Co. v. Cornforth*, 3 Colo. 280, 25 Am. Rep. 757; 2 *Hutchinson on Carriers*, 3d ed., secs. 495-497; *Ray on Freight Carriers*, sec. 4, and cases there cited. "A railway company is bound to provide cars reasonably fixed for the convenience of the particular class of goods it undertakes to carry. It is the duty of the carrier to provide suitable means of transportation adapted in each case to the particular class of goods he undertakes to transport. He must protect his goods from destruction or injury by the elements, from the effects of delay, from any sources of injury which, in the exercise of care and ordinary intelligence, may be known or anticipated": *Ray on Freight Carriers*, sec. 4. He must "provide all suitable means of transportation and exercise that degree of care which the nature of the property requires": *Smith v. New Haven etc. R. R. Co.*, 12 Allen, 531, 90 Am. Dec. 166. In addition to the duty imposed upon the defendants by the common law, our statutes provide that "the proprietors of every railroad shall furnish to all persons reasonable and equal terms, facilities and accommodations for the transportation of persons and property over their railroad, and for the use of depots, buildings and grounds in connection with such transportation": Pub. Stats., c. 160, sec. 1; *McDuffee v. Portland etc. R. R.*, 52 N. H. 430, 13 Am. Rep. 72.

Inasmuch, therefore, as the defendants were common carriers of milk, and as it was their public duty to furnish all persons desiring to ship that commodity with reasonable facilities and accommodations for its transportation, this contention of the defendants resolves itself into the inquiry whether their plea states facts from which it can be inferred that the furnishing of cars with icing facilities was under the circumstances more than they could reasonably be required to do in the fulfillment of their duty; for the question what facilities and accommodations were a reasonable compliance with their public duty—or, to state the proposition in another way, whether the cars furnished were more than <sup>110</sup> their public duty required them to do—is a question of fact: *Boothby v. Grand Trunk R. R.*, 66 N. H. 342, 34 Atl. 157. The plea does not allege that it would have been reasonable, in view

of the defendants' public duty, for them to have refused to furnish the Whittings with cars provided with icing facilities for the transportation of the large quantity of milk which they were daily desiring to ship, nor facts from which such an inference could reasonably be made. On the contrary, it is alleged in the plea that "at the time of the execution of all the agreements herein mentioned, large quantities of milk were produced by individual farmers living along the line of said defendant's railroad. The quantity was such that it was more economical and more advantageous to all parties—producers, distributors, and consumers—to have it transported in special cars furnished with icing facilities, than to have it carried in ordinary cars." The only reasonable deduction to be made from this allegation is that cars with icing facilities were reasonably necessary, and that those furnished did not afford greater facilities than the defendants' public duty required.

It is further contended that the defendants could not have been required to carry the shippers' servants in milk cars, and that when they agreed to carry them in these cars they undertook to do more than their public duty required, and on this account could lawfully demand of the shippers the contract of indemnity which they did. But this contention is not supported by the facts in the case. As already stated, it was the defendants' duty to provide suitable cars in which to transport the milk. It was also their duty to provide men to handle and care for it while being transported: *Beard v. Illinois Cent. Ry. Co.*, 79 Iowa, 518, 18 Am. St. Rep. 381, 44 N. W. 800, 7 L. R. A. 280; *Boscowitz v. Adams Express Co.*, 93 Ill. 523, 34 Am. Rep. 191; *Chesapeake & O. Ry. v. American Bank*, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449; and cases above cited. But by the terms of the special contract the duty of providing men to handle and care for the milk was imposed upon the shippers; and this being so, it would not seem that the defendants were undertaking more than their public duty called for when, by the contract, they required the shippers to perform a part of their public duty—a part the performance of which necessitated the presence of the shippers' servants upon the cars. But however this may be, it is the policy of the law that common carriers should be ready and willing at all times to contract with shippers for the full performance of their public duty; and in cases where this phase of the question has been presented, it has generally been held that a contract limiting a carrier's common-law liability is unreasonable and void when transportation

according to the carrier's public duty is not afforded the shipper as an alternative, and no reduction of rates is made as a consideration for the limitation. If carriers could maintain limitations or exemptions <sup>111</sup> of their common-law liability in cases where the shipper was not afforded the opportunity of making a contract without them, the result would be that such contracts would be universal—that the carrier's duty would be dispensed with, and the policy of the law be defeated: *Illinois Cent. R. R. Co. v. Lancashire Ins. Co.*, 79 Miss. 114, 30 South. 43; *Louisville & N. R. R. v. Gilbert*, 88 Tenn. 430, 12 S. W. 1018, 7 L. R. A. 162; *Illinois Cent. R. R. v. Craig*, 102 Tenn. 298, 52 S. W. 164; *Little Rock etc. Ry. v. Cravens*, 57 Ark. 112, 38 Am. St. Rep. 230, 20 S. W. 803, 18 L. R. A. 527, note; *Atchison etc. R. R. v. Mason*, 4 Kan. App. 391, 46 Pac. 31; *Lewis v. Great Western Ry. Co.*, 3 Q. B. D. 195; *Ray on Freight Carriers*, secs. 45, 48, 181; 4 *Elliott on Railroads*, sec. 1504; *Redman on Carriers*, 2d ed., 68; 6 Cyc. 392-401.

In this case it does not appear that the shippers were afforded the opportunity of having the defendants perform their full duty and handle and care for the milk. There is no allegation in the defendants' plea, or provision in the contract of shipment, to that effect; and in view of the absence of such an allegation or provision, and of the defendants' contention that they were under no duty even to provide cars with icing facilities for shipping the milk, it is to be inferred the shippers were not afforded such an opportunity, and that the defendants refused to provide the cars for the milk unless the shippers would furnish the men to handle and care for it, and would indemnify the defendants against all liability for damages to the men and their property. In such case it is clear that we must hold that the shippers' contract of indemnity is unreasonable and void, and that the plaintiff's contract with the shippers, which is based upon the indemnity contract, cannot be availed of by the defendants as a defense to this action.

The plaintiff was upon the cars at the time of the accident with the defendants' consent. His passage was not free. The consideration for it was the service he rendered in caring for the milk, or the charge against his employers in shipping it. And as the defendants cannot, on the facts disclosed in the plea, avail themselves of the plaintiff's agreement with the shippers, it was the defendants' duty to use due care for the plaintiff's safety; and if they or their servants were negli-

gent, and he was injured in consequence thereof, they are liable in damages.

Whether the agreements relied upon in the plea would have been enforceable if the defendants had been ready and willing for a reasonable compensation to perform their full duty as carriers, and had afforded the shippers the opportunity of having the milk carried without restriction or limitation of their public duty, and the shippers, instead of requiring the defendants to perform their full duty, had voluntarily agreed, in consideration of a reduced rate, to furnish the men to handle and care for the milk and to indemnify the defendants against liability for loss occasioned the <sup>112</sup> person or property of the men by the negligence of the defendants or their servants, we are not called upon to decide. It may be said, however, that it has been held in this state that common carriers cannot relieve themselves from the consequences of their own wrongful acts by special contract (*Peerless Mfg. Co. v. New York etc. R. R. Co.*, 73 N. H. 328, 61 Atl. 511; *Durgin v. American Exp. Co.*, 66 N. H. 277, 20 Atl. 328, 9 L. R. A. 453; *Duntley v. Boston & M. R. R.*, 66 N. H. 263, 49 Am. St. Rep. 610, 20 Atl. 327, 9 L. R. A. 449; *Merrill v. American Exp. Co.*, 62 N. H. 514), and that these decisions may be sustained upon the broad ground that it is against the policy of the law to permit anyone, be he common carrier or not, to relieve himself by contract from the performance of his common-law duty to use ordinary care to avoid injuring those with whom he knew or should have known his business would bring him in contact: *Nashua etc. Co. v. Worcester & N. R. R. Co.*, 62 N. H. 159; *Johnson's Admx. v. Richmond & D. R. Co.*, 86 Va. 975, 11 S. E. 829. But whether common carriers may, under some circumstances, contract for a release from liability for the negligence of their servants in respect to acts which do not pertain to the performance of non-delegable duties, is a question that has never been decided in this jurisdiction and is not now considered.

Demurrer sustained.

Parsons, C. J., and Walker and Young, JJ., concurred; Chase, J., doubted.

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*When a Carrier Accepts Perishable Goods for Transportation*, it is its duty to furnish cars especially adapted to the preservation thereof during the transportation: *St. Louis etc. Ry. Co. v. Renfro*, 82 Ark. 143, 118 Am. St. Rep. 58. When a carrier undertakes to transport such commodities in refrigerator-cars, it should provide a supply of ice ample for the purpose, not only at the point of shipment, but also at such places along its lines as will reasonably insure a safe transit to the point of destination, and failing to do this the carrier is guilty

of negligence: *Taft Co. v. American Express Co.*, 133 Iowa, 522, 119 Am. St. Rep. 642. As to the duty of carriers in respect to refrigerator cars, see, further, note to *Marks v. New Orleans Cold Storage Co.*, 90 Am. St. Rep. 300.

*The Limitation of Carriers' Liability in Bills of Lading* is discussed in the note to *Chicago etc. Ry. Co. v. Calumet etc. Farm*, 88 Am. St. Rep. 74.

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## HOBBS v. BLANCHARD & SONS COMPANY.

[74 N. H. 116, 65 Atl. 382.]

**TRESPASSERS, WHO ARE.**—A person who goes upon premises upon the invitation of the superintendent of the owner thereof alone, for his own pleasure and not to promote the interests of such owner, is not the guest of the latter, but is a trespasser or bare licensee. (p. 945.)

**TRESPASSERS—Duty of Land Owner to.**—An owner of premises knowing of the presence of a trespasser thereon is bound not to actively render the situation of the latter unreasonably dangerous. (pp. 945, 946.)

**TRESPASSERS, DUTY TO—Creating Unnecessary Danger.**—Leaving dynamite upon the ground in a logging camp, where strangers, though trespassers, are liable to be who are unacquainted with its use or its explosive properties, and who are not notified of its presence where they are liable to walk, is negligence. (p. 946.)

**TRESPASSERS—Duty of Land Owner to.**—A land owner cannot escape liability when injury results to a trespasser from the land owner doing upon his land an unusual and dangerous act, which an ordinarily prudent man would not do under the circumstances. (p. 947.)

**TRESPASSERS—Negligence—Concealed Danger.**—If negligence toward a trespasser consists in the owner creating upon his land a concealed danger, not justified or required by his business, when he knows of the presence of such trespasser upon his premises and of his probable ignorance of the existence of the danger, he is liable to him for an injury resulting therefrom. (p. 947.)

**TRESPASSERS, Duty of as to Hidden Danger—Contributory Negligence.**—A trespasser upon premises who does not know of the presence of an unnecessary hidden danger thereon, and is in no fault for not knowing of such presence, need not conduct himself as though he was informed of the danger, to relieve himself of a charge of contributory negligence. (pp. 947, 948.)

Action to recover for the death of Tommy Corbin, a boy less than fourteen years of age. The deceased was invited by the defendant's superintendent in charge of their lumbering operations to visit their logging camps, which he did. The defendant's business required them to use dynamite, which was kept stored in a safe place some distance from the camp. One Lacombe, who was employed to handle the dynamite, knew it was dangerous. He saw the deceased in camp the morning of the accident, and when he started to leave camp the deceased followed him, but was sent back. Lacombe took

some of the dynamite, used part of it, and threw the remainder down beside a tree within fourteen feet of where the deceased was at the time. The deceased obtained a hammer to be used in making a sled and then returned to where Lacombe was and asked for nails, which Lacombe did not have, and the deceased then started away. Lacombe knew that the dynamite was lying unprotected within fourteen feet of where the deceased started from, but took no precautions for his safety, though he knew that he was starting out with a hammer to look for nails. Four or five minutes later the dynamite exploded, and the deceased was soon after found lying dead some nine or ten feet away, while the hammer and the dynamite had disappeared. Nonsuit upon defendant's motion and the plaintiff appealed.

H. F. Hollis, T. H. Madigan, Jr., and E. Sullivan, for the plaintiff.

Drew, Jordan, Shurtleff & Morris, and Rich & Marble, for the defendant.

<sup>119</sup> WALKER, J. The deceased was not, in a legal sense, the guest of the defendant. He was not present in Camp No. 38 upon the defendant's invitation, either express or implied. The fact that it may be chargeable with knowledge that strangers frequently came upon the premises, and were suffered to remain there without actual objection, is not sufficient evidence that the camp boss was authorized by the defendant to charge it with the legal responsibility of a land owner to his guest, by inviting his friends to come to the camp, not for any benefit or advantage to the defendant in its business, but simply for their enjoyment or pleasure. The boy was evidently there to gratify his curiosity and to have "a good time," and not, in the slightest degree, to promote the interests of the defendant. There is, therefore, no reason upon which to base <sup>120</sup> the inference that the camp boss represented the company, or could legally assume that authority, when he invited the boy to visit the camp. The deceased was not the defendant's invitee.

Whether the deceased was technically a trespasser or a bare licensee, it was competent for the jury to find upon the facts disclosed that the defendant knew of his presence in the vicinity of the camp at the time of the accident. Knowing that he was there, as well as that strangers were frequently upon the premises with the passive acquiescence of the defendant, it was bound not to actively render his situation

unreasonably dangerous. It owed him some duty with reference to his personal safety. "Reasonable men might . . . find that, having reason to anticipate a human being might be in a position to be seriously injured by the action contemplated, men of ordinary prudence, having regard to their general obligation to so conduct their lawful business as not to injure others, would not set in motion forces which might have that result, without taking some precautions to prevent it. This would be true, whether the persons who might be injured were in legal definition trespassers, licensees or invitees": *Minot v. Boston & M. R. R.*, 73 N. H. 317, 61 Atl. 509. Other cases decided upon that general principle are *Mitchell v. Boston & M. R. R.*, 68 N. H. 96, 34 Atl. 674; *Hughes v. Boston & M. R. R.*, 71 N. H. 279, 93 Am. St. Rep. 518, 51 N. W. 1070; *Myers v. Boston & M. R. R.*, 72 N. H. 175, 55 Atl. 892; and *Brown v. Boston & M. R. R.*, 73 N. H. 568, 64 Atl. 194. In the last case it is said (page 573) that "the defendants would be responsible for negligently injuring the deceased through their active intervention, even if she were a trespasser, provided at the time of the accident she was in the exercise of ordinary care, and they knew of her presence in a dangerous situation, or failed to exercise due care to discover her presence in such a situation when circumstances existed which would put a person of average prudence upon inquiry. Her presence upon their premises would then be a mere condition and not a contributing cause."

Whether Lacombe's act of putting the sticks of dynamite on the ground at the foot of the tree was negligence, due to the defendant's "active intervention," is principally a question of fact. Lacombe while in the performance of his work as the custodian of the dynamite represented the defendant—he was in law the defendant for that purpose with reference to third parties—and the defendant is bound by the legal consequences of his act in that respect. As tending to prove that there was active intervention by the defendant which resulted in the boy's death, it is inferable from the case that leaving dynamite upon the ground in a logging camp, where strangers are liable to be, who are unacquainted with its use or its explosive properties and who are not notified of its presence where they are liable to walk, is not only <sup>121</sup> a careless act, indicating a disregard of human life, but an unnecessary and unusual act in the reasonable prosecution of lumbering operations. A finding that the defendant was not carrying on its business "in the usual and ordinary manner" (*Buch v. Amory Mfg. Co.*, 69 N. H. 257, 76 Am. St.



Rep. 163, 44 Atl. 809; Hughes v. Boston & M. R. R., 279, 93 Am. St. Rep. 518, 51 Atl. 1070), but in an unnecessarily dangerous and extraordinary manner, would seem to be supported by the reported facts, and to authorize the conclusion that the ordinarily prudent man, having regard for the safety of others, though trespassers upon his land, would not expose them to such exceptional dangers, created at the time and for no reasonably necessary purpose. A man's dominion over his land is not absolute, but is qualified by the principle of reasonably necessary user (Horan v. Byrnes, 72 N. H. 93, 101 Am. St. Rep. 670, 54 Atl. 945, 62 L. R. A. 602); and while he is not answerable to others for damages caused by using his land in such a way as is reasonable and necessary for the proper prosecution of his legitimate business, no reason is apparent why he should escape liability, when the injury results from his doing upon his land unusual and dangerous acts, which the ordinarily prudent man would not do in the proper prosecution of the same business under the circumstances. This principle is doubtless otherwise expressed when it is said that the land owner is not liable to a trespasser or bare licensee for the careless use of his land, in the absence of his active intervention: See 11 Harvard Law Review, 349, 360-366. In this case the defendant's negligence or breach of duty to the deceased consisted in creating upon the land a concealed danger, not justified or required by the business it was ostensibly carrying on, when it knew of the boy's presence and of his probable ignorance that the danger existed. It performed at the time an unnecessary affirmative act which it knew was likely to result in serious harm to the deceased and to others similarly situated. The exigencies of its business do not appear to justify such a dangerous mode of procedure, even as against a trespasser or bare licensee.

The fact that "so far as known the Corbin boy had never seen dynamite" is assumed to mean, that he did not know what it was when he saw it, and, of course, that he would not appreciate its explosive character. There is nothing in the case indicating that the defendant had reason to suppose he was acquainted with dynamite, or that he knew that any of it was on the ground at the foot of the tree. It is not improbable that it was partially concealed in the snow and would not attract the attention of one who was not looking for it. Under such circumstances, no duty rested on the boy with reference to the dynamite. If he did not know of its presence and was in no fault for not knowing it was there, it was

not incumbent on him to conduct himself as though he was informed of the danger. His ignorance of the danger and the <sup>122</sup> explosion may show that he was not guilty of contributory negligence. If, however, he understood the danger of his position and that a slight jar might produce an explosion, it would be necessary for the plaintiff to produce further evidence that he was exercising due care. The duty of care involves some conception of the danger likely to result from its nonobservance. The circumstances attending the catastrophe, as related in the plaintiff's opening statement, warrant the inference that the boy was guilty of no negligence contributing to his death, and that the sole cause thereof was due to actionable negligence of the defendant.

Exception sustained.

Parsons, C. J., and Chase and Bingham, JJ., concurred; Young, J., concurred in the result.

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*Trespassers on Real Property* are usually bound to take the premises as they are, and the owner owes them no further duty, as a rule, than to do them no wanton or willful injury: *Henderson v. Continental Refining Co.*, 218 Pa. 384, 123 Am. St. Rep. 668; *Weitzmann v. Barber Asphalt Co.*, 190 N. Y. 452, 123 Am. St. Rep. 560; *Wheeling etc. R. R. Co. v. Harvey*, 77 Ohio St. 235, 122 Am. St. Rep. 503; *Reams v. Taylor*, 31 Utah, 288, 120 Am. St. Rep. 930; *Widing v. Penn Mutual Life Ins. Co.*, 95 Minn. 279, 111 Am. St. Rep. 471; *Fitzmaurice v. Connecticut Ry. etc. Co.*, 78 Conn. 406, 112 Am. St. Rep. 159.

*One Who Keeps or Leaves Dynamite on His Premises*, where children have, to his knowledge or that of his servants, been in the habit of loitering and amusing themselves, is liable for damages to them due to their taking possession of the dynamite and being injured by its explosion: *Mattson v. Minnesota etc. R. R. Co.*, 95 Minn. 477, 111 Am. St. Rep. 483.

*The Placing of Dynamite on a Vacant Lot*, insufficiently covered and in such a position as to be readily discovered and easily tampered with by, and to form an object of attraction to, children accustomed to play upon or pass over the lot, is negligence which may cause responsibility for injury to such children from such explosive: *Nelson v. McClellan*, 31 Wash. 208, 96 Am. St. Rep. 902. As to the liability of a railway company to a child who intermeddles with torpedoes along its track, see *Harriman v. Pittsburgh etc. Ry. Co.*, 45 Ohio St. 11, 4 Am. St. Rep. 507; *Carter v. Columbia etc. R. R. Co.*, 19 S. C. 20, 45 Am. St. Rep. 754; *Hughes v. Boston etc. R. R.*, 71 N. H. 279, 93 Am. St. Rep. 518.

**WRIGHT v. BOSTON AND MAINE RAILROAD COMPANY.**

[74 N. H. 128, 65 Atl. 687.]

**NEGLIGENCE—Attempt to Cross in Front of Engine.**—A person whose business is not of an urgent character requiring great haste and expedition, and who has no excuse for his hazardous attempt to cross in front of a rapidly approaching engine, is guilty of negligence. (p. 951.)

**NEGLIGENCE—Attempt to Cross in Front of Engine.**—One who attempts to cross a railroad track in front of a rapidly approaching engine may be negligent without being willfully reckless, and while the instinct of self-preservation may be evidence of no attempt to commit suicide, yet it does not prove that he was not negligent. (pp. 952, 953.)

**NEGLIGENCE—Instinct of Self-preservation.**—In cases where there is active participation by the deceased in bringing about a dangerous situation, and the duty rests upon him as well as upon the defendant of actively and vigilantly exercising ordinary care under the circumstances, the absence of all evidence of what he did at the time cannot be supplied by conjecture, and although the instinct of self-preservation may furnish an explanation or excuse for his careless acts after he got into a place of danger, it is not evidence that his acts were the acts of an ordinarily prudent man before the danger became imminent. (pp. 954, 955.)

**NEGLIGENCE—Burden of Proof.**—If a person attempts to cross a railroad track in front of a rapidly approaching train, and is killed in the attempt, by being struck by the engine, the burden of proving that the deceased was reasonably careful is upon the plaintiff, who sues to recover for his death. (p. 956.)

**NEGLIGENCE, CONTRIBUTORY—Burden of Proof.**—A person who sues to recover for personal injury alleged to have been caused by defendant's negligence must prove by a preponderance of evidence not only that the defendant was guilty of negligent acts adequate for the infliction of the injury received, but also that he, himself, exercised ordinary care for his own safety under the circumstances. (p. 956.)

**NEGLIGENCE, CONTRIBUTORY.**—While want of contributory negligence on the part of a person killed at a railway crossing may be established by inferences from the circumstances, such an inference cannot be drawn simply from a presumption that a person exposed to danger will exercise care and prudence in regard to his own safety. (p. 959.)

**NEGLIGENCE, CONTRIBUTORY.**—The presumption that every person will take care of himself from regard to his own life and safety cannot supply the place of direct evidence to that effect when the burden of proof is upon the plaintiff. (p. 959.)

**NEGLIGENCE, CONTRIBUTORY—Burden of Proof.**—A plaintiff who has the burden of presenting evidence that he was free from fault does not prove it in the absence of direct evidence by a legal presumption arising from the fact that an ordinarily prudent man would have exercised care under the circumstances. (p. 961.)

Action to recover for negligence causing the death of plaintiff's intestate at a railroad crossing by his being struck by a railroad train. On March 5, 1905, such intestate, afoot

and alone, attempted to cross defendants' railroad tracks at such crossing in front of a rapidly approaching engine and single car, where the view of the track was somewhat obstructed by other cars. The defendants had no flagman at such crossing, nor was the engine bell rung nor the whistle blown before the engine reached the crossing at the time of the accident. Defendants' motion for a nonsuit was denied, to which an exception was reserved and a verdict was rendered for plaintiff.

Doyle & Lucier and Wason & Moran, for the plaintiff.

Burns & Burns and Hamblett & Spring, for the defendants.

<sup>129</sup> WALKER, J. In *Huntress v. Boston & M. R. R.*, 66 N. H. 185, 49 Am. St. Rep. 600, 34 Atl. 154, the court say: "A person of ordinary prudence, exercising the caution and vigilance which the law has adopted as the test of duty, might make an extremely hazardous attempt to cross a railroad in front of a train. From the mere fact of great danger, it does not necessarily follow that he exposed himself recklessly and consciously. When there is no evidence of insanity, intoxication or suicidal purpose, and no evidence on the question of his care, except the instinct provided for the preservation of animal life, it may be inferred from the circumstantial proof that, for some reason consistent with ordinary care and freedom from fault on his part, his attempt to cross was due to his inadequate understanding of the risk." The argument seems to be that, because a man may, while in the exercise of ordinary care and while governed by an instinctive desire to avoid danger, attempt to do a very dangerous thing, it may be found by the jury as a fact that a particular man killed at a railroad crossing was not negligent. That reasoning applied to this case would justify the jury in concluding that the deceased saw the approaching engine and, for some undisclosed and in fact undiscoverable reason, consistent with ordinary care, attempted to cross the track in front of it. Granting that that may possibly be the explanation of the cause of his fatality, is it not just as probable that it was due to acts on his part not consistent with ordinary care? It may be that he miscalculated the speed of the engine or its distance from him, or it may be that, without such miscalculation, he decided to incur the hazard and trust to his agility to carry him safely over. In short, he may have been negligent, or he may not have been.

The natural desire to avoid pain, suffering and death may have caused him to take a view of the situation when he was

in a place of safety, and it may have prevented him from hurling himself <sup>130</sup> directly in front of the engine; but it did not necessarily invest him with all the qualities of an ordinarily careful man in deciding whether it was prudent to cross in front of the train—it did not urge him when in a place of safety to attempt to cross when he saw the train approaching. No emergency had arisen which threatened him with peril. If he had found himself in a perilous situation, his acts might be justified though they were dangerous and ill-advised: *Folsom v. Concord & M. R. R.*, 68 N. H. 454, 38 Atl. 209. But he was not in such a situation. Until he stepped upon the third track, he knew, if he saw the train, that he was in no peril. He knew that he was perfectly safe if he remained there until after the train passed: *Central of Georgia Ry. v. Foshee*, 125 Ala. 199, 27 South. 1006. There was nothing urging him to cross. It does not appear that his business was of an urgent character requiring great haste and expedition, or that there was any excuse for his hazardous attempt. The instinct of self-preservation would have suggested delay in a safe position, instead of haste to get into an unsafe one.

When it is said that he may have miscalculated the distance and speed of the train, caused in part by the omission to ring the bell, it is sufficient to reply that, in the absence of evidence of the fact, he may have realized the nearness of the train and attempted to prove his fleetness by running onto the track in front of it. This is not equivalent to saying that he may have "recklessly and consciously" jumped upon the track. His natural desire to protect himself from harm would probably prevent him from consciously committing suicide, while it would not prevent him from negligently attempting to cross the track. If negligence were the willful, conscious recklessness of a man in a given situation, the desire to protect life and limb might constitute sufficient evidence, in the absence of all direct affirmative evidence, that he was not negligent. "Doubtless, the jury might infer that the deceased was governed by the natural instinct of self-preservation, and would not put himself recklessly and consciously in peril of death; but that men are careless and subject themselves thereby to injury is the common experience of mankind, and when injured, no presumption exists in the absence of proof that they were exercising due care at the time": *Reynolds v. New York C. & H. R. R. Co.*, 58 N. Y. 248. It may be conceded that it is a well-nigh universal characteristic of human nature that men have an instinctive impulse

to avoid physical pain and death; but it must be remembered that neither this nor any other universal instinct prevents them from being careless. Very few men intelligently seek death; but very many are guilty of negligence leading to fatal results. If the question in this case were, whether the deceased consciously threw himself upon the track or wished to commit suicide, it might be legitimate <sup>181</sup> to infer that he did not knowingly seek that fatality. But because that may be a proper deduction, it does not follow that he also used ordinary care, or was not negligent, in seeking to preserve his life while running across the track in front of the engine. His purpose undoubtedly was to get across in safety; the attempt may have been a foolhardy one, one of which the ordinarily prudent man would not have been guilty, and still it may not have involved the element of conscious recklessness. As before suggested, he may have trusted in his agility to preserve him from being overtaken by the locomotive. In short, he may have been negligent without being willfully reckless. Hence it follows that while the instinct of self-preservation may be evidence that he did not willfully commit suicide it does not prove that he was not negligent.

To say that he miscalculated the nearness of the engine, because some men have made that mistake, is to give the plaintiff the benefit of pure speculation as evidence of his careful conduct. It is no more probable that he observed the locomotive and estimated that he had sufficient time to safely cross to the opposite side of the track, than that he was lost in reverie, or for some other reason did not see or try to see whether a train was approaching, or that, having observed the engine, he negligently took the chance of getting across in front of it. If men in general do not go upon railroad grade crossings without ascertaining in some way whether a train is approaching, they do not, after having ascertained that it is approaching, attempt to protect themselves from personal injury by rushing in front of it upon a hasty calculation of chances as to its speed or nearness. The great majority of men do not try experiments of that character; consequently, the great majority of men are not maimed or killed while attempting to cross railroad tracks in front of approaching trains. Such fatalities are comparatively rare; and that fact, so far as it authorizes any inference in a given case as to the care exercised by the deceased, does not show that he was in the exercise of that degree of care which ordinarily prudent men exercise under similar circumstances. Though prudent men sometimes expose themselves to danger

through mistakes of judgment, it cannot be inferred in all cases that such is the explanation of their conduct when the evidence is wholly silent upon the subject. In such a case, it is pure conjecture whether the deceased exercised the care of an ordinarily prudent man to avoid the fatal catastrophe, or whether he did not. The only possible solution of the question depends upon a mere calculation of chances. One answer is as liable to be right as the other. He may have been reasonably careful, or he may have been unreasonably careless. Which alternative is the more probable is susceptible of no logical proof, and can be only tentatively <sup>132</sup> ascertained by the merest guessing. A man who is ordinarily prudent may, in a particular instance, be negligent.

In some cases the deceased's care may be reasonably inferred or found from the circumstances attending the accident. When a passenger, for instance, seated in a passenger-car is killed by a collision with another train, little doubt can be entertained that he is in the exercise of due care; and in an action by his administrator no further evidence upon that point would be required in the first instance. Other similar illustrations might be suggested, indicating conclusively that the care required of the plaintiff in an action for negligence may be proved by circumstantial evidence; that direct affirmative proof may be dispensed with, when upon the competent evidence reasonable men exercising their judgment upon the subject could say, from the manner in which the injuries were inflicted, that it is more probable than otherwise that the deceased was in the exercise of due care, or that no amount of care on his part would have prevented his injury. "It is well settled in cases of this character that direct affirmative evidence that the plaintiff was exercising due care is not necessary; it may be inferred from all the circumstances attending the accident and from the lack of evidence indicating carelessness on his part": *Stevens v. United G. & E. Co.*, 73 N. H. 159, 60 Atl. 848, 70 L. R. A. 119.

In *Lyman v. Boston & M. R. R.*, 66 N. H. 200, 20 Atl. 976, 11 L. R. A. 364, the motion for a nonsuit was denied because there was evidence that the deceased, who was attempting to cross the track riding on a horse-rake, had before taken special precautions to protect himself from injury at this crossing; and it was held that this fact was evidence from which it might be inferred he was exercising due care at the time of the accident. Besides, the circumstance that he was driving a horse might have a material bearing upon the ques-

tion of his care (*Folsom v. Concord & M. R. R.*, 68 N. H. 454, 38 Atl. 209), while a person on foot about to cross a track has no forces to control except his own voluntary and intelligent actions. The decision in *Lyman v. Boston & M. R. R.*, 66 N. H. 200, 20 Atl. 976, 11 L. R. A. 364, does not hold that the instinct of self-preservation alone is sufficient evidence that the deceased was careful or not negligent, for it was unnecessary to so hold. When it is said that a person's careful conduct may be inferred from the circumstances, it is not intended to announce the doctrine that the jury may find the fact by guessing. The circumstances must be logically such that the jury may deduce the fact from them by some process of human reasoning. And in all analogous cases in this state some special circumstances have appeared from which reasonable men might logically find the fact of due care. With the possible exception of *Huntress v. Boston & M. R. R.*, 66 N. H. 185, 49 Am. St. Rep. 600, 34 Atl. 154, no case has been put on the ground of the instinct of self-preservation. Some evidence of care, either direct or indirect, <sup>133</sup> has appeared, when it has been held that the plaintiff sustained the burden of disproving contributory negligence: See *Nutter v. Boston & M. R. R.*, 60 N. H. 483; *Evans v. Concord R. Corp.*, 66 N. H. 194, 21 Atl. 105; *Lyman v. Concord R. Corp.*, 66 N. H. 200, 20 Atl. 976, 11 L. R. A. 364; *Davis v. Concord R. Corp.*, 68 N. H. 247, 44 Atl. 388; *Folsom v. Concord R. Corp.*, 68 N. H. 454, 38 Atl. 209; *Smith v. Boston & M. R. R.*, 70 N. H. 53, 85 Am. St. Rep. 596, 47 Atl. 290; *Gahagan v. Boston & M. R. R.*, 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426; *Waldron v. Boston & M. R. R.*, 71 N. H. 362; *Tucker v. Boston & M. R. R.*, 73 N. H. 132, 59 Atl. 943; *Brown v. Boston & M. R. R.*, 73 N. H. 568, 64 Atl. 194. It is at least significant that the court, in denying the motion for a nonsuit in cases where the plaintiff's intestate was killed at a railroad crossing, and there was an entire absence of direct evidence showing what his acts in fact were, has based its decision on some circumstance connected with the accident, and not on the instinct of self-preservation, which in the *Huntress* case was deemed to be sufficient evidence of care.

In cases where there was active participation by the deceased in bringing about the dangerous situation, and the duty rested upon him, as well as upon the defendant, of actively and vigilantly exercising ordinary care under the circumstances, the absence of all evidence of what he did at the time cannot be supplied by conjecture, or by a theory which is as liable to be false as true. The instinct of self-preserva-



tion may furnish an explanation or excuse for his careless acts after he got into a place of danger, but it is not evidence that his acts were the acts of an ordinarily prudent man before the danger became imminent. Standing two or three feet from a railroad track when a train is about to pass is not ordinarily a dangerous situation for a man to occupy (*Waldron v. Boston & M. R. R.*, 71 N. H. 362, 52 Atl. 443), and his protection from harm does not then depend upon acts suggested by an instinctive impulse to avoid danger, but upon his intelligent exercise of ordinary care. If from that position he runs upon the track and is killed, never having before shown signs of mental derangement, are the jury to be allowed to find that he was exercising due care, because they may think he was anxious to avoid being killed and may possibly have miscalculated the speed of the train? If his acts so far as known were as likely to be negligent as careful, it is strange logic to hold that a presumption that he desired to avoid death shows he was guilty of no negligence.

The fallaciousness of this position seems to be recognized by the courts that sustain it, when they restrict the operation of the presumption to cases where there is no direct evidence of what the deceased's acts were, as in *Newport etc. Co. v. Beaumeister*, 102 Va. 667, 47 S. E. 821; *Reynolds v. Keokuk*, 72 Iowa, 371, 34 N. W. 167; *Ellis v. Leonard*, 107 Iowa, 487, 78 N. W. 246; *Gay v. Winter*, 34 Cal. 152. If the presumption is of sufficient evidentiary value to sustain the burden of proving due care when there is no direct evidence on the subject, <sup>134</sup> it is difficult to understand why it has no probative force when the evidence is conflicting or inconclusive. Why may it not outweigh the testimony of a prejudiced or ignorant witness; or why, if it is sufficient to prove the due care of a dead man, may it not be equally useful for a live man? That the only witness who could explain the matter is dead, does not make that evidence, which, if he were alive, would not have that character.

Since the jury are not permitted to find material facts without sufficient legal evidence (*Deschenes v. Concord & M. R. R.*, 69 N. H. 285, 46 Atl. 467; *Carr v. Manchester Electric Co.*, 70 N. H. 308, 48 Atl. 286; *Dame v. Laconia Car Co. Works*, 71 N. H. 407, 52 Atl. 864; *Reynolds v. Burgess S. Fibre Co.*, 73 N. H. 126, 59 Atl. 615), the inquiry arises at this point, upon the motion for a nonsuit, whether the burden of proving that the deceased was reasonably careful is upon the plaintiff, or whether it is for the defendants to prove that he was careless. If the former is the rule to be

applied, it would seem that the plaintiff must be nonsuited; if the latter rule is followed, the plaintiff has made out a *prima facie* case and is entitled to go to the jury. There is a great conflict of authority upon this subject: 1 Thompson's Commentaries on the Law of Negligence, secs. 364-369. But in this jurisdiction it has been uniformly held that the plaintiff, in an action to recover damages for personal injuries alleged to have been caused by the defendant's negligence, must prove by a preponderance of evidence, not only that the defendant was guilty of negligent acts adequate for the infliction of the injury received, but also that he exercised ordinary care for his own safety under the circumstances, or, in other words, that he was free from fault contributing to cause his injury. "From the fact of injury no presumption arises as to the guilt or innocence of either party. The plaintiff is, therefore, in suits for injury upon a railroad crossing, as in all cases for negligence, bound to prove that his injury was not due to his own fault, but was caused by the fault of the defendant. . . . Hence the plaintiff, to entitle him to submit his case to the jury, must produce evidence sufficient to render reasonable a finding that he was free from fault": *Gahagan v. Boston & M. R. R.*, 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426. Some text-writers have inaccurately stated the New Hampshire rule otherwise: See 1 Thompson's Commentaries on the Law of Negligence, sec. 366; Beach on Contributory Negligence, secs. 426, 440.

Whether, therefore, the plaintiff should have the burden of proving his carefulness in such a case, or whether he has made out a *prima facie* case by submitting sufficient evidence of the defendant's negligence only, leaving it for the latter to prove the plaintiff's carelessness as a matter of defense, are questions whose discussion at this time would serve no useful purpose. To hold, in substance, that the plaintiff sustains this burden by submitting no evidence of it, except conjecture and speculation, is little less <sup>135</sup> than an entire change of our procedure in such cases, and the substitution of the rule which throws the burden of proving the issue of the plaintiff's conduct upon the defendant. It is an apparent contradiction of terms to say that the plaintiff may sustain the burden of proof by presenting no evidence except the bare fact that the deceased was killed by a locomotive at a grade crossing. It would be much more consistent and logical to adopt the language of Mr. Beach (Beach on Contributory Negligence, sec. 426), where he says that, under the rule imposing the burden of proof upon the defendant, "the plain-

tiff has made his case when he has shown injury to himself and negligence on the part of the defendant which was a proximate cause of it. It then devolves upon the defendant to allege and prove contributory negligence as a matter of defense, the presumption being in favor of the plaintiff, that he was at the time of the accident in the exercise of due care, and that the injury was caused wholly by the defendant's negligent misconduct." In other words, it would be better to change our rule relating to the burden of proof in such cases, than, nominally retaining it, to indirectly deprive it of all vigor or force.

Thompson (2 Thompson's Commentaries on the Law of Negligence, secs. 1622, 1623), in discussing this question, recognizes that the presumption of right-acting on the part of a plaintiff does not apply in jurisdictions where the burden of showing carefulness is on the plaintiff, and he says (section 1623): "We may conclude this discussion by saying that, in those jurisdictions where the rule obtains that the person killed or injured is presumed to have been in the exercise of due care, and where the burden of showing the contrary is on the defendant, the question whether the circumstances attending the death of a traveler killed at a railway crossing are such as to warrant the presumption that the traveler, prompted by the instinct of self-preservation, exercised the care which the law demands of travelers in such cases—there being no witness to the accident and no evidence speaking upon the question of the manner in which the deceased approached and went upon the track—will be a question of fact for the jury." The whole difficulty seems to result from the different rules employed to determine the question of the burden of producing evidence upon the issue of the plaintiff's care. Where the law is that that burden is upon the plaintiff, as in this state, it is overlooked or disregarded by holding that he is not obliged to submit evidence, either direct or indirect, of his conduct, but may satisfy the rule by invoking a presumption of right-acting. Cases, therefore, decided upon a different theory of the burden of proof, which seem to enforce that presumption (*Cleveland etc. R. R. v. Rowan*, 66 Pa. 393; *Weiss v. Pennsylvania R. R. Co.*, 79 Pa. 387; *Northern etc. Ry. v. State*, 29 Md. 420, 96 Am. Dec. 545; *Southern Ry. Co. v. Bryant's Admr.*, 95 Va. 212, 28 S. E. 183; *Petty v. Hannibal etc. Ry. Co.*, 88 Mo. 306; *Atchison etc. R. R. Co. v. Hill*, 57 Kan. 139, 45 Pac. 581), cannot be useful authorities in this jurisdiction: See, also, *Continental I. Co. v. Stead*, 95 U. S. 161, 24 L. ed. 403;

Texas etc. Ry. Co. v. Gentry, 163 U. S. 353, 16 Sup. Ct. Rep. 1104, 41 L. ed. 186; Baltimore & P. R. R. Co. v. Landrigan, 191 U. S. 461, 24 Sup. Ct. Rep. 137, 48 L. ed. 262.

Legislation may establish a rule of procedure and require a defendant to prove in the first instance the contributing negligence of the plaintiff: See *Foss v. Baker*, 62 N. H. 247; *Walsh v. Boston & M. R. R.*, 171 Mass. 52, 50 N. E. 453. It may, perhaps, even go so far as to make the injury received evidence for the plaintiff of the defendant's negligence, throwing the burden upon the latter of proving his freedom from fault. But whatever the rule may be as to the burden of proof, or as to the duty of producing evidence in the first instance to prove or disprove a fact in issue, it cannot itself be evidence to be weighed with other evidence in ascertaining the ultimate fact. The burden of going forward with proof is not a species of evidence for the consideration of the jury. It is merely a rule of law, based in part on expediency and convenience in the trial of cases, and in part, in some instances, on a presumption of law derived from a conception of the conduct of men in general. But as said by Doe, J., in *Lisbon v. Lyman*, 49 N. H. 553: "A legal presumption is not evidence. In civil cases, it is the finding of a fact or the decision of a point, when there is not testimony, and no inference of fact from the absence of testimony, on the subject, or when the evidence is balanced. And often the fact is also found, or the decision made, by the rule of law which imposes the burden of proof on the party having the affirmative."

In his *Treatise on Evidence*, Professor Thayer says (page 314): "Presumptions are aids to reasoning and argumentation, which assume the truth of certain matters for the purpose of some given inquiry. They may be grounded on general experience, or probability of any kind; or merely on policy and convenience. On whatever basis they rest, they operate in advance of argument or evidence, or irrespective of it, by taking something for granted; by assuming its existence." And on page 337 this language occurs: "While it is obvious, then, that a presumption, i. e., the assumption, intendment, taking-for granted, which we call by that name, accomplishes, for the moment at any rate, the work of reasoning and evidence, it should be remarked, as I have said before, that neither this result nor the rule which requires it constitutes, in itself, either evidence or reasoning. This might seem too plain to require mention if it were not for the loose phraseology in which courts sometimes charge the

jury, leaving to it in a lump 'all the evidence and the presumptions,' as if they were capable of being weighed together as one mass of probative matter."

<sup>137</sup> If there is a legal presumption that the ordinary man performs his duty and is not negligent, it is no more competent as evidence to prove the fact in a particular case, in the absence of other proof, than are other rules of law, including the presumption of innocence in criminal cases.

The views thus far expressed seem to be abundantly supported by the cases that are in point. In *O'Reilly v. Brooklyn Heights R. R. Co.*, 82 N. Y. App. 492, 81 N. Y. Supp. 572, a case very similar to the present, the court say (page 485): "In fine, the record does not show that the deceased took any precautions whatever, and it does tend to show that if he had done so, he would have seen the approaching car and escaped it, for the witness Shanley saw it rapidly approaching, lighted by electricity, and with the usual rumble of such a vehicle. I think that the plaintiff did not meet the obligation to show the absence of contributory negligence of her intestate. . . . Even where the evidence upon such question points neither way, the plaintiff fails."

In *Wiwirowski v. Lake Shore etc. Ry. Co.*, 124 N. Y. 420, 26 N. E. 1023, it was held that, while want of contributory negligence on the part of a person killed at a railroad crossing may be established by inferences from the circumstances, such an inference may not be drawn simply from a presumption that a person exposed to danger will exercise care and prudence in regard to his own safety. In *Cordell v. New York C. & H. R. R. Co.*, 75 N. Y. 330, it is said: "When a person has been killed at a railroad crossing, and there are no witnesses of the accident, the circumstances must be such as to show that the deceased exercised proper care for his own safety. When the circumstances point just as much to the negligence of the deceased as to its absence, or point in neither direction, the plaintiff should be nonsuited. The presumption that every person will take care of himself from regard to his own life and safety cannot take the place of proof; because human experience shows that persons exposed to danger will frequently forego the ordinary precautions of safety": *Reynolds v. New York C. & H. R. R. Co.*, 58 N. Y. 248, is to the same effect.

In *Walsh v. Boston & M. R. R.*, 171 Mass. 52, 50 N. E. 453, the court say: "There is nothing to show that the plaintiff's intestate, as he approached the crossing, looked or listened, or took any precautions to ascertain whether a train was

coming. It is true that he may have been misled somewhat by the absence of the statutory signals, if those were not given, and by the open gates and the want of a light, and that, if he had looked, his view of the approaching train might have been obscured by trees, fences and buildings. But whether he was misled, or whether he looked or listened, or tried to look or listen, is all a matter of conjecture. . . . And the circumstances do not appear to have been such as to excuse him <sup>138</sup> from exercising the care which every traveler is bound to exercise as he approaches a railroad crossing": See, also, *Livermore v. Fitchburg R. Co.*, 163 Mass. 132, 39 N. E. 789; *Moore v. Boston & A. R. R. Co.*, 159 Mass. 399, 34 N. E. 366.

In *McLane v. Perkins*, 92 Me. 39, 42 Atl. 255, 43 L. R. A. 487, it is said: "But in all cases the plaintiff's freedom from contributory negligence in the particular case must affirmatively appear in evidence, or at least by some legitimate inference from the evidence. It is not to be presumed. If sought to be established by inference, it must be by inference from facts in evidence in the case. It cannot be inferred from . . . the argument that men are likely to be careful in danger. It is as true that men are careless as that they are careful. It is as true that men negligently contribute to their own injury, as that they do not": See, also, *Chase v. Maine Cent. R. R. Co.*, 77 Me. 62, 52 Am. Rep. 744; *Day v. Boston & M. R. R.*, 99 Me. 207, 90 Am. St. Rep. 335, 52 Atl. 771.

When the question is what a man did under a given state of facts, it is not often proved by showing or assuming what men in general would have done. What the average man would probably have done may furnish a standard by which to determine the legal duty of the man whose conduct is in question. When it is known what in fact he did, the question whether he performed his duty arises, which often, especially in cases for negligence, depends upon the conduct which the average man might be expected to disclose under similar circumstances. But this rule or principle which determines the degree of care which the law requires cannot also be used as evidence, to prove that the conduct in question was that of the ordinarily prudent man. It does not furnish both the measure and the thing measured.

The physical actions of a man, which are subject to his volition and control, cannot ordinarily be determined by presumptions based upon our general knowledge of human nature. We may be able to say that a machine will act in a certain way when subject to known forces, and so far as man

is a machine, we can calculate with some degree of certainty how he will act under known conditions. But so far as his actions are governed by his will, intelligence and judgment, we cannot know what his specific acts were in a special situation, unless it is true that all men would act alike in the same situation. If the question is whether A used good judgment in a business transaction with B, there is no presumption that he did what men in general would do under the circumstances, because it was his privilege to do differently. The fact that the great majority of minors are not emancipated is not evidence where the fact of the emancipation of a particular minor is in issue: *Libson v. Lyman*, 49 N. H. 553. The fact that the great majority of men pay their debts is not evidence of payment in an action of assumpsit upon a contract: *Kendall v. Brownson*, 139 47 N. H. 186. The fact that the great majority of mankind regard a certain religious doctrine as absolutely irrational and false is no evidence that a particular person entertained that opinion: *Spead v. Tomlinson*, 73 N. H. 46, 59 Atl. 376. If there is a presumption of the sanity of a party, in the absence of evidence to the contrary, because most men are sane (*State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533), it relates to a mental state or condition independent of volition and not controlled or produced by intelligent mental effort. Upon the same ground it may be inferred that a person's senses of sight, hearing and feeling are ordinarily acute. But the proposition that a man acted in one of several different ways in a specific instance, because a jury may happen to think that an ordinarily prudent man would have so acted, is illogical and substitutes pure conjecture for proof. As a matter of substantive law, he is bound to exercise ordinary care; but that legal duty does not become legal evidence that he was free from fault. A plaintiff who has the burden of presenting evidence of that fact does not prove it, in the absence of direct evidence, by a legal presumption. The burden of proof cannot be shifted in that way upon the defendant. Nor as a practical proposition is such a method of reasoning logical. To infer that the plaintiff's intestate exercised the care which the average man of ordinary prudence would probably have exercised, from the mere fact that he belonged to the human species, is to guess that he was, in respect to carefulness of conduct at a particular time, the equivalent of the average man of ordinary prudence, and from this to infer that his voluntary acts were careful and prudent. The minor premise in

the syllogism is pure conjecture; hence the conclusion is worthless.

Since, therefore, it was incumbent on the plaintiff to present some evidence for the consideration of the jury tending to show that the deceased was exercising due care at the time he received his fatal injury, and since the instinct of self-preservation, if deemed evidence for any purpose, does not explain how or why he got upon the track in front of the approaching engine, and since legal presumptions of right-acting have no probative, evidentiary force, the motion for a nonsuit should have been granted. Whether the fact that the deceased in this case was traveling on foot, while in the Huntress case the deceased was riding in a team, constitutes an important distinction between the two cases, it is unnecessary to inquire. If it does not, the Huntress case must be overruled. This result makes it unnecessary to decide whether there was sufficient evidence of the defendant's negligence.

Exception sustained.

All concurred.

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*The Presumption of the Exercise of Due Care* is the subject of a note to Chicago etc. Ry. Co. v. Wilson, 116 Am. St. Rep. 108; and the presumption of negligence from the happening of an accident is the subject of a note to Cincinnati Traction Co. v. Holzenkamp, 113 Am. St. Rep. 986.

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## ROBERTS v. CLAREMONT RAILWAY AND LIGHTING COMPANY.

[74 N. H. 217, 66 Atl. 485.]

**WATERS—Riparian Rights.**—The owners of the land through which a stream runs may divert it from its channel for any lawful use, provided they do not detain the water unreasonably, do not overflow the land of the next upper proprietor, and return it to its channel above the land of the next lower proprietor in substantially the same condition as when it reached their land. (p. 963.)

**WATERS—Riparian Rights—Joint Owners—Partition.**—If two persons are joint owners of a right to divert the water of a stream for power purposes, either has a right to have the water divided and his share assigned to him in severalty, if that can be done without unreasonably interfering with the rights of the other. (pp. 963, 964.)

**WATERS—Riparian Rights—Cotenancy in—Accounting.**—A common owner of the right to use water who uses more than his share thereof must account to his cotenants for their equitable share of the benefit he has received from the use of their share of such water. (pp. 964, 965.)



Application for an injunction. The parties were the common owners of a waterfall on a stream. The defendants owned the land on both sides of the stream above a certain fall and the plaintiff the land on both sides of the stream below such fall. The defendants built a dam across the stream on their land above the fall enabling them to divert all of the water ordinarily flowing in the stream through a canal to their powerhouse, and to return it to the stream above the point where the plaintiff owned the land on both sides thereof. When the defendants began to build their dam they supposed they had a right to take the water, but they had knowledge before their dam was used that the plaintiff disputed their right, and they have continued to use their dam since they knew that they had no such right, and that the plaintiff disputed such right. The latter had had no use of the water and the loss he sustained on account of the defendants' action was that incident to their invasion of their legal right. An injunction was issued and the defendant appealed.

H. Holt and Streeter & Hollis, for the plaintiff.

F. H. Brown and J. M. Mitchell, for the defendants.

**219** YOUNG, J. The plaintiff is trying to prevent the defendants from using their share of the water without his consent, even if that may be done without trespassing on his land or interfering in any way with his making a like use of his share of the water, and they are seeking to avoid paying for the benefit they have received from their use of his share. The rule that riparian proprietors have a right "to insist that the stream shall continue to run *uti currere solebat*" (*Tillotson v. Smith*, 32 N. H. 90, 64 Am. Dec. 355), on which the plaintiff seems to rely, is subject to the limitation that the owners of the land through which it runs may divert it from its channel for any lawful use, provided they do not detain the water unreasonably, do not overflow the land of the next upper proprietor, and return it to its channel above the land of the next lower proprietor in substantially the same condition as when it reached their land: *Angell on Watercourses*, secs. 90-95. So if the plaintiff and the defendants elect to do so, they lawfully may divert the whole of the water from the river, if they return it to its channel above the land of the next lower proprietor; in other words, they are the joint owners of the right to divert the water for power purposes. The question raised by the defendants' exception to the dismissal of their motion, therefore, is whether

they have a legal right to have the water divided and their share assigned to them in severalty, if that can be done without unreasonably interfering with the plaintiff's rights. It is clear they have such a right if the same rule is to be applied to both improved and unimproved water powers; for it is settled that the court has power to make such orders in respect to the way the several owners shall exercise their rights in the common property as will be for the best interest of each of them, in so far as that can be done without any unreasonable interference with the rights of the others: *Connecticut River Lumber Co. v. Olcott Falls Co.*, 65 N. H. 290, 21 Atl. 1090, 13 L. R. A. 826. Consequently, the defendants should be permitted to draw one-half the water from the river above the plaintiff's land, if that would be a reasonable exercise of their right to use the water and can be done without injury to the plaintiff: *Horne v. Hutchins*, 71 N. H. 128, 51 Atl. 651; *Fowler v. Kent*, 71 N. H. 388, 52 Atl. 554; *State v. Sunapee Dam Co.*, 70 N. H. 458, 50 Atl. 108, 59 L. R. A. 55; *Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 504; *Patten Paper Co. v. Kankanna W. P. Co.*, 70 Wis. 659, 35 N. W. 737; *Angell on Watercourses*, secs. 98-101. It is obvious that it can; for if the defendants are ordered to make a spill-way in their dam or to maintain a headgate to their canal which will cause half of the water to return to the river above the plaintiff's land, and he is permitted to attach a dam to the defendants' land or to adopt some other means by which he can exercise his rights as fully and completely as though they were not permitted to divert their share of the water from the stream, he will have no <sup>220</sup> cause for complaint. Consequently, there should have been a decree for the defendants, dividing the water upon condition that they permit the plaintiff to attach a dam to their land, or to adopt some other course which will make the use of his right practicable, whenever he desires to do so in order to use his share of the water for any lawful purpose.

Although the owners of the land are not, strictly speaking, the owners of the water which flows in a natural channel over it, nor is the owner of either bank the owner of that part of the water which flows over his land, still the owners of the banks are the owners of the right to use the water for any lawful purpose—each owning an undivided half of that right. Consequently, their rights and liabilities in respect to the use of the water are those of tenants in common in respect to common property. Although they are not the common owners of the water, they are of the right to use it.

If either uses it, his rights and his liabilities to the other owners will be the same as though they were tenants in common of the water. Since this is so, no reason can be given why a different rule should be applied when one of the owners is asked to account to the other for any benefit he has received from his use of more than his fair share of the water, from that applied in the case of an accounting between the common owners of any other property.

It is settled in this state that when a common owner uses more than his share of the common property—in this case the common right to use the water—he must account to his cotenants for their equitable share of the benefit he received from his use of their share: *Gage v. Gage*, 66 N. H. 282, 29 Atl. 543, 28 L. R. A. 829. Consequently, no question being raised as to the form of action, there should have been a decree that the plaintiff recover, at the rate of five hundred dollars a year from August 1, 1903, the benefit which it is found the defendants have received from their use of his share of the common property. The defendants' exception to the dismissal of their motion and to the injunction, and the plaintiff's to the assessment of damages, are sustained.

Case discharged.

All concurred.

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*Equity has Jurisdiction to Make Partition* of the use of water between opposite riparian proprietors when necessary to secure an equal use or enjoyment in their rights, and will exercise such power upon a bill properly framed and presented for that purpose: *Warren v. Westbrook Mfg. Co.*, 88 Me. 58, 51 Am. St. Rep. 372. And partition may be had of a mill and mill privileges: *Hanson v. Willard*, 12 Me. 142, 28 Am. Dec. 162.

*In a Suit to Partition Water-power*, it is beyond the power of the court, in approving the recommendation of referees to decree the appointment of an inspector or supervisor, to divide the water, keep out weirs, and otherwise superintend the property for the joint benefit of the owners after partition by allotment in kind. If, in such case, partition in kind is impracticable without such decree, the property must be sold and the proceeds divided to effect a partition: *Brown v. Cooper*, 98 Iowa, 444, 60 Am. St. Rep. 190.

**HILL v. HILL.**

[74 N. H. 288, 67 Atl. 406.]

**HUSBAND AND WIFE—Contract Concerning Marital Rights.** Husband and wife cannot make a valid contract renouncing their marital rights. (p. 966.)

**HUSBAND AND WIFE—Contract for Separation—Renunciation of Marital Rights.**—If covenants in a contract between husband and wife respecting their property rights are not independent of, and cannot be separated from, covenants in the same contract renouncing their marital relations and rights, the entire contract is void. (p. 967.)

**HUSBAND AND WIFE—Renunciation of Marital Relations—Evidence.**—If the renunciation of marital relations between husband and wife is one of the purposes sought to be accomplished by a contract between them, this express intent cannot be contradicted by extraneous evidence. (p. 967.)

Suit to set aside as fraudulent as against the complainant's homestead and dower rights a conveyance of his farm made by her husband, on the morning of their marriage and without the complainant's knowledge, it being the property in which the homestead and dower rights were claimed. As against the complainant, it was urged that she had lost her right to maintain the action by reason of an agreement entered into in July, 1897, the substance of which is stated in the opinion of the court. The validity of this agreement was the question reserved for the consideration of the court. If it was found valid, the bill was to be dismissed; otherwise, there was to be a decree in plaintiff's favor.

H. F. Hollis and H. J. Brown, for the plaintiff.

Martin & Howe, for the defendants.

**290 BINGHAM, J.** It is found that the deed of November 22, 1894, was fraudulent and void as respects the plaintiff. In this situation the case stands as though that conveyance had never been made, and the single question for our consideration is whether the agreement of July 20, 1897, is or is not void. The defendants say that it is valid and a complete defense to the plaintiff's position.

When the plaintiff and Samuel D. Hill married, they entered into a relation from which they could not relieve themselves by contract, and which while they live cannot be dissolved except with the assent of the state. So long as that relation continues, the law imposes upon them certain duties and obligations, and confers upon each certain rights in the other's property. If they can make a valid agreement between themselves touching their respective rights in each

other's property—a question not considered—they cannot make a valid contract renouncing their marital rights; and if covenants of each kind should occur in the same contract, their validity would depend upon whether they were independent and their considerations distinct. If they were not, the whole agreement would be void: *Foote v. Nickerson*, 70 N. H. 496, 48 Atl. 1088, 54 L. R. A. 554.

The contract that was made between these parties in July, 1897, includes covenants that contemplate a renunciation of marital as well as a release of property rights; and the validity of the latter covenants, in the aspect of the case here considered, depends upon whether they are independent of the former and based upon distinct considerations. The preamble of the contract discloses that the moving cause for entering into it was the desire of the parties to live separate and apart from each other. With this object in view, they undertook to put an end to their marital duties and obligations and to release such property rights as had <sup>291</sup> arisen out of that relation. Samuel covenanted that the plaintiff might at all times thereafter live separate and apart from him and in such places as she might desire, that she might engage in such business as she saw fit and for her sole benefit, that he would not molest her on account of living apart from him, and that he would pay to her for her support and maintenance the sum of two hundred dollars; and the plaintiff, in view of their desire to live apart and in consideration of Samuel's covenants that she might do so, agreed to accept the sum of two hundred dollars in discharge of his obligations to her, and in case he died before she did, not to make any claim for dower or other interest in his estate, but to receive that sum in full settlement and discharge of all interests of every kind which she might have by virtue of their marital relations. As Samuel's covenant that the plaintiff might live separate and apart from him forms a part, at least, of the consideration for her covenants, and as it cannot be known whether she would have entered into the contract but for his covenant that she might live apart from him, his covenant that she might do so is not independent of, and cannot be separated from, her covenants, and treated as valid, leaving the latter to stand: *Foote v. Nickerson*, 70 N. H. 496, 48 Atl. 1088, 54 L. R. A. 554; *Williams v. Park*, 72 N. H. 305, 56 Atl. 463, 64 L. R. A. 33.

That the renunciation of marital obligations and duties was one of the purposes sought to be accomplished by the contract is not obscure or doubtful. It was, therefore, not

open to the parties to contradict this express intent by extraneous evidence; and if the evidence from which it was found—that the parties continued to live together for a time after the contract was made—was introduced for this purpose, it was incompetent and immaterial: *Bancroft v. Union E. Co.*, 72 N. H. 402, 57 Atl. 97, 64 L. R. A. 298; *Horne v. Hutchins*, 72 N. H. 211, 55 Atl. 361. If it was introduced for the purpose of showing that the provisions of the contract relating to living apart had been waived, that fact is not found.

In accordance with the order made in the superior court, there should be a decree for the plaintiff.

Case discharged.

Walker, J., did not sit; the others concurred.

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*Separation Agreements Between Husband and Wife* are discussed in the notes to *Baum v. Baum*, 83 Am. St. Rep. 859; *Stephenson v. Osborne*, 90 Am. Dec. 367. While the validity of such contracts is now generally recognized, courts of equity will not specifically enforce the performance of contracts tainted with an understanding, contemporaneous with the marriage, looking to a possible or probable separation in the future, and, in the nature of things, tending to bring such a separation about: *Sawyer v. Churchill*, 77 Vt. 273, 107 Am. St. Rep. 762.

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## MOORE v. BERLIN MILLS COMPANY.

[74 N. H. 305, 67 Atl. 578.]

**LAND OWNER'S Right to Use of Land.**—The owner of land may put it to any use not unlawful which, in view of his own interest and that of all persons affected by it, is a reasonable use. For the consequences to others of such a use he is not liable, and the question of reasonableness is a question of fact. (pp. 971, 972.)

**WATERS—Flowage Rights—Percolation.**—The owner of flowage rights, by maintaining a dam across the stream and creating a reservoir for the storage of water to be used in the development of mill power or for other useful purpose, is not liable to an adjoining owner for the percolation of water unless such use is unreasonable. (p. 972.)

J. E. Libby and E. Sullivan, for the plaintiff.

Drew, Jordan, Shurtleff & Morris, and Rich & Marble, for the defendant.

<sup>306</sup> WALKER, J. In this action the plaintiff seeks to recover damages occasioned by water which, it is claimed, the

defendant, by means of its dam across the river, causes to percolate through the ground and into the soil of the plaintiff. Between the river and the plaintiff's land the railroad owns a strip of land from ninety-seven to one hundred and eighty-three feet wide, through which the water percolates before it reaches the plaintiff's land. Hence it follows that the plaintiff cannot complain that the defendant's dam obstructs the natural flow of the river or interferes with her riparian rights. So far as she is concerned, the defendant must be deemed to be the rightful owner of flowage rights in the river; and those rights are property rights, in the enjoyment of which it is entitled to the same protection accorded to the owners of real estate generally. The retarded flow of the water in the river produces an artificial reservoir which the defendant has the right to maintain and enjoy as its property; and the case does not materially differ from what it would be, if the defendant had constructed a reservoir on its own land for some useful purpose, and water from it had by percolation finally reached the plaintiff's land and damaged her sand-pit.

Upon this state of evidentiary facts, the court in substance instructed the jury, subject to the defendant's exception, that the defendant is liable for all damages caused by the percolating water, without regard to the question of the reasonableness of the defendant's use of the dam and the river. This was in effect telling the jury that though the defendant could not, in the exercise of ordinary prudence, foresee the injury to the plaintiff resulting from the percolation of water from its reservoir, though it was guilty of no negligence with reference to the plaintiff's rights, and though it used ordinary care in the management of its property to avoid causing injury to others, still it was bound at its peril to keep the water held in its reservoir from reaching the plaintiff's land, located one hundred feet from the river, through undiscovered subterranean passages. The doctrine of *Fletcher v. Rylands*, L. R. 1 Ex. 265, 3 H. L. Cas. 330, was thus applied without qualification; and the jury, upon finding that the water did percolate into the plaintiff's land in consequence of the swollen condition of the river, and that it caused damage to the plaintiff's land, were required as a matter of law to return a verdict for the plaintiff. But the doctrine of that case has been repudiated in this state. In *Garland v. Towne*, 55 N. H. 55, 20 Am. Rep. 164, Ladd, J., apprehended: "It would be a surprise, not only to that large class of our people engaged in various manufacturing opera-

tions, who use water-power to propel their machinery, and for that purpose maintain reservoirs, but to the legal profession, to hold that, in case of the breaking away of such reservoirs, there is no question of care <sup>307</sup> or negligence to be tried, but that he who has thus accumulated water in a 'non-natural' state on his own premises is liable, at all events as matter of law, in case it escapes, for the damage caused by it": See, also, *Brown v. Collins*, 53 N. H. 442, 16 Am. Rep. 372; *Carter v. Thurston*, 58 N. H. 104, 42 Am. Rep. 584; *Davis v. Whitney*, 68 N. H. 66, 44 Atl. 78; *Gerrish v. Whitfield*, 72 N. H. 22, 55 Atl. 551.

The radical inapplicability of that doctrine to the modern state of industrial enterprise, even if it was suited to and originated in an ancient civilization, is pointed out in *Brown v. Collins*, 53 N. H. 442, 16 Am. Rep. 372, and is deemed to be a sufficient reason for its rejection as a present rule for regulating the rights and duties connected with the ownership and use of property. And the court say (page 450): "When a defendant erroneously supposed, without any fault of either party, that he had a right to do what he did, and his act, done in the assertion of his supposed right, turns out to have been an interference with the plaintiff's property, he is generally held to have assumed the risk of maintaining the right which he asserted and the responsibility of the natural consequences of his voluntary act. But when there was no fault on his part, and the damage was not caused by his voluntary and intended act, or by an act of which he knew, or ought to have known, the damage would be a necessary, probable or natural consequence, or by an act which he knew, or ought to have known, to be unlawful, we understand the general rule to be that he is not liable." The distinction between interfering with the property of one's neighbor under a claim of right, and causing him some damage or inconvenience by the reasonable enjoyment of one's property, though plain, has not been recognized by cases which have followed the theory of *Fletcher v. Rylands*, L. R. 1 Ex. 265, 3 H. L. Cas. 330. In the present state of society, the rights of property owners are not absolute, but interdependent, and a legal enjoyment thereof is not inconsistent with a resulting injury to others: *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569, 83 Am. Dec. 179; *Hayes v. Waldron*, 44 N. H. 580, 84 Am. Dec. 105. As a consequence of this essential principle, the doctrine of reasonableness in the enjoyment of property has been established in this state as the test in many cases by



which to determine questions of liability for damages arising from such enjoyment.

“As to the use of land in the control of surface water, the enjoyment of water percolating beneath the surface, and the use generally that may be rightfully made of real estate by the owner or occupant, the test has been considered to be not merely whether the act was an exercise of dominion on the land regardless of the injury to other land, but the reasonableness of the use under all the circumstances, including the necessity and advantage to one and the unavoidable injury to the other”: *Horan v. Byrnes*, 72 <sup>308</sup> N. H. 93, 101 Am. St. Rep. 670, 54 Atl. 945, 62 L. R. A. 602. “Every interference by one land owner with the natural drainage, actually injurious to the land of another, would be unreasonable if not made by the former in the reasonable use of his own property”: *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569, 82 Am. Dec. 179. “The question presented in such cases is not so much one of law as of fact. It would doubtless be convenient if it could always be answered by citing a stereotyped definition of legal right. But as the situation of all adjoining owners of land is not the same, and as the circumstances attending the use of land in view of the flow of surface water are infinitely various, the failure to attain substantial justice by the enforcement in all cases of a rule of law which does not recognize these important differences is not surprising. The result is that the question of the reasonableness of the use in a given case must be determined as a question of fact under all the attendant circumstances”: *Franklin v. Durgee*, 71 N. H. 186, 51 Atl. 911, 58 L. R. A. 112.

“One of Eaton’s proprietary rights was the correlative of R.’s duty of abstaining from such a use of air and water, and from such an interference with their quality and circulation, as would be unreasonable and injurious to the enjoyment of Eaton’s farm. The same principle governs the ownership and use of land, and all material things. Whether we say that R. had a right to make a reasonable use of his land, and thereby cause a damage to Eaton, or that he had not a right, by an unreasonable use of his land, to injure Eaton, or that Eaton had a right not to be injured by R.’s unreasonable use of his own land, we mean the same thing. The principle may be expressed in an affirmative or a negative form, in a statement of rights or a statement of duties. Calling in a rule of consequential damages, or treating it under that head, tends to envelop a very plain matter in un-

necessary obscurity": *Thompson v. Androscoggin River I. Co.*, 54 N. H. 545.

In *Ladd v. Granite State Brick Co.*, 68 N. H. 185, 38 Atl. 1045, the principle is tersely stated thus: "The owner may put his land or other property to any use not unlawful which, in view of his own interest and that of all persons affected by it, is a reasonable use. For the consequence to others of such a use, he is not responsible. The question of reasonableness is a question of fact." In *Dolbeer v. Suncook W. Co.*, 72 N. H. 562, 58 Atl. 504, it is said: "The rights of the owners of lands adjoining the plaintiff's land to have water percolate from the pond through the ground to their lands, like the correlative rights of the plaintiff, are limited by the bounds of reasonableness. The plaintiff has a right to obstruct or change such percolation to an extent that is reasonable in view of its effect upon the interests of all parties affected by it." Many other cases might be referred to, in which the foregoing principles have been applied: See <sup>300</sup> *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276; *Thompson v. Androscoggin River I. Co.*, 58 N. H. 108; *Rindge v. Sargent*, 64 N. H. 294, 9 Atl. 123; *Hamlin v. Blankenberg*, 73 N. H. 258, 60 Atl. 1010.

The charge of the court in this case, therefore, cannot be sustained. The defendant's acts in maintaining a dam across the river were not in the nature of trespasses as against the plaintiff. Its enjoyment of flowage rights by creating a reservoir for the storage of water to be used in the development of power at its mill, or for other useful purposes, did not depend upon the consent or pleasure of the plaintiff; and the plaintiff cannot complain unless her damage results from its unreasonable exercise of those rights. What acts would be competent and sufficient evidence, or would constitute as a matter of law conclusive evidence, of an unreasonable exercise of its flowage rights, it would be useless to attempt to specify. The case discloses evidence tending to show that the defendant was using its mill property in a reasonable manner with reference to the plaintiff's land. Whether it violated its duty to the plaintiff in this respect by suffering water from the river to reach her land by percolation, and whether, after learning of the damage it occasioned to her land, it could and should, under the circumstances, have prevented the percolation, are questions determinable, not by the court under set rules relating to legal titles, but by the jury in the exercise of a discriminating judgment in view of all the competent evidence.

Other questions presented by the record have not been considered, since upon another trial they may not arise.

Exception sustained; verdict set aside.

All concurred.

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*One Who Negligently Allows Water to Escape from a Canal* lawfully constructed so as to overflow the land of another creates a liability for consequential damages: *Suter v. Wenatchee Water Power Co.*, 35 Wash. 1, 102 Am. St. Rep. 881. And persons who construct irrigation ditches must exercise reasonable skill and judgment in their construction and maintenance, to the end that the property and rights of others are not interfered with or trespassed upon: *Lisonbee v. Monroe Irrigating Co.*, 18 Utah, 343, 72 Am. St. Rep. 784; *Big Goose etc. Ditch Co. v. Morrow*, 8 Wyo. 537, 80 Am. St. Rep. 955. But they are bound to exercise only reasonable care; and if they do this, they are not answerable to an adjoining owner for injuries by seepage water: *Fleming v. Lockwood*, 36 Mont. 384, 122 Am. St. Rep. 375.

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## WILSON v. READ.

[74 N. H. 322, 68 Atl. 37.]

**CEMETERIES.**—Dead Human Bodies become after interment a part of the ground to which they are committed. (p. 974.)

**CEMETERIES**—Equity Jurisdiction.—Courts of equity have jurisdiction to settle controversies as to the burial of the dead, the care of their remains after burial, and the preservation of their place of interment from wanton violation or unnecessary disturbance. (p. 975.)

**CEMETERIES**—Right to Reburial.—Whatever right a person may have to protect the burial place of a relative, no decree of a court can effect the reburial of remains no longer in existence. (p. 975.)

**CEMETERIES**—Burial Rights.—The relatives of a deceased person cannot prevent a cemetery lot owner from using the spot where the remains have been buried for a subsequent burial, unless such use would constitute a wanton invasion or unnecessary desecration of the original place of burial. (p. 976.)

**CEMETERIES**—Rights of Lot Owners and Relatives.—The owner of a cemetery lot has no absolute right to disturb a grave already upon it, and the next of kin have no absolute right to prevent the removal of the remains of one buried there or other use of the land, but the rights of each are bounded by rules of propriety and reasonableness determinable by a court of equity. (p. 977.)

E. L. Kendall and G. B. French, for the plaintiff.

Martin & Howe, for the defendants.

323 PARSONS, C. J. In the absence of any information as to the terms of the decree for the plaintiff, to which exception was taken, it is presumed that the decree was drawn to

effect the purpose of the bill—the restoration of the remains of Harriet A. Read to their place of original interment. The fact that no trace of the remains which the plaintiff ask to have restored was discovered in the grave where they were originally buried discloses the futility of such a decree. If none was found in the grave, it is clear none can be in the place where the earth of the grave was deposited. The law does not require that to be done which is impossible or useless: *Wells v. Burbank*, 17 N. H. 393; *Copp v. Henniker*, 55 N. H. 179, 20 Am. Rep. 194; *Cahoon v. Coe*, 57 N. H. 556. "It is one of the maxims of the common law, and which is a dictate of common sense, that the law will not attempt to do an act which would be vain, or to enforce an act which would be frivolous. *Lex nil frustra facit. Lex non cogit ad vana seu inutilia.*" Kent, C. J., in *Huntington v. Nicoll*, 3 Johns. 566. The court has no power to order one to do what the law will not require him to do because of its impossibility or futility. A contract to convey real estate of which the vendor has no title will not be decreed, for such a decree would be simply nugatory: *Bispham's Principles of Equity*, 435; *Woodward v. Harris*, 2 Barb. 439; *Fitzpatrick v. Featherstone*, 3 Ala. 40.

Not only did the body of Harriet become, as matter of law, after burial a part of the ground to which it was committed (*Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759), but from lapse of time it has, as a physical fact, become indistinguishable from the soil in which it was placed. The body was returned to the parent earth for dissolution: *Gilbert v. Buzzard*, 3 Ph. Ecc. 335, 350. <sup>324</sup> That purpose has been accomplished. Whatever right the plaintiff may have to protect the burial place of her sister, no decree of the court can effect the reburial of remains no longer in existence. The plaintiff is not entitled to a decree to carry out the impossible purpose of her bill. The exception to the decree is therefore sustained.

The defendants also except to the order overruling the demurrer to the bill. In the absence of the allegations of the bill, the question directly presented by this exception is merely that of jurisdiction of the subject matter. It is well settled that in this country, in the absence of ecclesiastical tribunals exercising such jurisdiction in England, courts of equity have power to settle controversies as to the burial of the dead, the care of their remains after burial, and the preservation of the place of interment from wanton violation or unnecessary disturbance: *Page v. Symonds*, 63 N. H. 17,

56 Am. Rep. 481, and authorities cited. The defendants do not contest the power of the court, and the only question that can be raised is whether upon the facts the plaintiff is entitled to any relief. The cases are numerous which involve controversies as to the place of burial of a deceased relative, or as to a change of location of the remains after burial, or the diversion to other purposes of land once dedicated for use as a burial place; but none of them raises the precise question found here. This is not a controversy as to the removal of the remains of Harriet to some other location, or of the use of the burial place for other than burial purposes. The sole question appears to be whether the plaintiff can prevent the use by her sisters and brother, the owners of the burial lot, of the precise spot for the burial of their mother which was once used for the repose of their sister's remains.

Page v. Symonds, 63 N. H. 17, 56 Am. Rep. 481, was an application to enjoin the removal of the remains of the plaintiff's relatives, by public authority, from a burial ground discontinued because of public necessity. It was then said (pages 19, 20): "Strictly speaking, there is no right of property in a dead body. . . . But while it is not property in the ordinary sense of the term, it is regarded as property so far as to entitle the relatives to legal protection from unnecessary disturbance and wanton violation or invasion of its place of burial. The plaintiff, notwithstanding he is neither the owner of the soil of the cemetery nor of the remains of his deceased relatives interred there, may nevertheless be authorized to invoke protection against unnecessary desecration of their place of burial." If the action of the defendants in opening the grave of Harriet was criminal, or a wrong against the plaintiff, this proceeding is not brought to punish that action, or to recover damages for the injury to the plaintiff's right.

<sup>325</sup> Is the plaintiff entitled to an order requiring the defendants to remove the remains of their mother from the place where, in accordance with her expressed wish, they now rest beside those of her husband? The question is not whether the court, in the exercise of a sound judgment, would have enjoined the opening of the grave of Harriet for the purpose of interring the remains of the defendants' mother, but is whether the court can now order the removal of the remains of Mary E. from the spot where they now rest. The plaintiff has no title to the burial lot. She is not next of kin to Mary E., and can have no voice in the selection of a

resting place for her remains. Her sole interest arises from her relationship to Harriet. Under the decision in *Page v. Symonds*, 63 N. H. 17, 56 Am. Rep. 481, she would be entitled to an order requiring the removal of the remains of Mary E. from their present resting place, if it could be found that their continuance there was a "wanton violation or invasion" of the place of Harriet's burial—an "unnecessary desecration" of the spot. But the reported facts are insufficient to sustain such a finding.

John Read, the father of all the parties to the controversy, owned the lot, and in 1855 buried therein the remains of his daughter Harriet, who died at the age of seven months. Subsequently he buried in the same lot his wife and another daughter, the graves being so arranged as to leave a space between those of Harriet and his wife, while the other daughter, Mary A., was buried in the grave immediately on the other side of her mother's. In 1863, John married Mary E. He died in 1895, having devised the burial lot to his wife Mary E. She buried him in the lot beside his first wife, in the vacant space between that grave and the spot where Harriet's remains were buried. Mary E. died in 1904, having expressed a wish to be buried beside her husband. The defendants, her children who now own the lot, have now buried her in accordance with her wish. The question is, whether such burial is such a desecration of the spot used for the entire dissolution of Harriet's remains that the court is authorized to order the remains of Mary E. to be again dug up and buried elsewhere. When a body is once buried, courts are slow to order its removal, and will not do so except under circumstances of extreme exigency. This follows from considerations of the public health and welfare, as well as from a respect to the dead and consideration for the feelings of those who survive: *Gardner v. Swan Point Cemetery*, 20 R. I. 646, 78 Am. St. Rep. 897, 40 Atl. 871; *Choppin v. Daughin*, 48 La. Ann. 1217, 55 Am. St. Rep. 313. 20 South. 681, 33 L. R. A. 133; *Thompson v. Deeds*, 93 Iowa, 228, 61 N. W. 842, 35 L. R. A. 56. Where there is controversy as to the location of the grave, great weight is given to the wishes of the deceased, if known: *Pierce v. Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 326 667. It has even been said to be "the duty of courts to see to it that the expressed wish of one as to his final resting place shall, so far as it is possible, be carried out": *Thompson v. Deeds*, 93 Iowa, 228, 61 N. W. 842, 35 L. R. A. 56.

The body of Mary E. now rests in the place where she desired it to lie—beside her husband. The fact that the soil in which she lies once performed for the body of her husband's infant child the same service it is now performing for hers is not a sufficient reason why her remains should again be exhumed and her reasonable and proper wishes be defeated. No necessity probably has yet arisen in this country for holding that the right of burial is merely for the purpose of dissolution, generally requiring about a generation, and that each generation must give way to succeeding ones in the use of soil dedicated for that purpose: *Gilbert v. Buzzard*, 3 Ph. Ecc. 335. This case does not require such holding; for while, under the circumstances of the case as disclosed before the grave was opened, a refusal to permit the opening of Harriet's grave for the burial of Mary E., or to ascertain whether it contained any remains of the former occupant, might not have been erroneous as matter of law, the fact being established that the burial made by the defendants involved no disturbance of Harriet's remains, and being one that was otherwise fit and proper to be made, and having been made, no sufficient reason appears for disturbing the existing situation. None can be suggested except the injury to the plaintiff's feelings. In view of the relationship of the parties, an objection of this character by the plaintiff is too clearly fanciful and unreasonable to serve as a foundation for such an order. The defendants, as the owners of the lot, had not the absolute right to disturb the grave already upon the lot. Neither has the plaintiff, as next of kin, an absolute right to prevent the removal of the remains of one buried there, or other use of the land. The rights of each are bounded by rules of propriety and reasonableness determinable by a court of equity upon due application. This is the holding, in effect, of all the authorities: *Page v. Symonds*, 63 N. H. 17, 56 Am. Rep. 481; *Pulsifer v. Douglass*, 94 Me. 556, 48 Atl. 118, 53 L. R. A. 238; *Weld v. Walker*, 130 Mass. 422; *Pierce v. Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667; *Hackett v. Hackett*, 18 R. I. 155, 49 Am. St. Rep. 762, 26 Atl. 42, 19 L. R. A. 558; *Toppin v. Moriarty*, 59 N. J. Eq. 115, 44 Atl. 469; *Smith v. Shepherd*, 64 N. J. Eq. 401, 54 Atl. 806; *Wynkoop v. Wynkoop*, 42 Pa. 293, 82 Am. Dec. 506; *Fox v. Gordon*, 16 Phila. 185; *Thompson v. Deeds*, 93 Iowa, 228, 61 N. W. 842, 35 L. R. A. 56; *Larson v. Chase*, 47 Minn. 307, 28 Am. St. Rep. 370, 50 N. W. 238, 14 L. R. A. 85.

As the plaintiff has not the absolute right to require the removal of the remains of Mary E., and as the evidence has no tendency to establish the necessity, reasonableness or propriety of their removal, <sup>327</sup> no order to that effect can be made. The case does not show that such an order has been made; but as the exceptions raise the question whether any decree can be made for the plaintiff, the power to make such an order has been considered. Some facts appear in the case as to the erection of gravestones by the plaintiff upon the lot, but it does not appear that any orders are necessary or were asked for in reference to them. As upon the facts found the plaintiff is not entitled to any relief, the order will be, exception sustained; bill dismissed.

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*Burial Rights* are discussed in the notes to *Keyes v. Konkell*, 75 Am. St. Rep. 424; *Wynkoop v. Wynkoop*, 82 Am. Dec. 509. Buried human bodies must remain undisturbed, and the right and duty falls to the next of kin to see that such repose is duly protected and preserved: *Gardner v. Swan Point Cemetery*, 20 R. L. 646, 78 Am. St. Rep. 897.

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## BEAN v. BEAN.

[74 N. H. 404, 68 Atl. 409.]

**ESTATES OF DECEDENTS—Contests Over Compensation.**—A legatee who contests an executor's claim of ownership of part of the estate is entitled to reasonable compensation for counsel fees and expenses out of the funds of the estate. Such compensation is not dependent upon the success of his litigation. (p. 979.)

Burnham, Brown, Jones & Warren, for the plaintiffs.

Mitchell & Foster, for the defendants.

<sup>404</sup> **WALKER, J.** As executrices, it was the duty of the appellants to protect and conserve the estate committed to their care. But as they were personally interested in the property in question, claiming adversely to the estate to be the absolute owners of it, the interests of the estate in it were in fact protected by the intervention of one or more of the legatees, the appellees. That such intervention was reasonably necessary and prudent, the result of one of the suits seems to establish: *Bean v. Bean*, 71 N. H. 538, 53 Atl. 907. The result of that suit added to the estate or trust fund certain property which the executrices claimed to own individually. A finding by the superior court that the appellees are equitably entitled to reasonable compensation on this account



out of the trust fund presents no error of law: *Burke v. Concord R. Corp.*, 62 N. H. 531.

The fact that the appellees did not succeed in the second suit (*Bond v. Bean*, 72 N. H. 444, 101 Am. St. Rep. 686, 57 Atl. 340) does not conclusively show that they may not also be entitled to remuneration from the estate for <sup>405</sup> the expenses incurred therein. It is merely a circumstance bearing upon the reasonableness of the services and the good faith in rendering them for the estate. In legal effect, they represented the estate as much as though they had been the executors of it: *Bean v. Bean*, 71 N. H. 538, 53 Atl. 907.

Exception overruled.

All concurred.

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*An Executor Who is Unsuccessful* in resisting the revocation of the probate of a will is not entitled, as a matter of right, to the costs incurred by him, but the court is vested with discretion to determine whether he or the estate shall bear them: *Estate of McKinney*, 112 Cal. 447, 44 Pac. 743; *Henry v. Superior Court*, 93 Cal. 569, 29 Pac. 230; *Estate of Dillon*, 149 Cal. 683, 87 Pac. 379.

*When There has been an Unsuccessful Contest* against the admission of a will to probate, the court may allow the defeated contestant his costs to be paid out of the estate, but it will exercise its discretion in his favor in this respect only in rare cases and when he has acted in the utmost good faith in waging the contest: *Estate of Bump*, 152 Cal. 271, 92 Pac. 642.

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## CUNNINGHAM v. PEASE HOUSE FURNISHING COMPANY.

[74 N. H. 435, 69 Atl. 120.]

**NEGLIGENCE—Destructive Materials.**—One who puts destructive materials in situations, where they are likely to do mischief, must respond in damages to those who are injured on account of his acts, if he either knew or ought to have known that such materials were dangerous. (p. 980.)

**NEGLIGENCE—Representations of Seller.**—One who represents that a certain stove polish sold by him may be used with safety upon a hot stove is liable, either to the purchaser or to a member of his family injured by an explosion of such polish. (pp. 980, 981.)

**DECEIT—Misrepresentations of Seller.**—The common law imposes upon the seller the duty to refrain from falsely misrepresenting material facts for the purpose of misleading the buyer. (p. 981.)

**DECEIT—Negligence—Action for.**—A person who acts upon a false representation made for the purpose of inducing him to change his position may recover the damages he sustains in an action of deceit, when the maker of the statement knew it to be false, and in an action of negligence when he ought to have known it to be so. (pp. 981, 982.)

**NEGLIGENCE**—Proof of.—If an injury is intentionally inflicted, proof that the defendant did the act establishes his fault, but if negligence only is charged, proof of the act must be supplemented by proof that the average or ordinary man would not have done it. (p. 982.)

**DECEIT**—Truth of Representations.—If a seller, for the purpose of inducing another to buy a certain article, informs him that it can be safely used in a certain manner when he neither knows nor cares whether his statement is true or false, he is liable for any danger arising from a misrepresentation made by him. (pp. 982, 983.)

**SALES**—Negligence of Seller.—A purchaser of an article upon representations by the seller that it may be used in safety for a certain purpose, who is injured by its explosion when used, may maintain an action for negligence against the seller, although his representations when made were not knowingly false, provided they were made upon insufficient knowledge and without such investigation as an ordinary man would make under like circumstances. (p. 983.)

Case for personal injury caused by an explosion of stove blacking. The manufacturers of a stove blacking advertised it and stated that it was for sale by the defendants. The plaintiff's mother called at the defendants' store and inquired whether the advertised stove blacking was intended for stovepipes or for stoves. He replied that it was intended for stoves, and said that "the warmer the stove the better it works." Relying upon such representation the mother of the plaintiff bought some of the polish, and later her daughter, a member of the family, used some of it on a hot stove, when an explosion occurred, causing the injury complained of. Nonsuit in favor of defendants, and plaintiff excepted.

Doyle & Lucier, for the plaintiff.

Burnham, Brown, Jones & Warren, for the defendants.

<sup>436</sup> **YOUNG, J.** The defendants' position is like that of one who "puts destructive . . . materials in situations where they are likely to produce mischief": *Ricker v. Freeman*, 50 N. H. 420, 9 Am. Rep. 267. Such a person must respond in damages to those who are injured because of his acts, if he either knew, or ought to have known, that the materials were dangerous and that the persons injured might come in contact with them: *Hobbs v. Geo. W. Blanchard & Sons Co.*, 74 N. H. 116, ante, p. 944, 65 Atl. 382; *Scott v. Shepherd*, 3 Wils. 403, 2 W. Black. 892; *Cooley on Torts*, 78.

Although the defendants probably did not have the plaintiff in mind when they sold the blacking to her mother, they knew the mother bought it to use on her stove and that other members of the family were likely to use it; consequently the plaintiff can recover, if her mother could have recovered

had she been injured instead of the plaintiff. The defendants will not be prejudiced by the assumption that the plaintiff cannot recover if her mother could not and by the omission to consider whether the situation might not be such that recovery might be had against both the mother and the defendants: *Ricker v. Freeman*, 50 N. H. 420, 432. The case, therefore, is considered as though it were an action by the mother. The declaration does not sound in either assumption or deceit. Whether she could maintain an action for a breach of warranty need not be considered; and whether she could recover for deceit will be considered only so far as is necessary to <sup>437</sup> distinguish between facts constituting an intentional injury and those constituting a negligent one.

The common law imposes upon the seller the duty to refrain from falsely representing material facts for the purpose of misleading the buyer. The seller may praise the good qualities of his wares as much as he pleases, and is not bound to disclose their defects to the buyer, even if he knows of them and is aware that the buyer believes he is purchasing sound goods. But if, for the purpose of inducing the prospective buyer to change his position, the seller sees fit to make any representation, either express or implied, in respect to facts which are material to the subject matter of the sale, he must tell the truth: *Shackett v. Bickford*, 74 N. H. 57, ante, p. 933, 65 Atl. 252, 7 L. R. A., N. S., 646; *Spead v. Tomlinson*, 73 N. H. 46, 59 Atl. 376; *Stewart v. Stearns*, 63 N. H. 99, 56 Am. Rep. 496; *Rowell v. Chase*, 61 N. H. 135; *Springfield v. Drake*, 58 N. H. 19; *Pettigrew v. Chellis*, 41 N. H. 95; *Hanson v. Edgerly*, 29 N. H. 343; *Mahurin v. Harding*, 28 N. H. 128, 59 Am. Dec. 401.

The defendants admit their liability for an intentionally false statement of fact, but contend that they are not liable for a false statement honestly believed to be true, though negligently made. Although there are authorities which sustain that position (*Derry v. Peek*, 14 App. Cas. 337; *Angus v. Clifford*, [1891] 2 Ch. 449, 470), it is not the view which obtains in this jurisdiction. In this state, a person who acts upon a false representation made for the purpose of inducing him to change his position may recover the damages he sustains in an action of deceit when the maker of the statement knew it to be false, and in an action of negligence when he ought to have known it to be so: *Shackett v. Bickford*, 74 N. H. 57, ante, p. 933, 65 Atl. 252, 7 L. R. A., N. S., 646; *Hewett v. Woman's Hospital Aid Assn.*, 73 N. H. 556, 64 Atl. 190, 7 L. R. A., N. S., 496; *Pittsfield etc. Co. v. Pittsfield*

Shoe Co., 71 N. H. 522, 53 Atl. 807, 60 L. R. A. 116; *Edwards v. Lamb*, 69 N. H. 599, 45 Atl. 480, 50 L. R. A. 160; Judge Jeremiah Smith in 14 *Harvard Law Review*, 184.

If, therefore, the defendants' false representation that it was safe to use the blacking on a hot stove was the cause of the plaintiff's injury, the facts that they thought the statement was true and had no intent to deceive do not necessarily bar her right to a recovery. Proof of those facts would merely require her to prove facts not essential to her case if the representation was deceitfully made. If the representation was deceitful, she could recover by showing that their fault contributed to cause her injury; but if it was merely negligent, she must show that it was the sole cause of her injury: 14 *Harvard Law Review*, 188. The reason for this is, that the law makes it the duty of everyone to use ordinary care to avoid being injured by another's negligence; but it imposes on no one the duty to use such care to avoid being injured by another's intentionally wrongful act. In actions for negligence, contributory negligence is a defense; in actions for intentional injuries, it is not.

<sup>438</sup> There is a difference, also, between intentional and negligent wrongs, as to the facts necessary to establish the defendant's fault. If an injury is intentionally inflicted, proof that the defendant did the act establishes his fault; but where negligence is charged, proof of the act must be supplemented by proof that the average man would not have done it. So in this case, if the defendants, for the purpose of inducing the plaintiff to buy the blacking, told her it could be safely used on a hot stove, and they neither knew nor cared whether their statement was true or false, they would be liable: *Shackett v. Bickford*, 74 N. H. 57, ante, p. 933, 65 Atl. 252, 7 L. R. A., N. S., 646; *Spead v. Tomlinson*, 73 N. H. 46, 59 Atl. 376. But if they had no thought of deceiving her, it would not be enough to show that they made the representation; she must then go further, and show that the ordinary man would not have made it: 14 *Harvard Law Review*, 188. The test, therefore, to determine whether the defendants were in fault for making the representation is to inquire whether the ordinary man, having no more knowledge of the situation and its dangers than the defendants are shown to have had, would have told the plaintiff it was safe to use the blacking on a hot stove.

It cannot be said as a matter of law that the ordinary man would have made such a representation, unless it is common knowledge that the average man who engages in trade is

accustomed to tell his patrons, not what he believes to be the truth in respect to his goods, but what he thinks will induce them to buy. It can be found from the evidence that the defendants thought the plaintiff was looking for a blacking to be applied to a stove in which there was a fire, and that they represented the blacking sold to the plaintiff as safe to use in that way, for the purpose of inducing her to purchase it, when they either knew that the representation was false, or did not know it to be true. It is not common knowledge that the ordinary man is accustomed to make such representations to induce customers to buy his goods; and it cannot be said as a matter of law that an ordinary man selling a new blacking would affirm that he knew it would do all, and more than all, its makers claimed for it, when in fact he knew nothing of its qualities and had done nothing to inform himself as to the soundness of the makers' claims.

The plaintiff was entitled to go to the jury on the common-law count. The demurrer to the statutory count was properly sustained, for it is not alleged that the defendants sold the blacking as an illuminating oil (Pub. Stats., c. 126, sec. 26), or that they sold naphtha under an assumed name: Pub. Stats., c. 126, sec. 28.

Exception sustained.

Peaslee, J., did not sit; the others concurred.

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*The Liability of Vendors of Dangerous Articles* is discussed in the notes to *Kuelling v. Lean Mfg. Co.*, 111 Am. St. Rep. 701; *Woodward v. Miller*, 100 Am. St. Rep. 192.

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## ROLLINS v. CONNOR.

[74 N. H. 456, 69 Atl. 777.]

**ELECTIONS**—Common Council—Qualification of Members.—In the determination of an election contest before the common council of a city, it acts in a judicial capacity, and a member thereof who is a party to the proceeding is not qualified to take part in its decision. (p. 984.)

**JUDGMENTS**—Disqualification of Member of Tribunal.—The personal disqualification to act in a particular case of a participating member of a judicial tribunal having jurisdiction of the subject matter renders the judgment voidable, and liable to be set aside upon certiorari. (p. 985.)

**JUDGMENTS**—Disqualification of Member of Tribunal.—Judicial action by a tribunal, one of whose members is disqualified to

act, is voidable if the disqualified member participates therein without reference to the fact whether the result was produced by his vote. (pp. 985, 986.)

Petition for certiorari. At an election plaintiff and one Bruen were candidates for the office of councilman of the city of Nashau. Bruen was declared elected and qualified as a member of the council, whereupon plaintiff petitioned such council to determine his right to a seat therein. When such petition came before the council for consideration and determination, the petition was denied and the plaintiff deprived of a seat in the council by a vote of ten to seven, Bruen voting with the majority on the question.

E. H. Wason and G. F. Jackson, for the plaintiff.

W. H. Barry and H. T. Ledoux, for the defendant.

<sup>457</sup> PARSONS C. J. The action of the common council in weighing the evidence presented by the moderator's declaration and the subsequent count of the ballots was judicial in its nature; and from their determination of the question of fact according to their view of the comparative weight of competent conflicting evidence no appeal is provided, and the question of fact so determined is not revisable by the superintending power of the court: *Sheehan v. Mayor*, 74 N. H. 445. The finality of the decision, in the absence of a right of appeal, results from the judicial character of the proceeding. Though not in the ordinary sense a court, the members of the common council are required in controversies of this character to judicially determine which contestant is entitled to the office. "When so acting, they are not emancipated from the ordinary principles upon which justice is administered, . . . <sup>458</sup> and which are, as it has been said, founded upon its very essence": *Queen v. Council*, [1892] 1 Q. B. 190.

It is alleged that Bruen, whose seat the plaintiff claimed, although he appeared as a party with counsel before the committee, nevertheless participated in the action taken by the council, voting upon both motions by which the question was determined. He thus, while avowedly a party to the proceeding, attempted to act as a judge in its decision. "The rule is very plain, that no man can be plaintiff or prosecutor in any action, and at the same time sit in judgment to decide in that particular case—either in his own case, or in any case, where he brings forward the accusation or complaint on which the order is made": *Leeson v. Council*, 43 Ch. D. 366. It is equally plain that a man cannot sit in

judgment to decide upon the validity of a claim against himself, or in a proceeding in which he is the defendant. "The first idea in the administration of justice is that a judge must necessarily be free from all bias and partiality. He cannot be judge and party, arbiter and advocate in the same cause. Mankind are so agreed in this principle that any departure from it shocks their common sense and sentiment of justice": *Oakley v. Aspinwall*, 3 N. Y. 547. Whatever right a member of a legislative body may have to vote upon questions in which he may be interested, when the question under consideration is purely legislative, he cannot do so when the body is acting judicially: *Rider v. Portsmouth*, 67 N. H. 298; *Dorchester v. Youngman*, 60 N. H. 385; *Commonwealth v. McCloskey*, 2 Rawle, 369; *Brightley's Election Cases*, 196.

The judgment of the common council of which the plaintiff complains was rendered by a tribunal one of whose members participating in the decision was disqualified. The personal disqualification to act in a particular case of a member of a tribunal having jurisdiction of the subject matter renders the judgment voidable and liable to be set aside upon certiorari: *Bickford v. Franconia*, 73 N. H. 194, 60 Atl. 198. In *Biggins v. Lambert*, 213 Ill. 625, 104 Am. St. Rep. 238, 73 N. E. 371, a decision by a court of three judges was objected to upon the ground that one of the judges was disqualified. The objection was overruled without discussion, the court saying: "The appellate court was composed of three judges, at least two of whom were not subject to the objection made." In *Oakley v. Aspinwall*, 3 N. Y. 547, it was claimed that the vote of the judge whose competency was disputed determined the decree whose validity was attacked, but the opinion of the court vacating the decree is put upon the ground that the judge in question "could neither lawfully hear nor take part in the decision": 3 N. Y. 555. In *Rider v. Portsmouth*, 67 N. H. 298, 38 Atl. 385, the question <sup>459</sup> was the validity of the action of five aldermen, of whom the plaintiff was one, in approving the claim in suit. It was said: "Without his vote there was not a majority in favor of paying it." But the validity of action in which an interested member takes part, when without his vote there was a legal majority in support of the action taken, was not presented or considered.

But despite the Illinois case above cited, it is clear upon reason and authority that judicial action by a tribunal one of whose members is disqualified to act is voidable if the disqualified member participates therein, without reference to the fact whether the result is produced by his vote. The pre-

liminary question, whether the tribunal is properly constituted, is a question which must be answered in the affirmative before there can be a decision. As stated by Denman, C. J., in *Regina v. Justices of Hertfordshire*, 6 Q. B. 753: "A decision is vitiated by any one interested person taking part in it. We cannot enter into an analysis of the different motives which may have produced the decision; it is enough to say that a single interested person has formed part of the court." In England this decision has not only been followed and applied in the case of strictly judicial tribunals, but its principle has been considered fatal to the action of other bodies when acting judicially: *Regina v. Justices of Suffolk*, 18 Q. B. 416; *Regina v. Justices of London*, 18 Q. B. 421; *Queen v. Meyer*, 1 Q. B. D. 173; *Leeson v. Council*, 43 Ch. D. 366; *Queen v. Council*, [1892] 1 Q. B. 190; *Queen v. Hug-gins*, [1895] 1 Q. B. 563. The authorities in this country, with the exception above noted, appear to be to the same effect (*Oakley v. Aspinwall*, 3 N. Y. 547; *State v. Bradish*, 95 Wis. 205, 70 N. W. 172, 37 L. R. A. 289; *Case v. Hoffman*, 100 Wis. 314, 73 N. W. 390, 74 N. W. 220, 75 N. W. 945, 44 L. R. A. 728); while the precise question appears to have been passed upon in this state in *Sanborn v. Fellows*, 22 N. H. 473, in which it was held that proceedings before a board of three fence viewers, one of whom was disqualified from relationship to one of the parties, were void, and it is suggested by the court that the independent action of the two members of the board who were not disqualified, constituting a majority of the board, would be free from objection.

The lack of impartiality in the tribunal arises from the participation in the proceedings, as a co-ordinate member of the tribunal, of the person disqualified to act therein, and not merely from the fact that the decision is produced by the numerical effect of his vote. The influence a party in that position might have upon the decision of his associates cannot be estimated. It would be clear that he might have some advantage over his adversary, who is not a member of the court by which the controversy between them is decided. Whatever the rule may be as to the effect of the participation<sup>460</sup> of an interested member of a body such as the defendants are, upon action taken in accordance with, but not carried by, his vote in matters of an administrative nature (*Marshall v. Elwood City*, 189 Pa. 348, 41 Atl. 994), such participation invalidates any judicial act. If *Hartshorn v. Schoff*, 58 N. H. 197, is inconsistent with this conclusion, it is overruled.



It does not appear that the plaintiff had opportunity to object to Bruen's acting in the matter as a member of the council, or that he has waived his right to object upon that ground: *Moon v. Flack*, 74 N. H. 140, 65 Atl. 829. If upon hearing the facts are established as alleged and no waiver is shown, the decision of the common council denying the plaintiff's petition will be quashed. It will then be the duty of the council to adjudge the matter, excluding Bruen from any participation in their action; and treating the petition as an application for mandamus, they may be ordered to do so. In making such adjudication, all competent evidence offered, bearing upon the question for whom the larger number of legal votes were intended, including the moderator's declaration, the ballots in their present condition, and any facts tending to show which evidence, if conflict appears, is entitled to the greater weight, must be received and considered, and the seat awarded to the person whom it is found received the greater number of legal votes.

Exception overruled.

Peaslee, J., did not sit; the others concurred.

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*Where a Judicial Officer, Such as a Judge, is disqualified to sit in a proceeding, a judgment therein rendered by him is by some authorities said to be voidable only (Fowler v. Brooks, 64 N. H. 423, 10 Am. St. Rep. 425), but by other authorities it is said to be void: Chicago etc. Ry. Co. v. Summers, 113 Ind. 10, 3 Am. St. Rep. 616; Horton v. Howard, 79 Mich. 642, 19 Am. St. Rep. 198. See, also, Crook v. Newborg, 124 Ala. 479, 82 Am. St. Rep. 190; Ex parte Hilton, 64 S. C. 201, 92 Am. St. Rep. 800; First National Bank v. McGuire, 12 S. D. 226, 76 Am. St. Rep. 598. If a judge from whom a change of venue is taken on the ground of prejudice subsequently sits as a member of the appellate court in judgment on the case, that is no ground for reversal: Biggins v. Lambert, 213 Ill. 625, 104 Am. St. Rep. 238.*

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## PRESCOTT v. ROBINSON.

[74 N. H. 460, 69 Atl. 522.]

**NEGLIGENCE—Injury to Pregnant Woman—Recovery for Mental Suffering.**—A woman injured during pregnancy by the negligence of another is entitled to recover damages for her mental distress due to her fear or apprehension before the birth of the child that it will be deformed in consequence of such negligence as well as for her disappointment at the birth of a deformed child. (p. 989.)

**NEGLIGENCE—Injury to Pregnant Woman—Recovery for Mental Suffering After Birth of Child.**—A woman injured during pregnancy by the negligence of another, resulting in the birth of a deformed child, cannot recover for her mental suffering after its birth

and her prospective mental suffering and disappointment caused by its deformed condition, nor for the child's pain, suffering and inability to labor. (p. 990.)

Action for negligence. It was alleged that the defendant so negligently managed his automobile as to propel it against the carriage in which the plaintiff was riding with great force, hurling the plaintiff, who was then pregnant, therefrom, whereby she was severely injured, both externally and internally, so that the child of which she was then pregnant and to which she later gave birth was born deformed and diseased, and has so continued up to the present time, by reason of the said negligence of the defendant. That plaintiff suffered great mental anguish after such injury and during her said pregnancy on account of her dread of the effect of the injuries to her and her unborn child, and that since the birth of such child she has suffered, and will continue to suffer, in body and mind by reason of such injury, and by reason of the deformity and diseased condition of such child. Whereby she sues to recover all damages from the defendant which have accrued to her by reason of all of her past, present and future injuries, arising from pain and suffering in mind and body, together with inability to labor, and for all of the pain, injury, and suffering of such child, together with its inability to labor.

The defendant demurred to the complaint. His demurrer was overruled and he excepted.

Burnham, Brown, Jones & Warren, for the plaintiff.

Branch & Branch, for the defendant.

<sup>461</sup> WALKER, J. The demurrer and motion present the questions whether under the allegations of the declaration the plaintiff is entitled to recover damages for her mental distress due to her fear or apprehension before the birth of the child, that it would be deformed in consequence of the defendant's negligent act, and whether her mental suffering since the birth of the child and her prospective anxiety and disappointment on account of its deformity and diseased condition can be considered by the jury as elements of damage recoverable in this action. Assuming that she suffered mental distress, not only in regard to the effect of the accident upon her person, but in regard to its effect upon the unborn child, it cannot be doubted that it was proximately caused in both respects by the alleged negligence of the defendant. It was a natural result reasonably to be apprehended under the circumstances. The fact <sup>462</sup> that the defendant was ignorant

of her condition does not lessen his liability for the natural consequences of his negligent act: *Chicago Ry. Co. v. Hunenberg*, 16 Ill. App. 387; *Brown v. Chicago Ry. Co.*, 54 Wis. 342, 41 Am. Rep. 41, 11 N. W. 356, 911; *Purcell v. St. Paul City Ry. Co.*, 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203.

But it is contended that, while she may be entitled to recover for distress of mind due simply to her fear of the results of the accident to her person, her apprehension that the child might be deformed thereby is too remote or fanciful to be deemed in law an element of damage, although proximately caused by the defendant's negligent act. If a foetus is deemed to constitute a part of the mother's person, an injury to it is plainly an injury to her, as much as an injury to her hand or arm would be. And it would seem to follow that she has as much right not to be harmed in the one respect as in the other. A denial of that proposition would be equivalent to an assertion that the law protects persons in the use and enjoyment of some parts of their physical organisms, but not of all parts thereof. Such a conclusion rests upon no logical basis and is supported by no legal principle. If in consequence of a blow inflicted upon his person a man sustains an injury which may reasonably be expected to produce a deformity or to impair his health, his right to recover damages of the negligent defendant for his mental suffering occasioned by the prospect of such a result is a recognized and enforceable right. In *Walker v. Boston & M. R. R. Co.*, 71 N. H. 271, 51 Atl. 918, this principle was applied in the following language: "There was evidence that the plaintiff was suffering from partial mental disability. If as a result of mental disability induced by the defendant's fault the plaintiff suffered from apprehension of insanity, such suffering was an element of her damages": *Brush Electric L. & P. Co. v. Simonsohn*, 107 Ga. 70, 32 S. E. 902; *Sherwood v. Chicago etc. Ry. Co.*, 82 Mich. 374, 46 N. W. 773; *Schmitz v. St. Louis etc. Ry. Co.*, 119 Mo. 256, 24 S. W. 472, 23 L. R. A. 250. The fact that one of the results of the alleged injury in this case was the deformity of the foetus, which became the child's misfortune upon its birth, does not prove that no right of the plaintiff was invaded in this regard for which damages are allowable; on the contrary, it shows that her natural right to the normal action of her physical organs in the growth and development of the foetus was seriously infringed: *Alabama etc. R. R. v. Hill*, 93 Ala. 514, 30 Am. St. Rep. 65, 9 South. 722. Her ability to be delivered of a normal and healthy child was jeopardized, and her grief and,

apprehension before the birth on account of what the probable or not unreasonable effect would be upon the child is not a remote consequence of the alleged negligence of the defendant. It was her right to produce a healthy child; and if by the defendant's negligence her enjoyment of that right was diminished or violated, her mental distress for the unnatural result to be expected <sup>463</sup> was an element of damage for which she should be compensated, as well as her disappointment at the birth of a deformed child.

In this view of the case it is unnecessary to consider or determine what, if any, rights a child *en ventre sa mere* has for injuries received by it, which render its existence after birth painful and burdensome. Whether it may or not, after birth, maintain an action on that account (*Dietrich v. Northampton*, 138 Mass. 14, 52 Am. Rep. 242; *Gorman v. Budlong*, 23 R. I. 169, 91 Am. St. Rep. 629, 49 Atl. 704, 55 L. R. A. 118; *Marsellis v. Thalhimer*, 2 Paige, 35, 21 Am. Dec. 66; *Harper v. Archer*, 4 Smedes & M. 99, 43 Am. Dec. 472; *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 75 Am. St. Rep. 176, 56 N. E. 638, 48 L. R. A. 225; *Earl of Bedford's Case*, 7 Co. 7b; *Trower v. Butts*, 1 Sim. & St. 181; *Wallis v. Hodson*, 2 Atk. 115; *Thellusson v. Woodford*, 4 Ves. Jr. 227; *Doe v. Clarke*, 2 H. Black. 399; *Scruby v. Payne*, 34 L. T. 845; *The George & Richard*, L. R. 3 Adm. 466; *Walker v. Railway*, 28 L. R. Ir. 69; 2 Witt. & Beck Med. Jur. 150, 152, 159-161), is immaterial in this case. The mother's right to the damages she suffers for the defendant's wrongful act in causing her to bring forth a misshapen and sickly child, instead of a well developed and healthy one, does not depend on the question whether at the time of the injury the foetus is deemed in law a person, or whether after birth it may maintain an action to recover for the wrong done to it before its birth. She cannot recover in her own right for the child's injuries for which, if it were deemed a person in law, it would have a right of action; and if it is deemed not to be a person at the time of the injury, but *pars viscerum matris* (*Earl of Bedford's Case*, 7 Co. 7b), she suffers no damage for its deformity merely; that is, the fact alone that it is deformed is a misfortune to the child, for which she is not entitled to damages, unless it causes her special physical pain and suffering. Such damages pertain to the child alone. The mother is no more entitled to them than the father is. Upon the birth of the child, the physical consequences of the injury to it become effective. From the time of the injury to the time of the birth the mother suffers no physical damage merely

because the child's limbs are distorted or because its health is impaired. It therefore follows that the child alone suffers damage on that account; and if that damage is held to be *damnum absque injuria*, the mother's right thereto would not be increased. If the child cannot recover therefor, it does not follow that she can. In fact, there is no legal connection between their rights of action for their respective damages. But while the injuries suffered by each are distinct and independent, the mother's anxiety before the birth of the child, in view of the reasonable probability that the defendant's act will cause her to produce an abnormal child, is peculiarly an element of damage to her.

This result is not in conflict with cases cited by the defendant <sup>464</sup> in which it has been held that no recovery could be had by the mother for the miscarriage and death of the child: See *Bovee v. Danville*, 53 Vt. 183; *Tunnicliffe v. Bay Cities etc. Ry. Co.*, 102 Mich. 624, 61 N. W. 11, 32 L. R. A. 142, 107 Mich. 261, 65 N. W. 226; *Western Union Tel. Co. v. Cooper*, 71 Tex. 507, 10 Am. St. Rep. 772, 9 S. W. 598, 1 L. R. A. 728; *Hawkins v. Front St. C. Ry. Co.*, 3 Wash. 592, 28 Am. St. Rep. 72, 28 Pac. 1021, 16 L. R. A. 808. These cases do not decide that the mother's solicitude consequent upon the injury and before the birth is not an element of her damage, but that the death of the child and her loss of the comfort and enjoyment of the company of a living child are too remote consequences to be considered by a jury in assessing her damages: 1 *Joyce on Damages*, sec. 185. In *Bovee v. Danville*, 53 Vt. 183, the decision is stated thus (page 190): "The plaintiff was entitled to recover all damages that were naturally and legitimately consequent upon the negligence of the town. If the violence done her person resulted in the miscarriage, the miscarriage was a legitimate result of such negligence. Any physical or mental suffering attending the miscarriage is a part of it, and a proper subject of compensation. But the rule goes no farther. Any injured feelings following the miscarriage, not part of the pain naturally attending it, are too remote to be considered an element of damage." But injured feelings and regret before the birth and while the mother is seeking to perform her function of child-bearing through the organs of her body may be proper elements of recoverable damage, for the same reason, substantially, as led to the holding by the same court in *Godeau v. Blood*, 52 Vt. 251, 36 Am. Rep. 751, that solicitude occasioned by the bite of a dog, including apprehension of hydrophobia, though the dog was not shown to have been rabid, were proper

matters for the jury's consideration. To the same effect are *Warner v. Chamberlain*, 7 Houst. 18, 30 Atl. 638, and *Trinity etc. Ry. v. O'Brien*, 18 Tex. Civ. App. 690, 46 S. W. 389.

The fact that the plaintiff will undoubtedly suffer great disappointment during her lifetime, occasioned by her continual observation of her child's deformity and its probable suffering, though in some sense caused by the defendant's negligence, is a misfortune for which the law can afford no compensation in an action for negligence. If the collision which caused the injury both to her and her child had occurred while she was carrying the child in her arms, it would be a novel proposition to urge that she might recover damages for her subsequent mental distress on account of the disfigurement and ill-health of the child. However severe the grief may be of the friends and relatives of the victim of a catastrophe, they can ordinarily maintain no common-law action for damages on that account. The deformity of a crippled child and its suffering may be an ever-present cause of disappointment to its parents, and their lives may be made miserable thereby; but they can obtain no redress on that ground against the person whose <sup>465</sup> negligence was the cause of the child's condition: *Hyatt v. Adams*, 16 Mich. 180. The policy of the law requires that no action shall be maintainable for that cause: *Black v. Carrollton R. R. Co.*, 10 La. Ann. 33, 63 Am. Dec. 586.

In *Cowden v. Wright*, 24 Wend. 429, 35 Am. Dec. 633, it was held that in an action of trespass by a father for assaulting and beating his son per quod servitium amisit, a jury, in assessing the damages, are not authorized to take into account the wounded feelings of the parents. It was suggested in the opinion that it might be otherwise if the son were not also entitled to an action to recover for his mental suffering. In *Pennsylvania R. R. Co. v. Kelly*, 31 Pa. 372, it was decided that when a father brings an action on the case for damages resulting from an injury to his child, he can only recover compensatory damages, to be measured by the loss of the child's services and the expense of nursing and curing him, that he cannot recover for his lacerated feelings or disappointed hopes, and that the personal sufferings of the child should not enter into the computation of the father's damages: *Sullivan v. Old Colony St. Ry. Co.*, 197 Mass. 512, 83 N. E. 1091; *Butler v. Manhattan Ry. Co.*, 143 N. Y. 417, 42 Am. St. Rep. 738, 38 N. E. 454, 26 L. R. A. 46; *Galveston v. Barbour*, 62 Tex. 172, 50 Am. Rep. 519; *Flemington v. Smithers*, 2 Car. & P. 292; 1 Joyce on Damages, sec. 225.

Such damages are too remote and speculative to be properly estimated by a jury upon the theory of strict compensation alone for the consequences of a negligent act. In cases where the elements of malice, wantonness or willful indignity in causing the injury are present, it may be that a more liberal rule of damages prevails (*Fay v. Parker*, 53 N. H. 342, 16 Am. Rep. 270; *Bixby v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475; *Barnes v. Campbell*, 60 N. H. 27; *Kimball v. Holmes*, 60 N. H. 163), and that injured feelings indirectly caused by the defendant's willful act (*Friel v. Plumer*, 69 N. H. 498, 76 Am. St. Rep. 190, 43 Atl. 618) may furnish a legitimate element of damage, while in the absence of evidence of intentional wrong they ought not to be included in recoverable damages.

If, in the case at bar, the fact was that the defendant maliciously inflicted the injury upon the plaintiff, one of the natural and intended results of the act would be to cause the plaintiff great mental distress, not merely on account of the injury to her and the unborn child, but on account of her parental anxiety for the future healthfulness of her child. It might not be incorrect to say that it would be conclusively presumed that the defendant's purpose was to inflict upon her the mental suffering she sustained, and hence that he ought to pay for it. But if the act causing the injury is merely a negligent act, the recovery of compensation for such remote, secondary and speculative injuries could not be justified upon that ground, since a negligent defendant is answerable <sup>408</sup> only for the direct, proximate and natural results of his act. If a negligent defendant inflicts a violent blow upon the person of the plaintiff, in consequence of which the latter falls upon another who is crippled thereby, the sorrow of the plaintiff for the suffering of the third party could not be considered a proximate result of the defendant's involuntary act, for which he should be charged in damages. As the child's suffering in this case is his misfortune, the plaintiff's regret on that account is not a legitimate element of her damage for the mere negligence of the defendant.

It is not necessary to discuss at length the claim advanced by the plaintiff and alleged in her declaration, that she is entitled to recover for the "pain and suffering and inability to labor of said child," for the obvious reason that the child's peculiar injuries afford it, if anybody, a right of action; and if it should be held upon consideration that it cannot maintain an action for the damages suffered by it after its birth, it is not apparent how a right of action therefor would become

vested in the mother. Justice does not require that she should be paid for the sufferings of the child; and the doctrine of compensatory damages forbids it: *Fay v. Parker*, 53 N. H. 342, 16 Am. Rep. 270; *Kimball v. Holmes*, 60 N. H. 163.

When the declaration is amended in accordance with the views above indicated, the demurrer will be overruled and the motion denied.

Case discharged.

Peaslee, J., did not sit; the others concurred.

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*The Right to Recover for Injuries to a Child Received Before Birth* is discussed in *Gorman v. Budlong*, 23 R. I. 169, 91 Am. St. Rep. 629; *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 75 Am. St. Rep. 176.

*In an Action to Recover for Negligent Injury to a Pregnant Woman*, she cannot recover for the premature birth and death of the child as a result of the injury, although she may recover for her suffering and impaired health resulting from such death, if due to the injury received by her: *Hawkins v. Front St. Cable R. R. Co.*, 3 Wash. 582, 28 Am. St. Rep. 72. But in *Weston Union Tel. Co. v. Cooper*, 71 Tex. 507, 10 Am. St. Rep. 772, it is held that the death of a child before birth and the grief occasioned thereby to the mother are not elements of damage, in an action for personal injuries to a wife, although evidence that the child was still-born may be admitted, if that fact tends to show that her labor was thereby prolonged and her suffering so increased.

*Damages from Mental Suffering Occasioned by Fright* are discussed in the note to *Gulf etc. Ry. Co. v. Hayter*, 77 Am. St. Rep. 859.

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## MORAN v. DOVER, SOMERSWORTH AND ROCHESTER STREET RAILWAY COMPANY.

[74 N. H. 500, 69 Atl. 884.]

**NEGLIGENCE—Damages for Personal Injuries—Right of Jury to Estimate.**—In the absence of evidence, the jury in estimating the value of the services of a physician in a personal injury case may avail themselves of their common knowledge in determining the expense properly and reasonably incurred in endeavoring to effect a cure. (p. 995.)

Action to recover for personal injury caused by negligence. On the trial there was evidence that the plaintiff employed physicians to treat her for her injuries and of the nature and extent of such treatment, but none as to the value or cost of such services.

Kivel & Hughes, for the plaintiff.

S. W. Emery, for the defendant.



<sup>500</sup> PEASLEE, J. So far as a fact in issue is one upon which men in general have "a common fund of experience and knowledge," <sup>501</sup> the jury may use this information in making up their minds: 4 Wigmore on Evidence, sec. 2570. Such knowledge dispenses with the necessity for introducing evidence on the subject. It is also said that "the scope of this doctrine is narrow; it is strictly limited to a few matters of elemental experience in human nature, commercial affairs, and every-day life": 4 Wigmore on Evidence, sec. 2570.

It is apparent that the rule laid down cannot be applied with mathematical exactness. Upon the particular question involved in this case, the courts are divided. A considerable number hold with more or less strictness to the theory that the value of the services of a physician must be shown by evidence: *Brown v. White*, 202 Pa. 297, 51 Atl. 962, 58 L. R. A. 321; *Hobbs v. Marion*, 123 Iowa, 726, 99 N. W. 577; *Nelson v. Metropolitan St. Ry. Co.*, 113 Mo. App. 659, 88 S. W. 781; *Houston etc. R. R. v. Garcia* (Tex. Civ. App.), 90 S. W. 713. Compare with these cases the following: *Kelley v. Mayberry*, 154 Pa. 440, 26 Atl. 595 (jurors allowed to estimate the value of a wife's services to her husband); *Northern etc. Co. v. Mullins* (Tex. Civ. App.), 99 S. W. 433 (jurors allowed to take into consideration the fact that future medical attendance would probably be necessary); *Murray v. Missouri Pac. Ry. Co.*, 101 Mo. 236, 20 Am. St. Rep. 601, 13 S. W. 817 (jurors allowed to find the value of the services of a nurse, the measure being "their own knowledge and experience").

In other jurisdictions the rule is that jurors "have some knowledge in common with men in general as to the charges ordinarily made by physicians for attendance and services," and that they may avail themselves of that knowledge "for the purpose of determining what sum the plaintiff should have by reason of the expense he has properly and reasonably incurred in endeavoring to effect a cure": *McGarrahan v. New York etc. R. R. Co.*, 171 Mass. 211, 50 N. E. 610; *Scullane v. Kellogg*, 169 Mass. 544, 48 N. E. 622; *Feeney v. Long Island R. R. Co.*, 116 N. Y. 375, 22 N. E. 402, 5 L. R. A. 544; *Western Gas C. Co. v. Danner*, 97 Fed. 882, 38 C. C. A. 528.

The latter ruling appears the more reasonable, and is in accordance with the practice at nisi prius in this state. It would be difficult to conceive of a matter with which all men are more certainly called upon to deal than the employment and payment of a physician. Knowledge on the subject of

doctor's bills is as general as upon almost any question of every-day life.

If more satisfactory proof was available, it might have been produced by the defendant, had it not preferred to allow the case to rest here; and the fact that other evidence was not introduced by the plaintiff was legitimate ground for argument that probably the bills were of small amount: *Boucher v. Larochelle*, 74 N. H. 433, 68 Atl. 870, 15 L. R. A., N. S., 416.

Exception overruled.

All concurred.

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*In an Action to Recover Damages for Personal Injuries* suffered through negligence, the plaintiff may recover a fair compensation for necessary expenses incurred for nursing during a fixed period, without evidence of the value of such services. The jury may measure the same by its own knowledge and experience, and will be presumed to be reasonably familiar with the value of such services: *Murray v. Missouri Ry. Co.*, 101 Miss. 236, 20 Am. St. Rep. 601.

**CASES**  
**IN THE**  
**COURT OF ERRORS AND APPEALS**  
**OF**  
**NEW JERSEY.**

**POST v. HAGAN.**

[71 N. J. Eq. 234, 65 Atl. 1026.]

**GIFT FROM PARENT TO CHILD—Independent Advice—Presumption of Undue Influence.**—When a child upon whom a parent has become dependent accepts a gift from the parent of all of his or her estate, a court of equity, moved by the apparent improvidence of the gift, presumes that the donor did not appreciate the character or consequences to himself of his act, and casts upon the donee the burden of showing that the donor had the benefit of proper independent advice, which advice means that the donor had the preliminary benefit of conferring fully and privately upon the subject of his intended gift with a person who was not only competent to inform him correctly as to its legal effect, but who was furthermore so disassociated from the interests of the donee as to be in a position to advise with the donor impartially and confidently as to the consequences to himself of his proposed benefaction. (p. 1004.)

Appeal from a decree of the court of chancery by Vice-Chancellor Stevens, who filed the following conclusions:

“1. There are facts proved in this case which taken by themselves cast the burden upon the defendant, Mrs. Hagan, of showing that the deeds which she received from her mother are untainted by fraud of any kind.

“Mrs. Telfer, the grantor, was sixty-three years of age at the time of her death, on June 16, 1899. The deeds were executed June 9, 1899, and conveyed practically all the grantor's estate. The complainant and the defendant, Mrs. Hagan, were the two children of Mrs. Telfer, Mrs. Hagan being somewhat older than her brother. The evidence is inadequate to show that Mrs. Telfer, during her lifetime, had given her son, the complainant, what would naturally be deemed his portion of her estate. For ten years preceding her death Mrs. Telfer lived with the defendants, who appear to have occupied a comfortable house on a farm at Secaucus. The complainant, who had a wife and children, appears to

have resided under conditions of poverty in small quarters which he rented or were rented for him in Hoboken.

"At the time the deeds were executed Mrs. Telfer was confined to her room, if not to her bed, suffering from the disease from which she died, and undoubtedly she was contemplating her death as an event which was near at hand. Physically Mrs. Telfer was, to a very large extent, if not exclusively, within the absolute control of the defendants.

"2. Stating the presumption established against the deeds by the foregoing facts in the strongest possible way, in my opinion the defendants have discharged the burden cast upon them, and have established by evidence, which is entirely convincing to my mind, that these deeds were the voluntary intelligent act of Mrs. Telfer in execution of a purpose which she formed in her own mind, unaffected by any influence or suggestion from the defendants or either of them.

"The main fact which tends to explain and vindicate the transaction under investigation is that the complainant for years had been a drunkard and a spendthrift. At the time the deeds were made he was forty-one years of age, and it does not appear that he was making or had made any effort to reform. His status appears to have been fixed as that of a person entirely unfit to be intrusted with property. His mother, Mrs. Telfer, distinctly recognized this status long before her last illness began. The witnesses on both sides abundantly show that Mrs. Telfer for a long time aided her spendthrift son and his family with contributions of money. Mr. Frank Sturges, a brother of Mrs. Telfer, who was called on behalf of the complainant, and whose testimony was not in the slightest degree impeached, testified that Mrs. Telfer paid her son's rent and grocery bills, and stated to the witness that if she gave him the money to pay them she would have to pay them over again 'because he would go and blow it in.' This same witness also said that at an interview which he had with his sister in the first part of May, at a time when it appears distinctly she was not confined to her room and was evidently competent to attend to business, she expressed a desire to 'get over the hill' in order to consult counsel with a view to having 'the property fixed up,' and at that time she told this witness that she 'wanted to leave the property to Henry as long as he lived and then after his death to go to his children,' and that she declared, 'If I leave it to him he will drink it up, and he will have no home and the children will have nothing.' Mrs. Rosen, a sister of Mrs. Telfer and a witness for the complainant, testified that

Mrs. Telfer often told her that if Henry would not drink she would deed him the farm, but that she knew that if she gave the farm to him he would waste it, and that 'she wanted it fixed so that he could not waste it, so that Mary, complainant's wife, would have something to take care of the children.' This witness also testified that in the first part of May Mrs. Telfer expressed the hope that she would get strength so that she might 'go up and have it fixed, have the papers fixed so that Mary would have something to take care of the children.'

"Cornelius B. Sturges, a brother of Mrs. Telfer, testified on behalf of the complainant that Mrs. Telfer told him, at his house at Union Hill, some months before her decease, that she was going to have her children 'share and share alike,' but she also said: 'I will have it fixed so that Hank cannot spend the money; that it will go to his children.'

"It seems plain from the testimony that Mrs. Telfer for a long time before her death must have intended not to die intestate and leave one-half of her little estate to descend to this spendthrift son, who appears to have been capable of squandering it within a very short time.

"3. The question arises what a woman in Mrs. Telfer's position would naturally do under the circumstances above stated. The evidence satisfies me that for a long time prior to her death, while Mrs. Telfer was not only in full possession of her faculties, but able to go back and forth between Secaucus and Hoboken or Jersey City without difficulty, she contemplated 'making papers' which would dispose of the farm or of half of her entire estate in such manner that her son could not waste it, while he and his family would have the benefit of it. She talked about conferring with lawyers, but with abundant opportunity for obtaining such assistance she refrained from doing so. It is significant that in none of the quite numerous statements of the witnesses in regard to Mrs. Telfer's declarations there is no clear indication that the 'papers' with which she contemplated 'fixing' up her affairs included a will. One witness referred to a paper of some sort which had been made ten years before Mrs. Telfer's death, and by which some disposition of property among her children was effected, but while this witness stated that Mrs. Telfer destroyed the paper, it does not appear whether such paper was a will or a deed. While Mrs. Telfer may have refrained from employing counsel because of an unwillingness to incur the expense, or may have for some other reason merely procrastinated in regard to the matter, it is

probable that most persons would surmise from the evidence in this case that this old woman evaded the discharge of what probably she deemed her duty on account of a sentiment or superstition which exercises a controlling influence over many minds. Not infrequently persons who are strongly influenced by this sentiment or superstition allow themselves gradually to approach death, which they see before them as inevitable within a few weeks or months, while they know that they are violating most solemn obligations in respect of the disposition of their property after death by refraining from making a will.

"But whatever may have been the cause of Mrs. Telfer's conduct, the fact is proved beyond dispute that while she recognized that she was beset with difficulties in endeavoring to make a proper disposition of her property, and that she ought to seek competent legal advice and assistance, she deliberately refrained from seeking such advice and assistance. If she had gone to a competent lawyer she probably would have learned that a spendthrift trust might be created by will or by deed which would present a complete solution of the problem which she was endeavoring to solve alone. But whether a spendthrift trust could have been devised which would have satisfied Mrs. Telfer's mind, and would have accomplished the object which she had in view, relating to the support of her son and to the protection of the property from his improvidence, is a matter about which it is vain to undertake to speculate. Mrs. Telfer, although proved to have been a woman of force of character and intelligence, presumably knew nothing of spendthrift trusts, and for some reason refrained from seeking legal advice. She stared at the problem before her, and apparently allowed months to go by during which she slowly but surely approached her end endeavoring to solve this problem without help from anyone.

"In my opinion, the evidence shows that the conveyance of this property to Mrs. Hagan was the solution which Mrs. Telfer finally reached of the difficult problem which she had long been studying. I think, also, that the evidence would probably satisfy most minds that from Mrs. Telfer's point of view with the knowledge that she had, what she did was altogether wise and prudent. Mrs. Telfer probably knew that if she left the farm or any property to her son for life that such life estate would be within his control and would be forthwith squandered. The choice that Mrs. Telfer seems to have finally made was between allowing one-half of her estate to descend upon her death to this spendthrift, who

would immediately waste it, or to convey the whole of the estate in her lifetime to her daughter. If she were to die intestate she firmly believed that the half of her estate which her son would receive would soon be dissipated, and he and his family would derive no permanent benefit from it. On the other hand, the evidence indicates distinctly that Mrs. Telfer contemplated that the gift of the whole estate to Mrs. Hagan would involve the administration of it, or a part of it, by Mrs. Hagan for the benefit of this unfortunate son. This devise, which is attacked as inofficious, appears, after all, to have been intended in part at least as a settlement in the nature of a spendthrift trust, however impossible it may be for any court of law or equity to deal with it in that character. It is not an uncommon thing for testators of intelligence, with the aid of counsel, to make an absolute gift which the legatee knows well is to be sacredly applied to the benefit of some person unnamed in the will. The evidence shows that Mrs. Telfer, whose maiden name was Sturges, comes from good stock. There is nothing in this case which reflects upon the character of any member of this family, three generations of which are represented among the witnesses, excepting what has been already set forth in regard to the complainant. The defendants impressed me as honest, trustworthy people. The indications to my mind are very strong that the defendant, Mrs. Hagan, who is somewhat older than her brother, the complainant, might well be intrusted by her mother to occupy in a measure a relation to her brother, after her mother's death, similar to that which the mother in her lifetime had occupied. Mrs. Hagan, on her direct examination, testified frankly that the day after the deeds were delivered to her she had a conversation with her mother in which her mother said: 'The property is yours; don't give him a dollar, but don't let him want for bread.' On her cross-examination she repeated this solemn injunction which her mother gave her practically on her dying bed.

"It is not surprising that Mrs. Telfer, with a daughter like Mrs. Hagan, should have concluded that the conveyances which she made were the wisest and best means of accomplishing all the objects which she had in view in relation to the support of her son and his family.

"The testimony of Judge Paxton directly supports the explanation of these conveyances above set forth. This experienced lawyer, in view of the character of the deeds, naturally felt it his duty to proceed with great caution, and to be sure that the deeds expressed the final and intelligent

determination of the grantor's mind. He accordingly reminded Mrs. Telfer that she had a son, and she replied: 'I know what I am doing and I think he has all that he deserves. I am disposed to leave it to the generosity of my daughter to give him (if he is entitled to anything) what he is entitled to.' Elsewhere the witness says that Mrs. Telfer said that 'she was disposed to trust her daughter to do what she might think was right and what he might be deserving of.'

"4. I shall not discuss the evidence at length. The complainant's case stands on the allegations of the bill that the deeds were obtained by fraud and undue influence in the abuse of fiduciary relations, and at a time when the grantor's mind had become impaired by disease to such an extent as to render her incapable of performing any legal act.

"There is no evidence that can support these extreme allegations. The proof of a fiduciary relation need not be considered. I find as a fact that when these deeds were made the grantor, though weak, was in the full possession of her intellectual faculties, and that her will power was practically unimpaired, and that as a matter of fact no influence of any kind was exerted upon her by or on behalf of the defendant or either of them leading to the execution of these instruments. Of course, the witnesses who know most about the execution of these deeds are the defendant, Mrs. Hagan, and Judge Paxton. The testimony of these witnesses is throughout, I think, characterized by frankness and apparent honesty. Judge Paxton received the order to draw the deeds about a week before he prepared them and took them to Secaucus for execution. There seems to have been no urgency about the matter, and Mrs. Hagan's testimony, which is corroborated, I think, indicates that she, Mrs. Hagan, thought that her mother intended to make a will, and voluntarily procured information which she thought would be required in carrying out that purpose. When Judge Paxton found it convenient on account of an appointment at North Bergen he drew the deeds and took them to Mrs. Hagan's house in Secaucus. He had no personal acquaintance with Mrs. Telfer but was acquainted with very many members of her family. He knew of her and she knew of him. Judge Paxton testifies most positively to the effect that Mrs. Telfer, though physically weak, was entirely rational, and the picture which he presents is that of a woman who is engaged in carrying out a plan of her own.

"It is perhaps worth noticing that the answers in this case, which are not under oath, set forth that the deeds in



question were made in order to make the property received by the daughter equal in amount to the property which the son had already received in the lifetime of his mother. The statements made by Mrs. Telfer to Judge Paxton, which he testifies to most positively, accord with this allegation of the answer and no doubt were the origin thereof. Mrs. Hagan, however, in her testimony does not stand her case on any such claim. She admits that she received all her mother's state charged with an obligation, the moral force of which he does not undertake to deny.

"The exact matter to be decided in this cause must be kept ever in view while thus examining the evidence. We are not inquiring whether these conveyances were in fact wise and prudent transfers of property, or must be considered as effecting a harsh and unjust exclusion of the complainant from a share of the estate of his mother to which he had a moral claim; or whether, if Mrs. Telfer had been properly advised and aided by counsel, she would have made these conveyances. The sole question is, Did Mrs. Telfer act voluntarily and intelligently in making these conveyances, or were they obtained from her by fraud or undue influence?

"Without stating the evidence bearing on this question, I have endeavored to make plain what seems to me to be the point of view from which the examination of the evidence should be conducted and from which it appears to me quite plain that the question must be answered in favor of the defendants."

James A. Gordon, for the appellant.

Charles C. Black and William T. Hoffman, for the respondents.

**242** GARRISON, J. To the facts found, and found correctly, as we think, by the learned vice-chancellor, he applied the rule as to undue influence laid down in *Haydock v. Haylock's Exrs.*, 34 N. J. Eq. 570, 38 Am. Rep. 385, whereas in our opinion he should have applied the rule as to independent advice laid down in this court in *Slack v. Rees*, 16 N. J. Eq. 447, 59 Atl. 466, 69 L. R. A. 393.

Both cases were decided by this court, and the essential difference between them is that the rule of *Slack v. Rees* has specific application to cases in which the gift, if valid, has the effect of stripping the donor of all, or practically, all, of his property, whereas the rule followed in *Haydock v. Haydock* applies generally to gifts that bear no such relation to the donor's entire estate.

Slack v. Rees goes further than Haydock v. Haydock to just the extent required by this additional circumstance that marks the distinction between them.

This distinguished circumstance, namely, that a person already aged or infirm or otherwise dependent should give to the one upon whom he thus depends practically his whole living beyond recall, and at the very time when apparently he had most need to retain it, raises in the mind of a chancellor the <sup>243</sup> presumption that the donor may not have appreciated the irrevocable character of his act or that he did not foresee its legal consequences to himself. This presumption of apparent improvidence gives rise to the special rule followed in Slack v. Rees, 66 N. J. Eq. 447, 59 Atl. 466, 69 L. R. A. 393, which may be called the rule of independent advice. By force of this rule, if a person upon whom another has in fact come to be dependent accepts a gift from such dependent person of all of his or her estate, a court of equity, moved by the apparent improvidence of such a gift, casts upon the donee the burden of showing that the donor had the benefit of proper independent advice. Proper independent advice in this connection means that the donor had the preliminary benefit of conferring fully and privately upon the subject of his intended gift with a person who was not only competent to inform him correctly as to its legal effect, but who was furthermore so disassociated from the interests of the donee as to be in a position to advise with the donor impartially and confidently as to the consequences to himself of his proposed benefaction.

The practical distinction between this rule and that applied by the learned vice-chancellor in the present case is so clearly pointed out by Chief Justice Gummere in Slack v. Rees, 66 N. J. Eq. 447, 59 Atl. 466, 69 L. R. A. 393, that I cannot do better than cite here a pertinent extract from the opinion delivered by him in that case, the essential facts of which, by the way, were exactly those of the case now before us: "The normal relation of parent and child, as it had existed in earlier years, had been reversed, and the daughter had come to be the guardian of the father. In this situation the law presumes that a gift made by the parent to the child is the product of undue influence, and casts upon the latter the burden of proving the contrary. A decision upon this point in the case, however, is rendered unnecessary, as we conclude that the conveyance must be set aside, because in making it the donor did not have the benefit of competent and independent advice as to its effect.

"That the absence of such advice will invalidate a deed of gift, which contains no power of revocation, where a relation of trust and confidence exists between the donor and donee, is not denied, and, indeed, it was so held by the vice-chancellor. <sup>244</sup> He seems to have considered, however, that such relationship was not shown, unless it was made to appear that the donee occupied such a dominant position toward the donor as to raise a presumption that the latter was without power to assert his will in opposition to that of the donee. But this is not the situation. The rule has a much broader sweep. Its purpose is not so much to afford protection to the donor against the consequences of undue influence exercised over him by the donee as it is to afford him protection against the consequences of voluntary action on his part, induced by the existence of the relationship between them, the effect of which, upon his own interests, he may only partially understand or appreciate." In an earlier part of the opinion the essential facts referred to were thus stated: "On the day before his death he [the father] executed a deed to his daughter, conveying to her two houses and lots in the city of Trenton. He owned no other real estate, and his personal property was insufficient for the payment of his debts."

That the facts of the present case bring it within the rule of *Slack v. Rees*, 66 N. J. Eq. 447, 59 Atl. 466, 69 L. R. A. 393, both as to the relationship of the parties and the necessity of independent advice, appears fully from the conclusions of the vice-chancellor. That the improvidence of the gift was apparent even to the recipient of it appears in certain testimony given by the donee and not cited by the vice-chancellor. I refer to the answer given by the donee to a question put to her by the vice-chancellor, after the witness had testified that her mother had told her to get the deeds recorded, but that she had not done so. The question was why she had not done so, to which her answer was: "Because I have heart trouble and I never expected my mother to die, and if I should die before my mother my children would have it, the property, and what would my mother have had? She would not have had anything." This naive answer discloses at once the precise situation to which the rule of *Slack v. Rees*, 66 N. J. Eq. 447, 59 Atl. 466, 69 L. R. A. 393, applies, as well as the reason for the rule and the necessity for its application.

That the donor in the present case ought to have had independent advice must be taken to be entirely established. That she did not have it is also clearly shown. Judge Pax-

ton, the lawyer who drew the deeds and took the donor's acknowledgments, <sup>245</sup> was employed for that purpose by the donee and appeared for her in the court below. She called upon him with the old deeds, from which he was instructed to draw two new deeds, in all respects similar to the old ones saving as to the names of grantor and grantee, and when he had the deeds ready he was to attend upon the donor and have them executed. His instructions were both limited and explicit. These instructions he carried out. He was in no sense the adviser of the donor and at no time acted in that capacity. His only remark to the donor, as I recall it, was that cited by the vice-chancellor, viz., that he reminded her that she had a son. The consequences to the donor's son of the disposition she was making of her property, and her repeated expressions of a desire to provide for him or his family, are not material, in the present aspect of the case, save as they throw light upon the donor's lack of knowledge and her need of advice. It may be true, as the vice-chancellor suspects, that if she had known of such a thing as a spendthrift trust she would have made such a disposition of part of her estate; it is equally probable that if she had understood the doctrine of precatory words she might have impressed such a trust in favor of her son upon the conveyances made to her daughter—indeed, in a vague way, she seemed to have thought that she had done so. However well founded in the testimony these surmises as to the donor's intentions or desires may be, they do no more than emphasize her need of counsel, not with respect to the protection of her son, but of herself. The fundamental error of the learned vice-chancellor as to the rule to be applied by him to such a case appears from the concluding words of his opinion, in which, in summarizing the case before him, he says: "We are not inquiring whether if Mrs. Telfer had been properly advised she would have made these conveyances. The sole question is, Did Mrs. Telfer act voluntarily and intelligently in making these conveyances, or were they obtained from her by fraud or undue influence?" This is precisely the error pointed out in *Slack v. Rees*, 66 N. J. Eq. 447, 59 Atl. 466, 69 L. R. A. 393, in the citation above quoted.

For the reasons there stated, the question considered by the vice-chancellor as the sole question was not the question upon <sup>246</sup> which the case turned, while the question that he did not consider was not only an essential inquiry in the cause, but under *Slack v. Rees* was absolutely dispositive of it in favor of the appellant.

The decree of the court of chancery will be reversed, and the record remitted with instructions to that court to enter a decree setting aside the conveyances in question.

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*Where a Parent Enfeebled in Mind by Disease or Old Age*, and placed in a position likely to be subjected to the influence of her son, makes a voluntary disposition of her property in his favor, the burden is upon him to show that the parent understood the nature of the act and did it free from his influence: *Baur v. Cron*, 71 N. J. Eq. 743, 66 Atl. 585. But where a father, in the prime of life, in the full possession of his faculties, with a full understanding of the effect of his act, and without the exercise of any influence over him by his children, he occupying the dominant position in relation to them, makes an absolute gift to them, the gift, although improvident, is irrevocable: *James v. Aller*, 68 N. J. Eq. 666, 111 Am. St. Rep. 654. See, also, *Albert v. Haerberly*, 68 N. J. Eq. 664, 111 Am. St. Rep. 652; *Barnes v. Banks*, 223 Ill. 352, 114 Am. St. Rep. 331.

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### JOHNSON v. SEABURY.

[71 N. J. Eq. 750, 67 Atl. 36.]

**TRADE NAME—Refusal of Protection Because of Owner's Fraud.**—Equity will not refuse to protect a trade name merely because the complainant for several years circulated literature falsely representing his exclusive right to the name, if such false representations have ceased and there is no proof that they in any material degree tended to create the value of the name. (pp. 1010, 1011.)

Charles L. Corbin and William Brinkerhoff, for the appellant.

Williard V. Voorhees, Archibald Cox, and Chas. G. Coe, for the respondent.

<sup>750</sup> SWAYZE, J. The evidence establishes that the absorbent cotton and gauze of the complainant have been known for a number of years as "Red Cross Cotton" and "Red Cross Gauze"; that the words "Red Cross," as applied to absorbent cotton and gauze, have acquired in the trade a secondary meaning and designate goods of the complainant's manufacture. The time when this secondary meaning was acquired is not, and probably cannot be, fixed with certainty. Doubtless it was, as usually happens in cases <sup>751</sup> of the kind, a gradual growth. We see no reason to doubt the testimony of witnesses who fix the date as early as 1892 or 1893. The testimony of other witnesses fixing later dates does not conflict with these statements, since the later dates fixed by them are necessarily only the dates of their own knowledge of that use of the words. The time when the

manufacture was begun by the complainant, the prominence given by it to the red cross on its packages, the persistency of its use on large and small packages alike, and the vigorous efforts of complainant to protect its use of the words against harmful legislation in 1894, sustain this view.

We are satisfied, also, that the defendant has unfairly simulated the complainant's packages of absorbent cotton. The original business connection between the predecessors of complainant and the predecessors of defendant, the competition which resulted from their separation, and the original controversy as to the merits of interleaving cotton with tissue paper, show that the defendant was familiar with complainant's method of packing goods.

In view of this knowledge, we cannot explain the change in the color of the carton in which an inferior grade of defendant's cotton was packed, from granite and chocolate to dark blue, the use of granite cartons for the best grade and dark blue for the inferior grade, the use of the "Mercury" seal on the former and the "Red Cross" seal on the latter, the increased prominence given to the red cross by defendant after a somewhat irregular use for so many years, and the adoption of the interleaving by tissue paper of the same color as complainant's, upon any theory except that of an effort on the part of defendant to profit by complainant's trade. The injury was increased by the attempt to confuse the complainant's cotton with an inferior grade. If the defendant had desired to avoid confusion, it had only to continue its previous course of business.

The question as to gauze is more difficult. The defendant was the first to use an amber glass jar, and the color was later adopted by the complainant, whose motive in doing so does not seem to be questioned. The defendant then changed from a round jar to a square jar like that of complainant. The change <sup>752</sup> is suspicious, but in view of the fact that the red cross was not used on defendant's jar, we are not prepared to say that there was an intent to simulate complainant's packages. The use of the red cross seal on the "glazed container," however, indicates a desire to connect the name "Red Cross" with defendant's gauze, and although we think, for reasons to be stated, that the use of the seal itself was permissible, the complainant is entitled to protection in the use of the name. The additional wrapper which was used by the defendant as an excuse for the use of the red seal was an extra trouble and expense, and the reason alleged for adopting it—the protection of the ornamental

labels—does not appeal to us with any great force. The protection had not been found necessary during the previous use of the glazed containers for some years, and it was quite unnecessary to seal the exterior packing with a red cross seal when the red cross was not elsewhere used in connection with gauze.

The greatest difficulty we have had has been with the right of the complainant to claim relief in equity. Beginning with 1894 and continuing for several years, at least until 1899, the complainant circulated catalogues and price lists containing a statement that an act of Congress had vested the use of the red cross symbol in the American National Red Cross Society, and that the society in recognition of the services of the complainant, in perfecting surgical appliances and medicinal preparations, had granted to complainant the exclusive right to use the red cross trademark upon this class of preparations. This statement was untrue. The only foundation for it was that the red cross society, in order to induce the complainant to withdraw opposition to a pending bill intended to secure the exclusive use of the red cross to the society, had recognized the exclusive right of the complainant to the red cross as a trademark on chemical, surgical and pharmaceutical goods, and had agreed not to contest complainant's exclusive right in case the bill passed.

There is no question about the principle that a false representation in a trademark will prevent equitable relief for its protection. The cases cited by the defendant are, with one exception, cases where the false representation was contained in the trademark itself. In such a case it is quite impossible to determine <sup>753</sup> to what extent goodwill, for which protection is sought, has been created by the false assertion, and to afford protection to a trademark containing a false representation would perpetuate the falsehood by the decree of the court. A very different question is presented where, as in this case, the false representation is contained in trade literature, which may or may not have contributed to the goodwill which is to be protected. Allowance must be made for what in the law of sales is called mere dealers' talk and for trifling inaccuracies or faults. No one has ever supposed that every statement of a trade advertisement is a warranty and must be proved true on penalty of losing the whole goodwill of the business. The difficulty is to determine what inaccuracies may be disregarded as mere puffing. An illustration of a trifling inaccuracy is found in Clark

Thread Co. v. Armitage, 67 Fed. 896, 21 C. C. A. 178, 74 Fed. 936. The English courts have even gone so far as to hold that the false statement that a shirt was patented when made only in invoices and advertisements would not debar the complainant from relief. In that case the complainant described himself as patentee of the shirt in every invoice which he gave to every purchaser as well as in publications. Yet the court of appeal reversed Vice-chancellor Bacon and gave relief. Lord Justice Mellish, with the approval of Lord Justice James, said: "I am, therefore, very clearly of opinion, and I do not think there can be any doubt about it, that the fact of these false representations of the article being a patent having been made to some of the public, would be no answer at all to an action. Indeed, there would be this great difficulty to be solved—how much misrepresentation must be made to be an answer to an action? Not only that, but it would be very difficult to say, where the fraud is not in the trade carried on, how far the misrepresentation must go or to what extent the misrepresentation must extend, before it would be an answer to an action or a suit": *Ford v. Foster*, L. R. 7 Ch. App. 611, 41 L. J. Ch. 682. The particular question has never been reviewed in the house of lords, but the extent to which the English courts will go in protecting a trader whose conduct has, in the main, been fair, is shown in the case of *Cochrane v. Macnish*, [1896] App. Cas. 225, 65 L. J. P. C. 20. The appellants claimed <sup>754</sup> a trademark for "Club Soda," upon which were the words "Manufactured in Ireland by H. M.'s Royal Letters Patent." The court of Jamaica held the statement false and refused relief. The appellants contended before the privy council that the words meant "manufactured in Ireland by means of patented machinery," and that thus interpreted the words were true. The privy council took this view and reversed the judgment.

In this country we have a case in a federal court of first instance in which a different view was taken: *Preservalline Mfg. Co. v. Heller Chemical Co.*, 118 Fed. 103.

The question was suggested by Vice-chancellor Emery in *Stirling Silk Mfg. Co. v. Sterling Silk Co.*, 59 N. J. Eq. (14 Dick.) 394, 46 Atl. 199, but not decided.

We think the rule laid down in *Ford v. Foster*, L. R. 7 Ch. App. 611, 41 L. J. Ch. 682, is too favorable to the complainant. If it can be established in any case that the trade name which the complainant seeks to protect owes its value in any material degree to false representations on his part,



we think he is not entitled to the protection of a court of equity. To give him relief would not perpetrate a falsehood by decree of the court, as in a case where the false representation is on the face of the trademark or label, but it would enable a man to profit by his own wrong, and the court would be in the position of protecting a property right acquired by fraud. But we think there is no presumption that a trade reputation is due to the highly colored or false statements in advertisements. Such statements are not so uncommon as to mislead an ordinary man; most persons discount them. In the present case the complainant's goods had come to be known as "Red Cross Cotton" and "Red Cross Gauze" before the first publication in question; it was the already existing reputation which led it to oppose with vigor the proposed legislation by Congress. To afford relief does not, as the case stands, give prolonged life to the misrepresentation, for the publication had been discontinued before this suit was begun. We do not say that the mere discontinuance of publication before suit brought would cleanse the complainant's hands; we hold that in the absence of proof that the trade name was due to false representations, and upon proof that the false representations had ceased, the complainant is entitled to protection.

<sup>755</sup> Although we think the complainant is entitled to relief, an examination of the decree advised by the learned vice-chancellor convinces us that it goes too far. It restrains the defendant from all use of a red cross in connection with cotton or gauze. The proof shows that the red cross has long been commonly used in connection with surgery, and that the defendant, prior even to the beginning of business by the predecessors of the complainant, had used a red cross in connection with some surgical goods, and, if not on absorbent cotton and gauze, on articles of the same general class. This right ought not to be taken from them. The extent of the restraint to which the complainant is entitled is such as will prevent the confusion of the defendant's goods with the complainant's, except so far as such confusion must necessarily arise out of the continued use of the red cross by the defendant as it was formerly accustomed to use it. In fixing the extent of this use, justice will be done if the defendant is allowed to use the red cross in no more conspicuous way than in its exhibits D-3, D-4, D-6, D-7 and D-12. This excludes the use of two red crosses.

An injunction should issue restraining the defendant from selling, offering to sell or otherwise disposing of any absorbent

cotton not by or for complainant made in packages to which a representation of two red crosses shall be attached or applied, or to which a representation of one red cross shall be attached or applied in any way except as part of a label substantially as in defendant's exhibits D-3, D-4, D-6, D-7 and D-12; and likewise from selling and from offering to sell or otherwise disposing of any gauze not by or for complainant made in packages to which a representation of two red crosses shall be attached or applied, or to which a representation of one red cross shall be attached or applied in any way except as part of a label substantially as in defendant's exhibits D-3, D-4, D-6, D-7 and D-12; and likewise from using in connection with the sale of absorbent cotton the package or packages complained of in the bill of complaint heretofore by it the defendant used, or any other package or packages which shall so closely resemble the package of the complainant by it availed of in connection with the sale of its absorbent cotton and described in the bill of complaint as to be calculated <sup>758</sup> to deceive; and from unlawfully imitating the complainant's absorbent cotton or gauze packages; and likewise restraining the defendant from using the designation "Red Cross" in connection with the manufacture or sale of absorbent cotton or gauze not by or for the complainant made; and from using a representation of a red cross in connection with said manufacture or sale except as a part of a label substantially as in defendant's exhibits D-3, D-4, D-6, D-7 and D-12; and from doing any act or thing whatsoever which may be calculated to cause the absorbent cotton or gauze of the defendant to be mistaken in the market for, or confused with, the absorbent cotton or gauze of the complainant, or offered or sold as and for the complainant's absorbent cotton or gauze.

The decree should be reversed and a decree entered in accordance with this opinion.

GARRISON, J. The complainant is not, in my opinion, entitled to enjoin the use of the red cross by the defendant.

With regard to the simulation by the defendant of the complainant's packages in other respects, I concur in the view of Mr. Justice Swayze.

I shall vote to reverse the decree in order that it may be modified in the manner above indicated.

I am authorized by Judges Bogert, Dill and Green to say that they concur in the above modification.

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*Trade Names.*—For Authorities Bearing upon the principal case, see *Solis Cigar Co. v. Pozo*, 16 Colo. 388, 25 Am. St. Rep. 279; *Pratt's Appeal*, 117 Pa. 401, 2 Am. St. Rep. 676.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**OREGON.**

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**WASHINGTON v. CLELAND.**

[49 Or. 12, 88 Pac. 305.]

**APPEAL—Waiver of by Payment of Fine.**—If a judgment is entered imposing a fine, and the amount thereof is deposited with the clerk of the court under protest and to avoid being put in jail, the deposit must be considered as a voluntary payment of the fine and a satisfaction of the judgment, and no appeal will lie therefrom. (p. 1014.)

**M. J. MacMahon**, for the petitioner.

**H. K. Sargent**, for the respondent.

**12 HAILEY, J.** The plaintiff filed her petition for an alternative writ of mandamus to compel the defendant to sign a bill of exceptions, or show cause why he should not do so, in a criminal action against her, tried before him as one of the circuit judges of the fourth judicial district, in which action she was found guilty <sup>12</sup> of assault, and judgment entered imposing a fine of two hundred dollars, or, in default of payment of such fine, that she be confined one hundred days in jail. The petition alleges inter alia that the plaintiff gave notice of an appeal, served and filed the same immediately after judgment was entered against her, and presented a bond with sufficient sureties to the defendant, but that defendant stated that he would not fix a bond or grant a certificate of probable cause; that plaintiff was then remanded to the custody of the sheriff; and that, to release her from jail, "she paid into the coffers of the clerk of said court the sum of two hundred dollars, not as a fine, but as a deposit for her release until the proceedings herein before this court could be heard." Notice of petition having been served upon defendant, he has demurred to the sufficiency of the petition.

(1013)

One of the questions raised by this demurrer is whether or not the payment of the two hundred dollars to the clerk was a voluntary payment of the fine, and thus a satisfaction of the judgment, in which even no appeal would lie: *Batesburg v. Mitchell*, 58 S. C. 564, 37 S. E. 36; *Payne v. State*, 12 Tex. App. 160; *State v. Conkling*, 54 Kan. 108, 45 Am. St. Rep. 270, 37 Pac. 992; *State v. Westfall*, 37 Iowa, 575; *Madsen v. Kenner*, 4 Utah, 3, 4 Pac. 992; *Commonwealth v. Gipner*, 118 Pa. 379, 12 Atl. 306; *People v. Leavitt*, 41 Mich. 470, 2 N. W. 812; *Powell v. People*, 47 Mich. 103, 10 N. W. 129. There is no provision under our code for the deposit, pending an appeal, of the amount of a fine imposed. In *Batesburg v. Mitchell*, 58 S. C. 564, 37 S. E. 36, the defendants paid their fines under protest, and yet the court said: "We know of no authority by which a person who has been convicted before a magistrate and sentenced to pay a fine can obtain the advantages of an appeal and staying the sentence imposed upon him, by doing that which the law does not provide for, instead of that which the law does provide for. It is not for persons accused and convicted of criminal offenses to choose the mode which suits them best of staying the execution of sentences imposed upon them, pending appeal; but they must adopt the mode specially provided by law for <sup>14</sup> that purpose. It seems to us, therefore, that, even if these fines were paid under the most formal protest, it would not have the effect of staying the sentence pending the appeal, but must be regarded as a compliance with one of the alternatives provided for in the sentence, and as putting an end to the case." So here, there being no provision under our code for such a deposit, the plaintiff cannot, by doing what the law does not provide, secure the advantage of an appeal; nor could the officers of the court receive the payment which she made for any purpose other than as a payment of the fine and release the plaintiff. The payment, therefore, must be considered as a voluntary payment of the fine. The fact that she made it to avoid going to jail does not make it any the less voluntary; for, if she had not tried to appeal, she would have been compelled to make the payment anyhow to avoid a like result. She simply chose one of the alternatives provided for in the sentence. The payment having been voluntary, the judgment was therefore satisfied, and, upon the authorities heretofore cited, no appeal would lie therefrom.

The determination of this question makes it unnecessary to pass upon the other questions raised by the demurrer. The

demurrer will therefore be sustained, and the petition dismissed.

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*As a General Rule, a Plaintiff Who Accepts a Benefit Under a Judgment or obtains a satisfaction thereof is precluded from appealing therefrom.* The rule is not, however, without modifications and exceptions; See *Jackson v. City of Brockton*, 182 Mass. 26, 94 Am. St. Rep. 635; *Tyler v. Shea*, 4 N. D. 377, 50 Am. St. Rep. 660; *Schmidt v. Oregon Gold Min. Co.*, 28 Or. 9, 52 Am. St. Rep. 759; *Leake v. Hayes*, 13 Wash. 213, 52 Am. St. Rep. 34; *Fiedler v. Howard*, 99 Wis. 388, 67 Am. St. Rep. 865; monographic notes to *State v. Conkling*, 45 Am. St. Rep. 271-274; *Clark v. Ostrander*, 13 Am. Dec. 548, 549. One found guilty of contempt, who pays under protest the fine adjudged against him, cannot reserve the right to appeal: *State v. Conkling*, 54 Kan. 108, 45 Am. St. Rep. 270.

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## STATE v. THOMPSON.

[49 Or. 46, 88 Pac. 583.]

**MURDER—Evidence—Dying Declarations.**—If the deceased is suffering from a mortal wound at the time of making a statement as to the circumstances surrounding the affray, and his physician advises him that his case is hopeless and that he will probably die under an anesthetic about to be administered before an operation is to be performed, and he dies a few moments later, such statement is admissible in evidence as a dying declaration. (p. 1016.)

**MURDER—Self-defense—Evidence of Character of Deceased.**—If, in a murder case, there is evidence tending to show that the defendant acted in self-defense, proof that the deceased was a violent and dangerous man is competent whether that fact was known to the defendant or not, for the purpose of aiding the jury in determining who was in fact the aggressor, and the nature and character of the assault, if one was made by the deceased. (p. 1016.)

Bowerman & Snover and Huntington & Wilson, for the appellant.

A. M. Crawford, attorney general, and F. Menefee, district attorney, for the state.

47 BEAN, C. J. 1. The defendant was indicted, tried and convicted of murder in the second degree for the killing of one Alex Goericke by stabbing him with a knife, and appeals, assigning as error the admission in evidence of the dying declaration of Goericke, and an instruction that evidence that Goericke was a dangerous and desperate man was admitted only as bearing on the question of who was the aggressor in the affray resulting in his death. The killing is admitted, but defendant claims and offered evidence tend-

ing to show that he was assaulted by the deceased, who was a dangerous and quarrelsome man, with a butcher knife, and that he acted in his own lawful self-defense and to save his own life. The difficulty occurred about noon on the 29th of December, 1904. A physician was summoned to attend the deceased, and arrived at the place of the affray sometime between 4 and 5 o'clock in the afternoon. He found the deceased suffering from a wound in the abdomen through which the muscles were protruding, and directed that he be taken to Condon, a distance of ten or twelve miles, for treatment, where he arrived about 11 or 12 o'clock at night, as the surgeon says, in practically a dying condition. After examining his wounds, the surgeon told him that he thought his case hopeless, that his only chance laid in an <sup>48</sup> operation, and inquired if he was willing to take it, and he replied that he was. He was told by the surgeon that he would probably not come out from under the influence of the anesthetic, and was asked if he desired to make a statement, to which he replied in the affirmative. His statement was then taken down in writing and signed by him. He died fifteen or twenty minutes later while the anesthetic was being administered. There was no evidence from any declarations of the deceased or otherwise that he had any hope of recovery at the time he made the statement. To all inquiries upon that subject he replied: "I don't know; the doctor may know," or "the doctor can tell you." Under these circumstances we think the dying declaration was properly admitted in evidence: *State v. Fletcher*, 24 Or. 295, 33 Pac. 575; *State v. Gray*, 43 Or. 446, 74 Pac. 927. The deceased was suffering at the time from a mortal wound from which he died a few minutes later. His physician had advised him that his case was hopeless, and that he would probably die under the anesthetic which was about to be administered. It was with this knowledge that the statement was made, and it was manifestly under a sense of impending death, and when he had no hope or expectation of recovery. The fact that he was willing to take the only chance held out to him by the surgeon does not indicate that he expected to recover.

2. But the court was in error in limiting the effect of the evidence of the dangerous and desperate character of the deceased to the single question as to who was the assailant or the aggressor in the difficulty which resulted in his death. There was evidence, as the bill of exceptions states, tending to show that the defendant acted in self-defense, and in such case proof that the deceased was a violent and dangerous

man is competent, whether known to the defendant or not, for the purpose of aiding the jury in determining who was in fact the aggressor, and the nature and character of the assault, if one was made by the deceased. For, as said by Mr. Wigmore: "One's persuasion will be more or less affected by the character of the deceased; it may throw much light on the probabilities of the deceased's <sup>49</sup> action": 1 Wigmore on Evidence, sec. 63. To prove the dangerous and desperate character of a deceased, of course, does not tend to prove the commission of an unlawful act by him, but it does increase the probability of the other evidence tending to show that he commenced the affray, and that his attack was felonious and intended to do the defendant great bodily harm. The claim that the defendant acted in self-defense, if indicated by the other evidence, would be more readily believed concerning a violent and dangerous man than a peaceable and quiet one, and any mind searching for the truth and in doubt would naturally be affected by such evidence. The defendant's knowledge or want of knowledge of the deceased's character can have nothing to do with its value as evidence for the purpose stated. Its object was to render more probable the other evidence in the case which tended to show that the deceased was the aggressor, and that the nature of his attack was such as to justify the defendant in resorting to violence to repel it or to save his own life, and is not affected in the slightest by the defendant's previous knowledge. Its value comes from the fact that the deceased was one who was apt or likely to do what is imputed to him, and not from the defendant's knowledge of such fact. The rule in reference to the admissibility and use of evidence in a homicide case tending to show that the deceased was a desperate and dangerous man is practically the same as that regulating the admission of uncommunicated threats made by him, and in the latter case Lord, J., said: "Where the circumstances raise a question of self-defense, evidence of uncommunicated threats recently made are admissible for the purpose of showing the motive of the deceased, and the nature and character of the assault": State v. Tarter, 26 Or. 38, 37 Pac. 53. Proofs of threats, or that the deceased was a violent and dangerous man, are competent in a homicide case to show the probability of the acts charged against the deceased, whether known to the defendant or not. Where the threats have been communicated, or the desperate and dangerous character of the deceased is known to the defendant, such evidence may be used, not only <sup>50</sup> to show the

probability of the acts imputed to the deceased, but also the defendant's apprehension of danger when he acted upon appearances not wholly justified by the facts: 1 Wigmore on Evidence, secs. 63, 110. Because the instruction as given limited the application of the evidence in question to the single matter as to who was the assailant, it was erroneous, and the error was not cured by any other instructions.

Judgment reversed, and new trial ordered.

#### **ADMISSIBILITY OF EVIDENCE OF THE CHARACTER OR REPUTATION OF THE DECEASED IN HOMICIDE CASES.**

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**a. Evidence of Character or Reputation of Deceased Generally Inadmissible.**—As a general rule, evidence of the character or reputation of the deceased in homicide cases, whether for peace and quietness, or violence and turbulence, or for honesty, morality or chastity, is inadmissible. An exception to this general rule is allowed, however, in cases where the defendant pleads self-defense and the condition of the evidence is such as to leave or engender a doubt; (1), as to whether or not the deceased was the aggressor, or, (2), as to the reality or reasonableness of the belief under which the defendant claims to have acted: *People v. Lamar*, 148 Cal. 564, 83 Pac. 993; and an exception has also been claimed and admitted in some cases for the purpose of palliating the offense and reducing the grade or degree: *Fields v. State*, 47 Ala. 603, 11 Am. Rep. 771; *Smith v. State*, 88 Ala. 73, 7 South. 52; *Perry v. State*, 94 Ala. 25, 10 South. 650; *Palmore v. State*, 29 Ark. 248; *State v. Robertson*, 30 La. Ann. 340; *Bingham v. State*, 6 Tex. App. 169; but this exception is denied in other cases, and the authorities are at variance in this respect: *Gardner v. State*, 90 Ga. 310, 35 Am. St. Rep. 202, 17 S. E. 86; *Horbach v. State*, 43 Tex. 242.

**b. General Rule in Cases Where the Evidence Leaves or Engenders a Doubt Whether Deceased was the Aggressor, or as to the Reality or Reasonableness of the Belief Under Which Defendant Claims to have Acted.**—The general rule in such cases, established by the decisions which now constitute the weight of authority, is, that wherever it becomes necessary to determine the intent of the deceased, or

whether or not he was the aggressor, evidence of his violent and dangerous character or reputation is admissible on behalf of the defendant, whether known to him or not: *Pritchett v. State*, 22 Ala. 39, 58 Am. Dec. 250; *Monroe v. State*, 5 Ga. 85; *Keener v. State*, 18 Ga. 194, 63 Am. Dec. 269; *State v. Feely*, 194 Mo. 300, 112 Am. St. Rep. 511, 92 S. W. 663, 3 L. R. A., N. S., 351; *State v. Tackett*, 8 N. C. (1 Hawks) 210; but where, as in *State v. Nett*, 50 Wis. 524, 7 N. W. 344, the only question to be determined is the intent of the defendant, and the truth or falsity of his claim that he acted solely upon an honestly and reasonably entertained belief that he was in imminent danger of death or great bodily harm at the hands of the deceased, then and in such cases it is manifest that evidence of the bad character or reputation of the deceased is wholly immaterial and inadmissible, unless it is known to the defendant at the time of the homicide; but if known to him at that time it is admissible: *Pritchett v. State*, 22 Ala. 39, 58 Am. Dec. 250; *Eiland v. State*, 52 Ala. 322; *Lang v. State*, 84 Ala. 1, 5 Am. St. Rep. 324, 4 South. 193; *Gardner v. State*, 90 Ga. 310, 35 Am. St. Rep. 202, 17 S. E. 86; *Commonwealth v. Tirciuski*, 189 Mass. 257, 75 N. E. 261, 2 L. R. A., N. S., 102; *Brownell v. People*, 38 Mich. 732; *Abbott v. People*, 86 N. Y. 460; *Marts v. State*, 26 Ohio St. 162; *Tiffany v. Commonwealth*, 121 Pa. 165, 6 Am. St. Rep. 775, 15 Atl. 462; *Commonwealth v. Straesser*, 133 Pa. 451, 26 Atl. 17; *Horsbach v. State*, 43 Tex. 242; *State v. Lull*, 48 Vt. 581; *State v. Nett*, 50 Wis. 524, 7 N. W. 344; *Smith v. United States*, 161 U. S. 85, 16 Sup. Ct. Rep. 483, 40 L. ed. 626; the basic principle in cases of this sort is stated in the most general terms in one of the earliest cases in which it was ever ruled that evidence of decedent's bad character or reputation could be admitted for any purpose whatever, namely; *Monroe v. State* (July, 1848), 5 Ga. 85, where it was said that "in cases of doubt, whether the homicide was perpetrated in malice, or from a principle of self-preservation, it is proper to admit any testimony calculated to illustrate to the jury, the motive by which the prisoner was actuated"; and the same principle, applied to the conduct of the deceased, was expressed in one of the later of the leading cases as follows: "Evidence of the violent and dangerous character of the deceased is admissible to show, or as tending to show, that a defendant has acted in self-defense; or in other words, under such circumstances as would have naturally caused a man of ordinary reason to believe that he was, at the time of the killing, in imminent danger of losing his life or suffering great bodily harm at the hands of the deceased; but it is not admissible for this purpose except where it explains or will give meaning, significance or point to the conduct of the deceased at the time of the killing, or will tend to do so": *Garner v. State*, 28 Fla. 113, 29 Am. St. Rep. 232, 9 South. 835. The principle indicated prevails in all of the later cases: *Storey v. State*, 71 Ala. 329; *Williams v. State*, 74 Ala. 18; *Garner v. State*, 28 Fla. 113, 29 Am. St. Rep. 232, 9 South. 835; *Hart v. State*, 38 Fla. 39, 20 South. 805; *Allen v. State*, 38 Fla. 44, 20 South. 807; *Kipley v. People*, 215 Ill. 358, 74 N. E. 379; *State v. Graham*, 61 Iowa, 608, 16 N. W. 743; *State v. Rutledge*, 135 Iowa,

581, 113 N. W. 461; State v. Keefe, 54 Kan. 197, 38 Pac. 302; Payne v. Commonwealth, 58 Ky. (1 Met.) 370; State v. Rideau, 116 La. Ann. 245, 40 South. 691; Smith v. State, 75 Miss. 542, 23 South. 260; State v. Keene, 50 Mo. 357; State v. Bryant, 55 Mo. 75; State v. Elkins, 63 Mo. 159; State v. Brown, 63 Mo. 439; State v. Freeman, 8 Mo. App. 591; State v. Hayden, 83 Mo. 198; State v. Downs, 91 Mo. 19, 3 S. W. 219; State v. Shafer, 22 Mont. 17, 55 Pac. 526; Basye v. State, 45 Neb. 261, 63 N. W. 811; People v. Rodawald, 177 N. Y. 408, 70 N. E. 1; Nichols v. People, 23 Hun. 165; State v. McIver, 125 N. C. 645, 34 S. E. 439; State v. Roderick, 77 Ohio St. 301, 82 N. E. 1082, 14 L. R. A., N. S., 704; State v. Turner, 29 S. C. 34, 13 Am. St. Rep. 706, 6 S. E. 891; State v. Thrailkill, 71 S. C. 136, 50 S. E. 551; Moore v. State, 15 Tex. App. 1; Childers v. State, 30 Tex. App. 160, 28 Am. St. Rep. 899, 16 S. W. 903.

c. **Origin and Development of the Rule.**—The rule as above stated, though at the present time well established, is of comparatively recent origin, and in several of the earlier cases, where the point was raised, it was either denied in toto or held applicable only in cases where the evidence is wholly circumstantial. It is said in *State v. Barfield*, 30 N. C. (8 Ired.) 344, that *Tackett's Case* (*State v. Tackett*, 8 N. C. (1 Hawks) 210), decided in 1820, is the first instance in which, even in a case of circumstantial evidence, proof of the bad character or reputation of the deceased was held to be proper in a prosecution for homicide. In the *Barfield* case (30 N. C. (8 Ired.) 344), decided in June, 1848, and in which the defendant pleaded self-defense, one of the grounds of the appeal was that the lower court had refused to permit the defendant to prove that the general character of the deceased "was that of a violent, overbearing and quarrelsome man" (possibly the proposed evidence did not amount to an offer to prove that the deceased was, or was even commonly reputed to be a "dangerous" man; but that point was not made or discussed). The supreme court, after stating its reasons therefor, affirmed the ruling of the trial court in these words: "For these reasons, and because we think, if there were any such general rule of evidence, as that urged for the prisoner, it would have been laid down in some one of the numerous treatises on this branch of the law, the court holds the evidence was properly rejected"; and in *State v. Thawley*, 4 Harr. (Del.) 562, Chief Justice Booth, in the opinion delivered by him, reflects the views generally entertained by the courts at that time as follows: "The testimony offered is the general character of the deceased as a violent man. From the fact, that we cannot find in the books, where this evidence has been admitted, nor any principle which would admit it, we feel constrained to reject the evidence." In Wharton's *American Law of Homicide*, 249, published in 1854, it is stated that, "as a general principle, the rule continues unbroken, that evidence that the deceased was riotous, quarrelsome and savage, is inadmissible, even though such knowledge be brought home to the defendant himself." This qualification, however, is added, to wit: "There have been cases in which courts have

been obliged to allow such evidence to be introduced, and it is easy to imagine cases, in the future in which it would be impossible to exclude it." The progress and development of the rule as stated, since the date of the decision in *Monroe v. State*, 5 Ga. 85, is indicated, and may be traced in the authorities above cited.

**d. Illustrative Instances.**—It has been held that evidence that deceased was an "overbearing, turbulent and impetuous man" is inadmissible, for the reason that the quoted words do not necessarily imply that he was "violent, dangerous, or regardless of human life": *Spivey v. State*, 58 Miss. 858; and on the trial of a white man for the murder of a slave it was held inadmissible to prove that the deceased was generally insolent and impudent to white persons, there being nothing to show that he was insolent or impudent to the defendant at the time he was killed: *State v. Tackett* 8 N. C. (1 Hawks) 210, it was held that it was competent for one charged with the murder of a slave to show that he "was a turbulent man, and that he was insolent and impudent to white people."

Where the defense was that the defendant at the time of the killing was a peace officer, in good faith endeavoring to arrest the deceased for violation of a city ordinance, it was error to exclude evidence tending to show that deceased was a dangerous character.

Animosity, threats and previous assaults by deceased upon defendant are each and all admissible upon the same principle and for the same purpose as evidence of decedent's character or reputation: *State v. Scott*, 24 Kan. 68; *Rippy v. State*, 39 Tenn. (2 Head) 217.

In *Surginer v. State*, 134 Ala. 120, 32 South. 277, the defense was, the right of the defendant to use violence in defense of his brother in law. It was held that such right exists only where the imperiled person would be justified in using the same violence in his own defense, which, in the case cited he was not, and that consequently the defendant was not entitled to prove the dangerous character of the person he assaulted.

In *Tiffany v. Commonwealth*, 121 Pa. 165, 6 Am. St. Rep. 775, 15 Atl. 467, the defendant claimed that at the time of the homicide he was assaulted on his own premises by the deceased and a third party, and it was held that he might properly prove the violent and dangerous character of such third party.

**e. Habit of Going Armed, Threats and Character or Reputation, Admissible upon One and the Same Principle.**—The habit of going armed, particularly with concealed weapons, is obviously in close analogy with the character and reputation of the deceased, and his threats against the defendant, and it has been accordingly held, in *King v. State*, 65 Miss. 576, 7 Am. St. Rep. 681, 5 South. 97, that the decedent's habit of going armed, known to the defendant, is admissible in evidence upon the same principle which justifies the admission of evidence of the character of the deceased, and his threats against the defendant. The same rules and authorities which have been stated and cited with reference to the admissibility of evidence of the character or reputation of the deceased are, therefore, applicable to

his habit of carrying arms, and consequently need not be repeated under this head. The following cases, however, are cited as dealing more particularly with this trait or characteristic of the deceased: *Wiley v. State*, 99 Ala. 146, 13 South. 424; *Cawley v. State*, 133 Ala. 128, 32 South. 227; *Rodgers v. State*, 144 Ala. 32, 40 South. 572; *Bluet v. State*, 151 Ala. 41, 44 South. 84; *Garner v. State*, 31 Fla. 170, 12 South. 638; *Warrick v. State*, 125 Ga. 133, 53 S. E. 1027; *State v. Graham*, 61 Iowa, 608, 16 N. W. 743; *Riley v. Commonwealth*, 94 Ky. 266, 22 S. W. 222, 15 Ky. Law Rep. 46; *King v. State*, 65 Miss. 576, 7 Am. St. Rep. 681, 5 South. 97; *State v. Yokum*, 14 S. D. 84, 84 N. W. 389; *Branch v. State*, 15 Tex. App. 96; *Glenewinkel v. State* (Tex. Cr. App.), 61 S. W. 123; *State v. Eller*, 30 Wash. 369, 70 Pac. 963; *State v. Crawford*, 31 Wash. 260, 71 Pac. 1030.

**f. Character, Reputation or Disposition of Deceased When Under the Influence of Liquor or Cocaine, or After Losses at Gambling.**

**1. When Under the Influence of Liquor.**—While the general rule is that evidence of the bad reputation of deceased for peace and quiet cannot be received, still this rule has its exceptions applicable to cases where the facts and circumstances surrounding them are peculiar. Such an exception applies in cases of homicide where the plea of self-defense is interposed and the evidence before the jury leaves it in doubt whether the deceased was the aggressor, or where the circumstances attending the homicide render it doubtful or equivocal whether the defendant was justified in believing in imminent danger at the hands of deceased: *People v. Lamar*, 148 Cal. 564, 83 Pac. 993. It was claimed by the defendant, in the case just cited, that he killed the deceased in necessary self-defense, and upon the trial after introducing evidence which, as said by the supreme court, brought the case within the exception stated, as presenting a situation where the sufficiency of the plea of self-defense was enveloped in doubt, and which showed also that the deceased was intoxicated at the time of the homicide, and that this was known to defendant at that time, the defendant sought to prove the reputation of the deceased as a violent and dangerous man when under the influence of intoxicating liquors (admitting that his general reputation for peace and quietness was good), and that this bad reputation was known to him. The trial court excluded the offered evidence and this was held reversible error on appeal, where the court took occasion to say that "A man may possess different characters or different reputations, adapted to different localities or different conditions of mind, and as applied to the inquiry at hand the deceased may have had one reputation for peace and quiet when sober, and quite another for these same traits when drunk." In *State v. Manns*, 48 W. Va. 480, 37 S. E. 613, the prisoner, on trial for murder, knew that the deceased was intoxicated at the time of the killing, and sought to prove his dangerous character when intoxicated. This the court refused to permit. The judgment was reversed on other grounds, and there was no holding, in express terms, upon the point stated. The inference, however, is

plain that the ruling of the lower court in this respect was considered erroneous.

But evidence offered by defendant as to how the appearance and manner of deceased, when drunk, would impress a stranger, or one who had but slight acquaintance with him, and make him resort to prompt action in defending himself against deceased, is without the issues in the case, and clearly incompetent: *Jackson v. State*, 147 Ala. 699, 41 South. 178. Evidence, on trial for manslaughter, that the deceased was addicted to drink, and was a quarrelsome and dangerous man when under the influence of liquor, and that he had been drinking on the day he was killed, is all inadmissible where there is no evidence of any sufficient provocation or legal excuse for the homicide: *State v. Field*, 14 Mo. 244, 31 Am. Dec. 52. And where the defense, on a prosecution for murder, is that the killing was accidental, and there is no claim of self-defense, evidence that the deceased was a violent and treacherous man when drinking is irrelevant and inadmissible: *State v. McDaniel*, 68 S. C. 304, 102 Am. St. Rep. 661, 47 S. E. 384.

2. **When Under the Influence of Cocaine.**—In *Moseley v. State*, 89 Miss. 802, 41 South. 384, the trial court, on prosecution for murder, permitted the defendant to show the general reputation of deceased for peace or violence, and further permitted testimony to the effect that deceased was under the influence of cocaine at the time of the killing, and further permitted evidence as to the conduct and manner of deceased at the time of the killing; but refused to permit evidence of the effect of cocaine on deceased. The supreme court, on appeal, held that "testimony is admissible of the character of the deceased when under the influence of cocaine. A man may be peaceable and quiet when sober, but a terror when affected by cocaine. There was testimony offered to show this, and it is shown that defendant knew his character, and there is testimony sufficiently tending to show that deceased was under the influence of the stimulant to give Moseley the right to such testimony of character."

3. **After Losses at Gambling.**—In *State v. Hunter*, 118 Iowa, 686, 92 N. W. 872, the defendant, on trial for murder, claimed that he killed the deceased in self-defense, and offered testimony to show that at the time of the affray the deceased had lost his money at the gaming table, and that when he had lost his money at gambling he was a violent and quarrelsome man—all of which was excluded by the trial court. Held, that this testimony should have been received; citing *State v. Collins*, 32 Iowa, 36, where it was held error to reject evidence that deceased, when under the influence of liquor, was quarrelsome, vindictive, ugly and dangerous; and the court went on to say: "The trial court in this case excluded the offered evidence on the theory that the character of the deceased under special or exceptional circumstances could not be shown; that nothing but his general character was involved. The Collins case, to which we have just referred, clearly negatives that idea, for in that case the testimony;

offered was to show the character of deceased while under the influence of intoxicants."

**4. Right of State to Rebut, and Manner of Rebuttal in Such Cases.**—In *State v. Feeley*, 194 Mo. 300, 112 Am. St. Rep. 511, 92 S. W. 663, 3 L. R. A., N. S., 351, the defendant, accused of murder, introduced evidence tending to show that the deceased was a quarrelsome and dangerous man when drinking, and the trial court permitted the state to show in rebuttal the general reputation of deceased when not drinking, and this on appeal was assigned as error. The argument was that such evidence upon the part of the state was improper, not rebuttal, and brought forward an issue not raised by the defendant; and the reply to this argument contained in the decision of the appellate court, sustaining the lower court, is that while it would have been proper for the defendant to show by testimony the general reputation of deceased in the neighborhood in which he lived for violence and quarrelsomeness when drunk, yet, under the circumstances of the case, that was only one trait or quality of his disposition which went to make up his general reputation, and not separable from it, and the state should not, therefore, be deprived of the right to show, in rebuttal, his general reputation for peace, quiet and good citizenship in the neighborhood in which he resided.

**g. Reputation or Character of Deceased with Reference to Morality, Chastity or Honesty.**

**1. Evidence Inadmissible on Behalf of Defendant.**—As a general rule, evidence of the bad character or reputation of the deceased as an immoral, lecherous, unchaste or dishonest person is inadmissible, upon the part of the defendant, on a prosecution for homicide: *State v. Rose*, 47 Minn. 47, 49 N. W. 404; *Commonwealth v. Sapp*, 90 Ky. 580, 29 Am. St. Rep. 405, 14 S. W. 834; *Commonwealth v. Hoskins*, 18 Ky. Law Rep. 59, 35 S. W. 284; *Pence v. Commonwealth*, 21 Ky. Law Rep. 500, 51 S. W. 801; *Gibson v. State* (Tex. Cr. App.), 68 S. W. 174; and it was stated in *Copeland v. State*, 41 Fla. 320, 26 South. 319, as the general rule, that evidence, on behalf of the defendant, of the immoral character of the deceased, except where it explains, or will give meaning, significance or point to the conduct of the deceased at the time of the killing, or will tend to do so, is not proper, "as it is no less a crime to murder a bad person than a good one"; and so also it is held that it is certainly not admissible for the defendant to prove the character of the deceased for honesty; for this would not serve to explain the actions of the deceased at the time he was killed, or to show that in the killing of the deceased the defendant was only acting in self-defense, and was under a reasonable fear of his life or serious bodily injury from the deceased: *Plasters v. State*, 1 Tex. App. 673.

An exception to the general rule arises in Texas, however, under a statute of that state providing that insulting words toward "a female relation" shall be adequate cause to reduce a homicide from murder

to manslaughter: *Hudson v. State*, 6 Tex. App. 565, 32 Am. Rep. 593; *Jones v. State*, 38 Tex. Cr. 87, 70 Am. St. Rep. 719, 41 S. E. 633. It was held in the latter case that the general bad reputation of the deceased, with reference to chastity and virtue and his conduct toward women or otherwise, and that defendant was informed thereof, was admissible both to show that the defendant believed what his wife told him and also to add to the presumption that he acted on this belief.

**2. Evidence Inadmissible on Behalf of the State, Except in Rebuttal.**—The general rule regarding the right of the state to give evidence for the purpose of showing the good character or reputation of the deceased for chastity, honesty or morality, either in chief or in rebuttal, appears to be the same as it is with reference to evidence of his or her good character or reputation for peace and quietness—that is to say, unless attacked by the defendant, the prosecution cannot introduce such evidence: *Burnett v. People*, 204 Ill. 208, 98 Am. St. Rep. 206, 68 N. E. 505, 66 L. R. A. 304; *Gregory v. State*, 50 Tex. Cr. App. 73, 94 S. W. 1041. In neither of these cases did the defendant prove, or offer or attempt to prove, the character or general reputation of the deceased for chastity. But in each case the deceased was in *flagrante delicto* at the time of the alleged killing, and testimony to this effect as well as with reference to the attendant circumstances was, as part of the *res gestae*, in each case; and the theory of the prosecution was that the character and reputation of the deceased was thereby attacked, and the door opened for the introduction of evidence on the part of the people of good reputations of the decedents. This view was, however, rejected by the appellate court in each instance, upon the ground that the reputation of the deceased had not been attacked by the defendant, and was not in issue.

**h. Bad Character or Reputation of Deceased—How Treated and Considered.**—The bad character or reputation of the deceased, when proven, and for the purpose of proof, is to be taken and treated and considered as a part of the *res gestae*: *Pritchett v. State*, 22 Ala. 33, 58 Am. Dec. 250; *Lang v. State*, 84 Ala. 1, 5 Am. St. Rep. 324, 4 South. 193; *Garner v. State*, 28 Fla. 113, 29 Am. St. Rep. 232, 9 South. 835.

#### **i. Periods of Time to Which Character Evidence must Relate.**

**1. General Rule.**—"The general rule is said to be that evidence as to such reputation (i. e., 'for quarrelsomeness, violence and a vindictive temper') must be confined to the community in which the person lives whose reputation is sought to be shown, and limited to some reasonable time previous to and connected with the time of the homicide": *Lynch v. People*, 33 Colo. 128, 79 Pac. 1015; but it is said in the same case that this rule "is not inelastic."

**2. Illustrative Instances of Applications of the Rule.**—Character of the deceased for violence and brutality in a foreign country years



before the homicide is held to be immaterial and inadmissible: *May v. People*, 8 Colo. 210, 6 Pac. 816; the general character of the prosecuting witness as a violent and dangerous man, at a time subsequent to the assault made upon him by the defendant with intent to murder, is immaterial: *Burks v. State*, 40 Tex. Cr. App. 167, 49 S. W. 389; on trial for the murder of a fellow-convict the defendant introduced the testimony of another convict to prove that the character of the deceased was bad before his incarceration, and that he was vindictive and quarrelsome. It was held that it was then proper to permit the state to rebut by showing that the decedent's character while in prison was good: *Thomas v. People*, 67 N. Y. 218. In a prosecution for an assault with intent to murder, evidence that defendant was afraid of the person assaulted a few days prior to the difficulty is inadmissible where there is no evidence that he was afraid of him at the time of the assault: *Wynne v. State* (Tex. Cr. App.), 51 S. W. 909. "The general reputation of the deceased acquired after the homicide, is inadmissible": *Skaggs v. State*, 31 Tex. Cr. 563, 21 S. W. 257; and so, also, where a witness had no knowledge of decedent's bad reputation prior to his death, he cannot testify to any knowledge of that sort which he has acquired since that time: *State v. Kenyon*, 18 R. I. 217, 26 Atl. 199.

## II. Of the Foundation or Predicate Requisite Before the Defendant can Put in Issue the Character or Reputation of the Deceased.

a. **Character and Reputation of Deceased Presumptively Good.**—The character and reputation of the deceased for peace and quietness will be presumed to be good until the contrary is proven: *Kelly v. People*, 229 Ill. 81, 82 N. E. 198, 12 L. R. A., N. S., 1169.

b. **Necessity of Some Preliminary Evidence of Self-defense.**—This presumptively good character and reputation of the deceased for peaceableness cannot be put in issue by the defendant in the absence of any evidence showing, or tending to show, a case of self-defense: *Quesenberry v. State*, 3 Stew. & P. (Ala.) 308; *Bowles v. State*, 58 Ala. 335; *Robinson v. State* (Ala.), 45 South. 916; *People v. Murray*, 10 Cal. 309; *People v. Edwards*, 141 Cal. 640; *McKeone v. People*, 6 Colo. 346; *Jones v. People*, 6 Colo. 452, 45 Am. Rep. 526; *State v. Faino*, 1 Marv. (Del.) 492, 41 Atl. 134; *Gardner v. State*, 90 Ga. 310, 35 Am. St. Rep. 202, 17 S. E. 86; *State v. Claude*, 35 La. Ann. 71; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *Wesley v. State*, 37 Miss. 327, 75 Am. Dec. 62; *State v. Harris*, 59 Mo. 550; *State v. Zorn*, 202 Mo. 12, 100 S. W. 591; *Abbott v. People*, 86 N. Y. 460; *People v. Hess*, 8 App. Div. 143, 40 N. Y. Supp. 486; *Commonwealth v. Straesser*, 153 Pa. 451, 26 Atl. 17; *State v. Morrison*, 49 W. Va. 210, 38 S. E. 481; *State v. Madison*, 49 W. Va. 96, 38 S. E. 492; and it is very generally held that there can be no such case of self-defense unless the deceased was, at the time of the homicide, engaged either really or apparently, in committing or attempting to commit some overt felonious attack upon the defendant: *Pritchett v. State*, 22 Ala. 39, 58 Am. Dec. 250; *Lang v. State*, 84 Ala. 1, 5 Am. St. Rep. 324, 4

South. 193; *King v. State*, 90 Ala. 612, 8 South. 856; *Gardner v. State*, 90 Ga. 310, 35 Am. St. Rep. 202, 17 S. E. 86; *Davidson v. People*, 4 Colo. 145; *Garner v. State*, 28 Fla. 113, 29 Am. St. Rep. 232, 9 South. 835; *Roten v. State*, 31 Fla. 514, 12 South. 910; *Doyal v. State*, 70 Ga. 134; *Cannon v. People*, 141 Ill. 270, 30 N. E. 1027; *Carle v. People*, 200 Ill. 494, 93 Am. St. Rep. 208, 66 N. E. 32; *State v. Jackson*, 33 La. Ann. 1087; *State v. Birdwell*, 36 La. Ann. 859; *State v. Labuzan*, 37 La. Ann. 489; *State v. Janvier*, 37 La. Ann. 644; *State v. Jackson*, 37 La. Ann. 896; *State v. Mitchell*, 41 La. Ann. 1073, 6 South. 785; *State v. Taylor*, 44 La. Ann. 783, 11 South. 132; *State v. Carter*, 45 La. Ann. 1326, 14 South. 30; *State v. Williams*, 46 La. Ann. 709, 15 South. 82; *State v. Green*, 46 La. Ann. 1522, 16 South. 367; *State v. Vallery*, 47 La. Ann. 182, 16 South. 745, 49 Am. St. Rep. 363; *State v. Stewart*, 47 La. Ann. 410, 16 South. 945; *State v. Napoleon*, 104 La. 164, 28 South. 972; *State v. Haab*, 105 La. 230, 29 South. 725; *State v. Coleman*, 119 La. 669, 44 South. 338; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *People v. Hess*, 8 App. Div. 143, 40 N. Y. Supp. 486; *Irwin v. State*, 43 Tex. 236; *West v. State*, 18 Tex. Cr. App. 640; *Creswell v. State*, 14 Tex. Cr. App. 1; *Walker v. State*, 28 Tex. App. 503, 13 S. W. 860; *Evers v. State*, 31 Tex. Cr. 318, 37 Am. St. Rep. 811, 20 S. W. 744, 18 L. R. A. 421; *Smith v. State* (Tex. Cr. App.), 20 S. W. 831; *Smith v. United States*, 1 Wash. Ter. 262. A fortiori, the defendant cannot put the character or reputation of the deceased in issue when he the defendant is himself the aggressor: *Winters v. State*, 123 Ala. 1, 26 South. 949; *Lawson v. State* (Ala.), 46 South. 259; *Morrison v. Commonwealth*, 24 Ky. Law Rep. 2493, 74 S. W. 277; *Bond v. State*, 21 Fla. 738; *Steele v. State*, 33 Fla. 348, 14 South. 841; *State v. Watson*, 36 La. Ann. 148; *State v. Paterno*, 43 La. Ann. 514, 9 South. 442; or the killing is shown to have been premeditated: *State v. Dumphy*, 4 Minn. (Gil. 340) 438.

1. **Character Evidence Inadmissible Where Defendant Denies the Killing.**—Where defendant does not claim to have acted in self-defense, but denies the killing, or claims it was accidental, evidence of the reputation of deceased for lawlessness, violence and recklessness, is immaterial: *Manning v. State*, 79 Wis. 178, 48 N. W. 209; *Travers v. United States*, 6 App. D. C. 450.

2. **Sufficiency of Showing of Self-defense.**—It is said in *King v. State*, 65 Miss. 576, 7 Am. St. Rep. 681, 5 South. 97, that the decedent's habit of going armed, known to the defendant, is admissible in evidence upon the same principle which justifies the admission of evidence of the character of the deceased, and of his threats against the defendant; and in *Garner v. State*, 28 Fla. 113, 29 Am. St. Rep. 232, 9 South. 835, it was held that "If there is the slightest evidence tending to prove a hostile demonstration which may be reasonably regarded as placing the accused apparently, in imminent danger of losing his life or sustaining great bodily harm, the threats should not be excluded." From these two cases may be deduced a general rule to the effect that if there is the slightest evidence reasonably tending to show that the killing was in self-defense, evidence of the violent

and dangerous character of the deceased should be admitted: *Palmore v. State*, 29 Ark. 248. Illustrative instances of the rulings of the courts upon questions of this sort will be found in *Territory v. Harper*, 1 Ariz. 399, 25 Pac. 528; *People v. Lamar*, 148 Cal. 564, 83 Pac. 993; *People v. Stock*, 1 Idaho, 218; *State v. Ford*, 37 La. Ann. 443; *State v. Janvier*, 37 La. Ann. 644; *State v. Pearce*, 15 Nev. 188; *State v. Turner*, 29 S. C. 34, 13 Am. St. Rep. 706, 6 S. E. 891.

**c. Other Matters Necessary to be Shown by the Defendant In Limine.**

**1. Defendant's Knowledge of Decedent's Character or Reputation.**

It is in some cases necessary, and in others unnecessary, that the defendant show also by way of predicate, his knowledge, at the time of the homicide, of the bad character or reputation of the deceased; and it is held necessary, in some jurisdictions, that the defendant show also that before killing he had retreated as far as he safely could.

Whether or not the defendant must prove his knowledge of the bad character or reputation of the deceased will depend upon the circumstances of the case and the purpose for which the evidence of such character or reputation is offered. If the condition of the evidence is such as to leave it in doubt whether or not the deceased was the aggressor, or as to what was his purpose, or intent in making any certain claimed or proven demonstration (*Garner v. State*, 28 Fla. 113, 29 Am. St. Rep. 232, 9 South. 835), the evidence of his bad character or reputation is admissible in support of the probabilities to be inferred therefrom, whether the defendant had knowledge or information thereof or not: *Pritchett v. State*, 22 Ala. 39, 58 Am. Dec. 250; *Monroe v. State*, 5 Ga. 85; *Keener v. State*, 18 Ga. 194, 63 Am. Dec. 269; *State v. Tackett*, 8 N. C. (1 Hawks) 210; *Dukes v. State*, 11 Ind. 557, 71 Am. Dec. 370; *State v. Hicks*, 27 Mo. 555; *State v. Feeley*, 194 Mo. 300, 112 Am. St. Rep. 511, 92 S. W. 663, 3 L. R. A., N. S., 351; and in such a case, if the defendant shows that he did have knowledge or information, either actual or presumptive, of the decedent's bad character or reputation, the evidence of such character or reputation is admissible for the purpose also of throwing more light upon the circumstances under which the defendant acted and the probabilities of the truth and good faith of his defense; but where the only question to be determined is the intent of the defendant, and the existence and reasonableness of the belief under which he claims to have acted, it is obvious that evidence of the bad character or reputation of the deceased must be wholly immaterial and inadmissible, unless the defendant first shows his knowledge or information thereof: *Pritchett v. State*, 22 Ala. 39, 58 Am. Dec. 250; *Eiland v. State*, 52 Ala. 322; *Lang v. State*, 84 Ala. 1, 5 Am. St. Rep. 324, 4 South. 193; *Garner v. State*, 28 Fla. 113, 29 Am. St. Rep. 232, 9 South. 835; *Gardner v. State*, 90 Ga. 310, 35 Am. St. Rep. 202, 17 S. E. 86; *Commonwealth v. Tirciuski*, 189 Mass. 257, 75 N. E. 261, 2 L. R. A., N. S., 102; *Brownell v. People*, 38 Mich. 732; *Abbott v. People*, 86 N. Y. 460; *Marts v. State*, 26 Ohio St. 162; *Tiffany v. Commonwealth*, 121 Pa. 165, 6 Am. St. Rep. 775, 15 Atl. 462; *Commonwealth v. Straesser*,

153 Pa. 451, 26 Atl. 17; *Horsbach v. State*, 43 Tex. 242; *State v. Lull*, 48 Vt. 581; *State v. Nett*, 50 Wis. 524, 7 N. W. 344; *Smith v. United States*, 161 U. S. 85, 16 Sup. Ct. Rep. 483, 40 L. ed. 626.

2. **That Defendant had Retreated as far as He Safely Could.**—It is held necessary in some of the States, where the doctrine of retreat prevails, that the defendant must show also, by way of foundation or predicate, that before killing he had retreated as far as he safely could: *State v. Compagnet*, 48 La. Ann. 1470, 21 South. 46.

3. **Foundation may be Laid Either by State or Defendant.**—The necessary preliminary showing or appearance of a case of self-defense may be adduced either in the evidence given on behalf of the state in its main case, or by the defendant in his defense; the only indispensable prerequisite is that it precede the offered evidence of the decedent's bad character or reputation: *State v. Turner*, 29 S. C. 34, 13 Am. St. Rep. 706, 6 S. E. 891.

4. **Manner of Proving Defendant's Knowledge of Decedent's Character or Reputation.**—The knowledge of the defendant, actual or presumptive, of the bad character or reputation of the deceased may be established in either of four ways, namely: (A) by proof of defendant's knowledge of decedent's actual character and disposition, acquired by personal observation and experience; (B) by information communicated to him by others; (C) by proof of defendant's actual knowledge, in common with others, of the general reputation of the deceased in the community in which he lived; and (D) by proving, first, the bad reputation of the deceased, and, secondly, a long and intimate acquaintanceship between defendant and deceased, or, the fact that defendant was a resident of the same community in which the deceased lived, from which it will be presumed that what was generally known in that community was known also to the defendant.

A. **By Defendant's Personal Observation and Experience.**—The defendant may show by his own testimony his knowledge of the decedent's actual character and disposition, acquired by personal observation and experience: *Boyle v. State*, 97 Ind. 322; *Bowlus v. State*, 130 Ind. 227, 28 N. E. 1115; *State v. Burton*, 63 Kan. 602, 66 Pac. 633; *People v. Harris*, 95 Mich. 87, 54 N. W. 648; *Sneed v. Territory*, 16 Okl. 641, 86 Pac. 70; *Glenewinkel v. State* (Tex. Cr. App.), 61 S. W. 123; *Hampton v. State* (Tex. Cr. App.), 65 S. W. 526.

B. **By Information Communicated to Him by Others.**—So, also, the defendant may show that he was informed by others, prior to the homicide, of the decedent's violent and dangerous character or reputation: *State v. Burton*, 63 Kan. 602, 66 Pac. 633, 635; *Spangler v. State*, 41 Tex. Cr. 424, 55 S. W. 326; *Childers v. State*, 30 Tex. App. 160, 28 Am. St. Rep. 899, 16 S. W. 903.

C. **By Defendant's Knowledge of Decedent's Bad Reputation.**—The defendant may have been personally unacquainted with the deceased, and yet have had, in common with others, a thorough knowledge of his bad reputation in the community in which he lived, and, if so, he

may establish that fact by his own testimony: *State v. Burton*, 63 Kan. 602, 66 Pac. 633, 635.

**D. By Inference, from Other Facts in Evidence.**—The defendant may prove an intimate acquaintanceship with the deceased (*Abernethy v. Commonwealth*, 101 Pa. 322), or, he may prove, first, the bad reputation of the deceased in the community in which he lived, and, secondly, the fact that he, the defendant, was a resident of the same community—from which it will be presumed that what was generally known in that community was known also to the defendant: *Frabune v. Commonwealth*, 13 Ky. Law Rep. 343, 17 S. W. 186; *State v. Smith* (S. C.), 12 Rich. 430; *State v. Turner*, 29 S. C. 34, 13 Am. St. Rep. 706, 6 S. E. 891.

### III. Manner of Proving Character or Reputation of Deceased.

**a. By General Reputation.**—By the great weight of authority the character or reputation of the deceased, in homicide cases, is to be proven by evidence of the general reputation of the deceased in the community in which he or she lived, and not by particular acts or instances, which were not a part of the *res gestae*, nor connected therewith: *Garner v. State*, 28 Fla. 113, 29 Am. St. Rep. 232, 9 South. 835; *Pound v. State*, 43 Ga. 88; *Powell v. State*, 101 Ga. 9, 65 Am. St. Rep. 277, 29 S. E. 309; *State v. Fontenot*, 50 La. Ann. 537, 69 Am. St. Rep. 455, 23 South. 634. In *Pound v. State*, 43 Ga. 88, it is said the rule is founded upon the plainest principles of justice; for the character of the deceased affords strong light in which to view the transactions, particularly in cases of self-defense. In *State v. Roderick*, 77 Ohio, 301, 82 N. E. 1083, 14 L. B. A., N. S., 704, the rule is laid down as above stated, and it is said therein that it was conceded by the state in that case “that one of the appropriate methods of proving the character of the deceased in respect to those traits is by proving that such was his ‘general character’ at that time and in that community, using the term ‘general character’ in the sense of general reputation”; and the court thereafter proceeded to state the reasons for the rule, as follows: Because, first, reputation to be available as evidence must be common or general reputation, the crystallized estimate which people in general have formed of the individual in the community where he has lived, and reputation does not consist of mere reports or rumors which may be true or false; because, second, to prove that a man was the aggressor in one case does not necessarily prove that he was the aggressor in the case on trial; because, third, the policy of the common law is to keep close to the issue in the case on trial and not to allow the jury to be distracted in the determination of side issues, as numerous as the particular instances of conduct which may be offered in evidence; and because, fourth, while it may be presumed that the general reputation of an individual in the community where he has lived is always susceptible of proof or defense, nobody can be ready at a moment’s notice to defend against accusations relating to all the transactions of his life. The court in *Harrison v. Commonwealth*, 79 Va. 374, 52 Am. Rep. 634, approves the rule as stated, and adds: “That being matter of public notoriety, the prisoner is pre-

sumed to have had knowledge of it and to have been put in greater fear of his life being taken when assaulted by such a person, or of suffering serious bodily hurt."

**b. Not by Particular Acts or Instances.**—The authorities in support of the proposition that the bad character or reputation of the deceased, as a quarrelsome, violent and dangerous man cannot be proved by evidence of particular wrongful acts, not part of the *res gestae* nor connected therewith, nor by the opinions of witnesses based thereon, are numerous: *Dupree v. State*, 33 Ala. 380, 73 Am. Dec. 422; *Andrews v. State* (Ala.), 44 South. 696; *Campbell v. State*, 38 Ark. 498; *Croom v. State*, 90 Ga. 430, 17 S. E. 1003; *Thornton v. State*, 107 Ga. 683, 33 S. E. 673; *Andrews v. State*, 118 Ga. 1, 43 S. E. 852; *Pratt v. State*, 56 Ind. 179; *State v. Fontenot*, 50 La. Ann. 537, 69 Am. St. Rep. 455, 23 South. 634; *State v. Thompson*, 109 La. 296, 33 South. 320; *Jenkins v. State*, 80 Md. 72, 30 Atl. 566; *State v. Bonk*, 91 Minn. 419, 98 N. W. 334; *King v. State*, 65 Miss. 576, 7 Am. St. Rep. 631, 5 South. 97; *State v. Jones*, 134 Mo. 254, 35 S. W. 607; *People v. Bodawald*, 177 N. Y. 408, 70 N. E. 1; *Alexander v. Commonwealth*, 105 Pa. 1; *State v. Dill*, 48 S. C. 249, 26 S. E. 567; *State v. Andrews*, 73 S. C. 257, 53 S. E. 423; *Powers v. State*, 117 Tenn. 363, 97 S. W. 815; *Skaggs v. State*, 31 Tex. Cr. 563, 21 S. W. 257; *Darter v. State*, 39 Tex. Cr. 40, 44 S. W. 850; *Bybee v. State* (Tex. Cr. App.), 47 S. W. 367; *Heffington v. State*, 41 Tex. Cr. 315, 54 S. W. 755; *Spangler v. State*, 41 Tex. Cr. 424, 55 S. W. 326. So it has been held that where a homicide was committed under such circumstances that it was doubtful whether the act was done maliciously or from a well-grounded apprehension of danger, the fact that the deceased was a turbulent, violent man cannot be shown by evidence of particular acts, or of what, in the opinion of witnesses, he would be likely to do under certain circumstances: *State v. Elkins*, 63 Mo. 159; and the general reputation of the deceased cannot be proved by evidence that he had previously killed two men: *Garner v. State*, 28 Fla. 113, 29 Am. St. Rep. 232, 9 South. 835; nor by proving that deceased had shot his horse while drunk: *Naugher v. State* (Ala.), 23 South. 26; or treated his domestic animals with cruelty: *People v. Druse*, 103 N. Y. 655, 8 N. E. 733; or that he was an escaped convict: *Dupree v. State*, 33 Ala. 380, 73 Am. Dec. 422; or that he was engaged in selling whisky or keeping it for sale: *Martin v. Commonwealth*, 30 Ky. Law Rep. 1196, 100 S. W. 872; or that he had been indicted for murder at least twice: *Nelson v. State* (Tex. Cr. App.), 58 S. W. 107; or that he had committed various violent assaults on different members of his family: *Connell v. State*, 45 Tex. Cr. Rep. 142, 75 S. W. 512; or that the witness had heard people say that the deceased "had the reputation of shooting people": *Bluett v. State*, 151 Ala. 84, 44 South. 84; or that deceased had cut several people in fights, and declarations of deceased of his cutting people with razors, all which had been communicated to defendant: *Thomas v. People*, 67 N. Y. 218; or that deceased, in a quarrel with defendant, a few weeks prior to the homicide, armed himself with an ice-pick: *State v. Mims*, 50 Or. 315, 61 Pac. 838;

nor by evidence of a quarrel between deceased and a third person unconnected with the homicide: *Garrett v. State*, 97 Ala. 18, 14 South. 327.

**c. Nor by the Knowledge or Opinion of Witnesses Derived from Personal Observation or Experience.**—In *State v. Shadwell*, 22 Mont. 559, 57 Pac. 281, the question put by the defendant to one of his witnesses was, "Had you, from your acquaintance with him [the deceased], had an opportunity to observe, and had you observed, during this acquaintance, and the morning of the 11th, when you saw him, what his general disposition was as to aggressiveness, combativeness and quarrelsomeness?" An objection to the question was held to be properly sustained. In *Hughes v. State* (Ala.), 44 South. 694, a witness was called by defendant charged with assault with intent to commit murder, to prove the bad character of the prosecuting witness. The defendant's witness testified "that he knew Hunter's character as being a dangerous and fussy man, that he knew this of his own knowledge," and what he said "was based on his own knowledge, and not [on] what other people say." It was held properly excluded. Evidence of a witness that the deceased had tried to attack him a short time prior to the homicide is inadmissible to show the character of the deceased: *Bybee v. State* (Tex. Cr. App.), 47 S. W. 367. It is error to permit the state to prove that the "deceased was not, in fact, a dangerous man": *People v. Anderson*, 39 Cal. 703.

**d. Nor by Evidence of Decedent's Habitual Deportment Toward Certain Classes.**—Defendant, an overseer on trial for the murder of his employer, is not entitled to show the general temper and deportment of the deceased toward his overseers and tenants: *State v. Tilly*, 25 N. C. (3 Ired.) 424; and a slave charged with the homicide of his overseer cannot prove "the general management of the deceased on the plantation where he was the overseer with reference to violence and cruelty": *Wesley v. State*, 37 Miss. 327, 75 Am. Dec. 62.

**e. Nor by Evidence of His Reputation Among "Certain Classes," or Among "His Race."**—It is not admissible to prove the reputation of the deceased among "his race": *Commonwealth v. Bright*, 23 Ky. Law Rep. 1921, 66 S. W. 604; nor "among the peace officers of the county . . . any more than any other class": *Stevens v. Commonwealth*, 124 Ky. 32, 98 S. W. 284.

#### **f. Other Modes of Proof.**

**1. By Defendant's Personal Observation and Experience.**—The defendant in a homicide case, relying on self-defense, may show his knowledge, acquired by personal observation and experience, of the decedent's quarrelsome and dangerous character, and the violence of his temper and conduct when in anger: *Boyle v. State*, 97 Ind. 322; *Bowling v. State*, 130 Ind. 227, 28 N. E. 1115; *People v. Harris*, 95 Mich. 87, 54 N. W. 648; *Sneed v. Territory*, 16 Okl. 641, 86 Pac. 70; *Glenewinkel v. State* (Tex. Cr. App.), 61 S. W. 123; *Hampton v. State* (Tex. Cr. App.), 65 S.W. 526.

2. **By Evidence of Particular Wrongful Acts.**—The defendant, charged with murder and claiming self-defense, has been permitted in some cases to prove by witnesses, other than himself, not only certain specific wrongful acts of the deceased, but also the circumstances thereof, which had been brought to his attention prior to the homicide: *Hampton v. State* (Tex. Cr. App.), 65 S. W. 526; *Poor v. State* (Tex. Cr. App.), 67 S. W. 500 (Henderson, J., dissenting).

3. **By Record Evidence of Particular Wrongful Acts.**—In *Brunet v. State*, 12 Tex. App. 521, in a homicide case, "the defendant proved . . . that the deceased was a malicious and dangerous man. The state adduced evidence to the contrary; . . . The defendant then proposed to introduce in evidence the record of conviction of the deceased for manslaughter"; and it was held that the evidence was admissible; the court observing that "The objection to the introduction of particular acts is the want of information and preparation to meet them by the party." This objection not being applicable in "this state of the case, the rule does not apply, for no amount of time and preparation would enable the witness or the state to meet and overturn the solemn judgment of a court of competent jurisdiction"; and in *Johnson v. State*, 28 Tex. App. 17, 11 S. W. 667, under the same circumstances the defendant "as a circumstance going to establish both these issues," i. e., his own good character and decedent's bad character for peace and quietness, proposed to introduce in evidence an indictment found against the deceased about a month before the killing for an assault and battery upon the defendant, and the court held the indictment admissible.

4. **By Evidence of the Reputation of Deceased for Vindictiveness Toward a Certain Class of Persons.**—Where the deceased is killed while resisting arrest, by a city marshal, it is competent for the defendant upon his trial to show the reputation and character of the deceased for vindictiveness and hostility toward city marshals as a class: *State v. Spangler*, 64 Kan. 661, 68 Pac. 39.

#### 5. **By Evidence Brought Out in Rebuttal.**

A. **General Rule.**—The good reputation of the deceased may also be shown by the state in rebuttal of evidence of his bad character or reputation adduced by the defendant: *Weaver v. State*, 83 Ark. 119, 102 S. W. 713; and the Indiana supreme court has repeatedly held that in murder cases where the defendant pleads self-defense and introduces evidence for the purpose of showing an apparently felonious assault upon him by the deceased at the time of the homicide, the state may in rebuttal prove the good character or reputation of the deceased for peace and quietness: *Dukes v. State*, 11 Ind. 557, 71 Am. Dec. 370; *Bowlus v. State*, 130 Ind. 227, 28 N. E. 1115; *Fields v. State*, 134 Ind. 46, 32 N. E. 780; *Trawley v. State*, 153 Ind. 375, 55 N. E. 95 (in which the reasoning of the court is fully set forth); this, however, is not the prevailing view.

It is well settled by the great preponderance of authority that the prosecution, in a homicide case, cannot show the good reputation of



the decedent for peaceableness unless the same be first attacked by the accused: *Jimmerson v. State*, 133 Ala. 18, 32 South. 141; *Kenedy v. State*, 140 Ala. 1, 37 South. 90; *People v. Bezy*, 67 Cal. 223, Pac. 643; *State v. Thawley*, 4 Harr. (Del.) 562; *Pound v. State*, 43 Ia. 88; *Kelly v. People*, 229 Ill. 81, 82 N. E. 198, 12 L. R. A., N. S., 169; *Parker v. Commonwealth*, 96 Ky. 112, 28 S. W. 500; *State v. McCarthy*, 43 La. Ann. 541, 9 South. 493; *Woods v. State*, 90 Miss. 445, 43 South. 433; *State v. Woodward*, 191 Mo. 617, 90 S. W. 90; *People v. Webster*, 139 N. Y. 73, 34 N. E. 730; *State v. Hogue*, 51 N. C. 381; *Miers v. State*, 34 Tex. Cr. 161, 53 Am. St. Rep. 705, 29 S. W. 1074; *Bowles v. Commonwealth*, 103 Va. 816, 48 S. E. 527; *Brucker v. State*, 19 Wis. 539; and it is equally well settled that the state cannot in the first instance, and as a part of its evidence in chief, put in issue the reputation of the deceased for peace and quietness: *State v. Potter*, 13 Kan. 414; *State v. McCarthy*, 43 La. Ann. 541, 9 South. 493; *Purveyor v. State*, 50 Tex. Cr. 454, 48 S. W. 258; *Bays v. State*, 50 Tex. Cr. 548, 99 S. W. 561; an exception to the foregoing rule prevails, however, in Texas under the provisions of a statute authorizing defendant to introduce evidence of threats in justification of the killing, whereupon the state may prove deceased's reputation for peaceableness: *Russell v. State*, 11 Tex. App. 288; *Moore v. State*, 49 Tex. Cr. 499, 96 S. W. 321; *Menefee v. State*, 50 Tex. Cr. 249, 97 S. W. 486; *Jirou v. State* (Tex. Cr. App.), 108 S. W. 655; but it is held that the statute does not authorize proof of such reputation prior to attack thereon by the accused unless such threats were communicated to him: *Arnwine v. State*, 50 Tex. Cr. 254, 96 S. W. 4; dissenting opinion by Brooks, J., in *Arnwine v. State*, 50 Tex. Cr. 477, 99 S. W. 97.

**B. What Constitutes Attack on Character of Deceased.**—No general rule can be laid down for the determination of what will be held to constitute an attack by the defendant upon the character or reputation of the deceased, so as to "open the door" for rebuttal on behalf of the people; but each case will be decided according to the circumstances thereof. Courts have disagreed, and even the judges of the same court, with reference to some of the questions so presented: *Kelly v. People*, 229 Ill. 81, 82 N. E. 198, 12 L. R. A., N. S., 169. Illustrative instances of the questions so arising and of the decisions given with reference thereto will be found in *Hussey v. State*, 87 Ala. 121, 6 South. 420; *Martin v. State*, 90 Ala. 602, 24 Am. St. Rep. 844, 8 South. 858; *Jimmerson v. State*, 133 Ala. 18, 32 South. 141; *Davis v. People*, 114 Ill. 86, 29 N. E. 192; *Bowlus v. State*, 130 Ind. 227, 28 N. E. 1115; *Fields v. State*, 134 Ind. 46, 42 N. E. 780; *State v. Lejeune*, 116 La. 193, 40 South. 632; *State v. Vaughan*, 22 Nev. 285, 39 Pac. 733; *People v. Gallagher*, 78 N. Y. Supp. 5, 75 App. Div. 39; affirmed, 174 N. Y. 505, 66 N. E. 1113; *McCaudless v. State*, 42 Tex. Cr. App. 58, 57 S. W. 672; *Bowles v. Commonwealth*, 103 Va. 816, 48 S. E. 527; *Phipps v. State*, 34 Tex. Cr. 560, 31 S. W. 397.

## STATE v. AYERS.

[49 Or. 61, 88 Pac. 653.]

**CRIMINAL LAW**—Reference to Common Law for Definition of Crime.—Although no common-law offenses are recognized in a state, it is quite proper to go to the common law for a definition of a crime denounced by a statute. (p. 1037.)

**POOLSELLING on Horseraces**.—The act of selling for gain pools upon a horserace grossly disturbs the public peace and welfare, and openly outrages public decency, within the meaning of a statute providing a punishment for the commission of such an act. (p. 1033.)

**POOLSELLING on Horseraces—Public Nuisance**.—The sale of pools on the result of a horserace on the racecourse of a private association where the public assembles is a public nuisance, affecting the general welfare, and punishable as such. (pp. 1039, 1040.)

**GAMBLING and Gambling Devices**.—The selling of pools on a horserace is not the playing of a game by a device within the meaning of a statute constituting such act a crime. (p. 1040.)

**GAMBLING DEVICE**.—A pool ticket on a horserace is not a gambling device. (p. 1040.)

**JURISDICTION, CONCURRENT**—State and Municipal Corporations.—If the power to hear and determine minor offenses is given to a municipal corporation, but no words of exclusion or restriction are used, the remedies between the state and the corporation must be construed to be concurrent. (p. 1040.)

M. L. Pipes, S. B. Huston, W. L. Boise and J. T. McKee, for the appellant.

B. E. Haney, A. M. Crawford, attorney general, and J. Manning, district attorney, for the state.

<sup>65</sup> **MOORE, J.** The defendant, William M. Ayers, was accused by an information of the crime of willfully committing an act which grossly disturbed the public peace, openly outraged public decency, and injured the public morals, alleged to have been perpetrated in Multnomah county, August 4, 1905, and prior thereto, by habitually selling for gain pools upon horses at an exhibition trial of their speed on a race track, particularly describing the place and the method pursued, and that he there, and on the day mentioned, sold a ticket upon a certain horse to one Victor Lindback, receiving therefor the sum of twenty dollars, to the common nuisance of all good citizens, and contrary to the statutes, etc. A demurrer to the information, on the ground that it did not state facts sufficient to constitute an offense against the laws <sup>66</sup> of Oregon, having been overruled, a plea of not guilty was interposed, whereupon the defendant stipulated that the facts stated in the information were true and submitted the cause to the court, without the interven-

tion of a jury, to determine whether or not he was guilty as charged, and, having been convicted thereof, he appeals from the judgment which followed.

1. The finding of his guilt conforms to the decision rendered in the case of *State v. Nease*, 46 Or. 433, 80 Pac. 897, and is based on an alleged violation of the following statute, to wit: "If any person shall willfully and wrongfully commit any act which grossly injures the person or property of another, or which grossly disturbs the public peace or health, or which openly outrages the public decency and is injurious to public morals, such person, if no punishment is expressly prescribed therefor by this code, upon conviction thereof, shall be punished," etc.: B. & C. Comp., sec. 1930.

It is contended by defendant's counsel that, as this section neither names any offense at common law, so that reference might be had thereto for a more specific description, nor specifies any particular act that is denounced as a crime, an error was committed in observing the rule adopted in the case mentioned. As no common-law offenses are recognized in this state (*State v. Vowels*, 4 Or. 324; *State v. Gaunt*, 13 Or. 115, 9 Pac. 55; *State v. Nease*, 46 Or. 433, 80 Pac. 897), it is necessary for the legislative assembly by statute to specify crimes and to prescribe punishments therefor, in order to make their enactments enforceable. In *Hackney v. State*, 8 Ind. 494, decided in 1856, it was held that there were not then in Indiana any common-law offenses, the court remarking: "We cannot look to the common law for the definition of a nuisance or any other crime," but that decision was evidently rendered after the passage of an act requiring all offenses committed in that state to be defined by statute (*Burk v. State*, 27 Ind. 430), for prior thereto the rule had been that reference might be had to the ancient law to ascertain of what facts the crime of nuisance consisted: *State v. Bertheol*, 6 Blackf. 474, 39 Am. Dec. 442. Lord Coke, in discussing the principles of the common law and describing a <sup>67</sup> species of crime cognizable thereat, says: "Murder is when a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature in rerum natura under the king's peace, with malice aforethought, either expressed by the party or implied by law, so as the party wounded, or hurt, etc., die of the wound or hurt, etc., within a year and a day after the same": 3 Coke's Institutes, 47.

If our statute, embodying parts of sections 1741 and 1751, B. & C. Comp., had delineated the commission of an offense

and prescribed a punishment as follows: "If any person shall purposely, and of deliberate and premeditated malice, kill another, such person, upon conviction thereof, shall be punished with death," the elements of the common law could undoubtedly be examined to ascertain the name anciently given to the classification of such crime: *State v. De Wolfe*, 67 Neb. 321, 93 N. W. 746. In the case last cited, the defendant was charged with maintaining a nuisance by unlawfully exposing the citizens of a village to a contagious disease in negligently keeping an infected person in a public place. A demurrer to the information having been sustained on the ground that the Code of Nebraska particularly sets forth the conduct which constitutes a nuisance and provides a penalty therefor, but did not include the acts complained of, the action was dismissed and the state appealed. In reversing the judgment, Mr. Chief Justice Sullivan says: "In this state all public offenses are statutory, no act is criminal unless the legislature has in express terms declared it to be so, and no person can be punished for any act or omission which is not made penal by the plain import of the written law. . . . But, while there are in this state no common-law crimes, the definition of an act which is forbidden by the statute, but not defined by it, may be ascertained by reference to the common law": See, also, *Smith v. State*, 12 Ohio St. 466, 80 Am. Dec. 355; *Prindle v. State*, 31 Tex. Cr. 551, 37 Am. St. Rep. 833, 21 S. W. 360. In the case at bar, the character of the act which constitutes the offense is stated in the statute, and, though the enactment does not define <sup>as</sup> the crime, it specifies the facts which evidence the commission thereof.

2. It is argued, however, that the only human conduct thus denounced is such as, in the opinion of the courts, might seem "grossly" to injure the person or property of another, or "grossly" to disturb the public peace, or "openly" to outrage public decency, thereby necessitating a resort to the principles of the common law to determine whether or not any particular act comes within the prohibition, when recourse should only be had to a statute which clearly defines the behavior inveighed against. Our statute makes it a crime for any person, being armed with a dangerous weapon, to assault another with such instrument (B. & C. Comp., sec. 1771), without in any manner attempting to define the weapon. "Some weapons under particular circumstances," says Mr. Justice Strahan in *State v. Godfrey*, 17 Or. 300, 11 Am. St. Rep. 830, 20 Pac. 625, "are so clearly lethal that the court may declare them to be such as a matter of law." The

rule by which the conclusion is deduced that an instrument which, when violently used, is ordinarily capable of producing death or great bodily harm, and therefore danger is derived from the common law. As this principle is based on the degree of harm that is commonly incident to impetuous use of a weapon, and can be invoked when occasion demands its exercise, a court, upon principle, ought to be equally as competent to determine what acts of a person "grossly" injure, etc., or "openly" outrage the public decency. In *State v. Nease*, 46 Or. 433, 80 Pac. 897, Mr. Justice Bean portrays the mischievous consequences that attend the keeping of a gaming-house for the sale of pools on horse races, and shows the evil effect of the dealing upon persons who visit these gambling places or witness the operations conducted thereat, and, in view of such pernicious result, we entertain no doubt that the offense which the defendant stipulated that he committed comes, as a matter of law, within the degree of "grossly" outraging public decency and also injuring public morals.

3. The sale of pools by the defendant is alleged to have been <sup>69</sup> at the course of the Multnomah Fair Association, a corporation, where, on the day named, were assembled many thousands of people to witness the racing of horses. The offense charged was the commission of a public nuisance affecting the general welfare, and therefore subject to punishment imposed by section 1930, B. & C. Comp., in our opinion, unquestioned, and whether or not the statute may have been intended to include private nuisances, which were not recognized as crimes at common law, is not deemed necessary to a decision herein.

4. It is insisted by defendant's counsel that the section under consideration does not include the keeping of houses for selling pools on horseracing, because another part of the code, adopted at the same time, prescribes a punishment for such conduct. The section mentioned was passed October 1864, appears in the General Laws of Oregon, 1845-1864, and is compiled and annotated by M. P. Deady as section 659 of chapter 49. The next chapter of that compilation, another part of the code referred to, embraces sections 666 to 681, inclusive, which relate to the playing of games, etc., and gambling devices for money, property or any representation thereof. In the brief of defendant's counsel on this branch of the case, the following statement is found: "And there can be no doubt that poolselling, as set out in the indictment, uses a device." A gambling device is any contrivance

the operation of which chances are determined whereby money or property is lost or won: *Portis v. State*, 27 Ark. 360; *In re Lee Tong*, 9 Saw. 333, 18 Fed. 253; *State v. Herryford*, 19 Mo. 377. The keeping of a place for the sale of pools on horses by which money or property is staked on the result of a race is the maintenance of a gambling house: *Swigart v. People*, 50 Ill. App. 181; *Edwards v. State*, 76 Tenn. (8 Lea) 411. In such case, however, the chance upon which the wager is made and the money or property placed is the competitive speed of a particular horse that has been selected as the possible winner, and not upon the manipulation of any device. The ticket which the defendant is charged with having sold was undoubtedly designed to evidence a contract,<sup>70</sup> but from the manner of its use, we do not think it can be classed as a gambling device, and hence conclude that the selling of pools on horseraces was not included in chapter 50 of the compilation mentioned.

5. It is also maintained by defendant's counsel that, if section 1930, B. & C. Comp., ever prohibited the selling of pools on horseraces, the statute in this respect was repealed by the adoption of the charter of the city of Portland, within the limits of which the act complained of occurred. The clauses of the action of incorporation thus relied upon are section 72, which confers upon the council exclusive legislative power, etc., and subdivision 49 of section 73, which authorizes the prevention and punishment of gaming and gambling houses: *Special Laws 1903*, pp. 3, 26 and 3, 33. It will be remembered that the defendant stipulated that he committed the act charged in the information as therein alleged. The following averment is contained in the written accusation, to wit: "That the said race track is situated about two miles from the courthouse in the said city of Portland, and is in the suburbs of the said city."

Whether or not the race track mentioned is within the limits of the municipality is not clearly disclosed by the information, but, as counsel for the respective parties have so treated it, we shall assume the course is within the boundaries thereof. "The legislature," says Mr. Justice Wagner, in *State v. Gordon*, 60 Mo. 383, "has the undoubted right, in reference to statutory misdemeanors, to say in what particular jurisdiction they shall be tried, and to make that jurisdiction exclusive of all others. When the power to hear and determine these minor offenses is given to a municipal corporation, but no words of exclusion or restriction are used, the remedies between the state and the corporation will be con-

strued to be concurrent, but where the manifest intention is that the prosecution shall be limited exclusively to one jurisdiction, that intention must prevail." To the same effect, see, also, 14 Am. & Eng. Ency. of Law, 2d ed., 695; *State v. Haines*, 35 Or. 379, 58 Pac. 39; 2 *Municipal Corporation Cases*, 430; <sup>71</sup> *Rogers v. People*, 9 Colo. 450, 59 Am. Rep. 146, 12 Pac. 843; *Berry v. People*, 36 Ill. 423.

The charter of the city of Portland does not purport to confer exclusive jurisdiction to prevent gambling houses, and, as the crime of gaming was recognized at common law (4 Blackstone's Commentaries, \*171), the circuit court had jurisdiction of the case at bar, and the judgment rendered therein is affirmed.

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*Bookmaking and Poolselling Constitute Gambling or Gaming:* *State v. Thompson*, 160 Mo. 333, 83 Am. St. Rep. 468; *St. Louis Fair Assn. v. Carmody*, 151 Mo. 566, 74 Am. St. Rep. 571. And betting on the result of a horserace is gaming: *People v. Weithoff*, 51 Mich. 203, 47 Am. Rep. 557. A poolroom or turf exchange, maintained to facilitate betting on horseraces, is a common-law nuisance, whether or not such betting is prohibited by statute, and may be enjoined: *State v. Vaughan*, 81 Ark. 117, 118 Am. St. Rep. 29.

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## SCOTT v. CHRISTENSON.

[49 Or. 223, 89 Pac. 376.]

**PLEADINGS—Alder by Verdict.**—An imperfect allegation in a complaint is cured by a general verdict for the plaintiff, if the issue joined necessarily required proof of the facts imperfectly alleged. (p. 1043.)

**LIMITATIONS OF ACTIONS—Part Payment of Joint Obligation.**—Payment of a part of a joint obligation by a maker thereof or by his agent or legal representative revives it against all persons who were liable thereon, though made without their knowledge or consent. (p. 1043.)

**LIMITATIONS OF ACTIONS—Payment by Joint Maker.**—A payment by either of the joint makers of a note to be indorsed thereon at his request is sufficient to extend the statute of limitations, which had not run when such payment was made. (p. 1044.)

**LIMITATIONS OF ACTIONS—Part Payment—Evidence.**—Testimony by the holder, in an action against the joint makers of a note, that on a certain day when the note was not barred by limitation a part payment thereon was made to him by one of them is competent, though he is unable to identify the one who made the payment. (p. 1044.)

**LIMITATION OF ACTIONS—Indorsement of Part Payment.**—An indorsement on a note purporting to acknowledge the receipt of  
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money by the holder thereof is admissible in his favor to repel the presumption of the bar of the statute of limitations, on his testifying that one of the joint makers of the note made the payment to him to be credited on the note. (p. 1044.)

**EVIDENCE, SECONDARY—Production of Letter.**—A party is entitled to a reasonable time to comply with a request to produce a letter which is sought by his adversary to be offered in evidence, and if it appears that the letter is in his possession or is easy of access, a demand therefor made at the trial is sufficient, and if the letter is not then produced within a reasonable time, secondary evidence of its contents is admissible. (p. 1045.)

F. Holmes, for the appellant.

C. W. Corby and H. J. Bigger, for the respondent.

**223** MOORE, J. This action was commenced in September, 1904, by Charles Scott, as executor of the last will and testament of R. H. Scott, deceased, to recover the remainder alleged to be due from defendants **224** on their promissory note given to the testator. The complaint alleges the execution of the instrument, the making of a last will by the testator, his death, the probate of the will, the plaintiff's nomination, appointment and qualification as executor, his right to the note, and also avers:

"That defendants have not paid said note, nor any part thereof, except the sum of \$20.50, as interest thereon, paid on January 19, A. D. 1897, and the sum of \$2, paid on account thereof, on the 2d day of January, A. D. 1899, and there is now due and owing thereon (less the above-mentioned credits), the sum of \$74, with interest thereon at the rate of 8 per cent per annum from the 20th day of April, A. D. 1893."

The answer denied the allegation of the complaint, except the execution of the note and the plaintiff's representative capacity, and alleged a complete discharge of the instrument, and that no payments had been made thereon by the defendants, or either of them, since August 20, 1896, by reason whereof the action is barred by the statute of limitations. The reply put in issue the allegations of new matter in the answer, and, a trial being had, judgment was rendered against the defendants as demanded in the complaint, and they appeal.

1. It is contended by defendants' counsel that, as it appears from the face of the plaintiff's primary pleading that the statute of limitations had fully run since the maturity of the note sued upon, it was incumbent upon him to allege in positive terms a payment within six years prior to September, 1904, but, not having done so, the complaint fails to state facts sufficient to constitute a cause of action. No demurrer



April, 1907.]

SCOTT

to the complaint was inter-  
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46 Pac. 884; *Savage v. Sa*  
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v. Christenson, 46 Or. 417

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307; *Sutherland v. Roberts*  
*Horner*, 30 Or. 558, 48 Pa  
73 Pac. 336, 75 Pac. 133; 1  
375.

3. It was stated by cou  
this court that the defend  
of exceptions does not d  
any similarity of countena  
defendants, but by reason

sible that the plaintiff could not recognize one from the other, yet he may have been able to distinguish them from all other persons. If <sup>226</sup> such is the case, his testimony was competent for their identification, and a payment by either to be indorsed on the note at his request was sufficient to extend the statute of limitations, which had not run when the alleged payment was made. As the consanguinity of the defendants may have produced a similarity in their appearance, and such resemblance is not negatived in the bill of exceptions, the plaintiff's testimony was sufficient to entitle the matter to be submitted to the jury.

4. The payment of two dollars, at the time and in the manner stated, having been testified to by plaintiff as indicated, the promissory note, and the indorsement of that sum thereon, were, over objection and exception, received in evidence, and it is insisted by defendants' counsel that an error was thereby committed. An indorsement purporting to acknowledge the receipt of money or the value of property, made on a promissory note by the holder thereof, without the knowledge of the maker, is not admissible in evidence in favor of the party making the indorsement so as to repel the presumption of payment arising from the lapse of years: *Roseboom v. Billington*, 17 Johns. 182; *Whitney v. Bigelow*, 4 Pick. 110. When, however, a payment is indorsed on a note by the holder at the request of the payer, proof of such fact is sufficient to remove the bar of the statute of limitations (*Sibley v. Phelps*, 6 Cush. 172), and the note and the indorsement are thereupon admissible in evidence, on the theory that, if the jury believe the payment was made and indorsed in the manner indicated, such memoranda enable them to determine the amount due on the commercial paper. The plaintiff having testified that the payment of two dollars was made January 2, 1899, by one of the defendants, to be credited on the note, no error was committed in admitting it and the indorsement in evidence.

5. The plaintiff, during the progress of his case in chief, served upon the defendants, in open court, a notice to produce a letter purporting to have been written by him to them, identifying it by its date, the place from which it was sent, and to which it was addressed, and upon their failure to comply therewith he testified that on February 7, 1898, he mailed from <sup>227</sup> Woodburn, Oregon, the letter called for in a postage prepaid envelope, addressed to the defendants at Silverton, Oregon, which envelope had printed thereon a request to return it to the plaintiff, at the city from which it was sent, if

it was not delivered in ten days, and that the letter was never returned to him. Thereupon a letter-press copy of the epistle mentioned was, over objection and exception, admitted in evidence. It is contended by defendants' counsel that his client did not have sufficient time in which to produce the letter called for, and, this being so, an error was committed in admitting secondary evidence thereof. A party is entitled to a reasonable time to comply with a request to produce documents which are sought by his adversary to be offered in evidence. What is proper time, however, depends upon the ability of the party to bring forward the exhibit desired. It appears that the paper is in his possession or is easy of access, a demand therefor, made at the trial, is sufficient: *Griff v. Sheffield*, 38 Miss. 359, 77 Am. Dec. 646; *Morrison v. White*, 17 Md. 452, 79 Am. Dec. 661. The bill of exception is silent upon this question, and, as it does not purport to contain all the testimony given at the trial, it must be presumed that the evidence disclosed that the defendants could have complied with the request, but, not having done so, no error was committed as alleged.

From these considerations it follows that the judgment should be affirmed, and it is so ordered.

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*A Payment by One Joint Debtor* without the knowledge or assent of the other does not, according to some authorities, stop the running of the statute of limitations as to the latter: *Boynton v. Spaff*, 162 Ill. 113, 53 Am. St. Rep. 274; *Oleson v. Wilson*, 20 Mont. 544, 4 Am. St. Rep. 639. But in *Skinner v. Moore*, 64 Kan. 360, 91 Am. St. Rep. 244, it is held that if a husband and wife execute a mortgage on their homestead to secure the payment of a note made by only one, his payment of interest from time to time, though without the knowledge of the other, prevents the running of the statute of limitations, and the mortgage may be foreclosed in a suit commenced more than five years after the note became due.

## AYERS v. LUND.

[49 Or. 303, 89 Pac. 806.]

**JUDGMENTS—Right to Modify or Correct Judgment During Term.**—During the term at which a judgment or decree is rendered the court has inherent power to correct, modify or vacate it, and its action in such case will not be disturbed on appeal except for an abuse of discretion. (p. 1047.)

**RETROACTIVE LEGISLATION—Curative Statutes.**—It is within the power of the legislature to cure by retroactive enactment such omissions or irregularities in proceedings of public officers as might, in the first instance, have been dispensed with by it. (p. 1048.)

**TAX SALES—Retroactive Legislation.**—The legislature has power to enact that tax sales theretofore made shall be valid, although the required levy was not made as required by statute. (p. 1048.)

**TAX TITLES.—Burden of Proof** is on the holder of a tax title to maintain it by affirmatively showing that the provisions of the law have been complied with. (p. 1049.)

**TAX SALES—Sales to Counties.**—A statute providing that in case of a tax sale to a private purchaser the deed shall be prima facie evidence that the provisions of the law have been fully complied with does not apply to a purchase by the county, as no deed is provided for in such case. (p. 1049.)

**TAX DEEDS—Recitals as Evidence.**—A statute providing that a deed given by a sheriff at a sale of real property shall be conclusive evidence of the regularity of all proceedings to pass the title applies only to the regularity of such proceedings as are the foundation of the deed, and cannot operate as evidence of the regularity and existence of the proceedings necessary to transfer the tax debtor's title to the county. (p. 1049.)

**TAX SALES—Sufficiency of Return.**—The return of an officer making a tax sale consisting of a printed notice of such sale cut from a newspaper and headed, "Sheriff's Sale for Delinquent Taxes," which is attached to the delinquent tax-roll, and upon which is interlined or written at the time of or after the sale opposite the name and description of the property, the name of the purchaser and the selling price in each case, and to which is attached a certificate that "the foregoing return of delinquent tax sales is true and correct in every detail," is not a compliance with a statute providing that the warrant for the collection of delinquent taxes must be executed and returned in like manner as an execution against property, and that the sheriff must make written return of an execution, setting forth his doings thereon. (p. 1049.)

**TAX SALES—Advertisement and Return.**—Without a due return showing the advertisement of property and its sale for delinquent taxes, there is no evidence of title in the county. These are essential elements in the proceedings, and the absence of them cannot be cured by legislation. (p. 1050.)

H. D. Norton, for the appellant.

R. G. Smith, for the respondent.

**304 EAKIN, J.** This is a suit to quiet title brought by S. N. Ayers and others against O. O. Lund. Elizabeth Ayers,

through whom the plaintiffs claim, was the owner of the property in question during the year 1898, and it was assessed to her for taxation for that year. The answer as a defense alleges that, the tax thereon being delinquent, the sheriff, on October 23, 1899, sold the same to Josephine county by authority of the delinquent tax warrant for the amount of said taxes, eight dollars and thirty-five cents, and thereafter, on July 14, 1902, sold to defendant the title thus acquired by the county for the sum of sixteen dollars and thirty-five cents, pursuant to the terms of sections 3133, <sup>305</sup> 3136, B. & C. Comp., and on August 8, 1902, executed to him a deed therefor under the provisions of section 3135. Plaintiffs, by their reply, question the validity of defendant's title, for the reason that the sheriff in making said tax sale to the county made no levy on the property under his warrant, and did not advertise the same for sale, as provided by law, and made no return of said sale upon his tax warrant, and alleges tender of fifty dollars to the defendant prior to the suit to cover the amount of his bid and subsequent taxes paid, and that they tender the same into court with the reply. At the trial no proof was offered of the tender or deposit of the tender with the clerk, and for want thereof findings were made and decree rendered by the court in favor of defendant. On the same day the plaintiffs filed a motion, based upon affidavit, to vacate the decree and reopen the case and permit them to prove the tender and to deposit the money in court, which was granted by the court, and thereafter, upon the further findings, decree was rendered for plaintiffs. The case was submitted on briefs under the proviso of rule 16: 35 Or. 587, 600.

1. Defendant assigns as error the act of the court in vacating the decree and permitting further testimony to be offered. The proceedings of the court remain in the breast of the judge until the close of the term, during which time the court has inherent right to correct, modify or vacate its decree, and its action in such a case will not be disturbed on appeal except for an abuse of discretion, which does not appear here: *Deering v. Quivey*, 26 Or. 556, 38 Pac. 710.

2. It is also claimed that the court erred in finding that the tax sale is void for want of a levy upon the property under the warrant. By the terms of the statute in force at the time of the <sup>306</sup> sale (*Hill's Ann. Laws 1892*, secs. 2814, 2816) the sheriff was required, under his warrant, when resort was had to the real estate, to make a levy upon the property before advertising it for sale, so that the levy is part of the pro-

cedure in the execution of the warrant. But it is claimed by the defendant that the omission of the levy is cured by the terms of section 3135, B. & C. Comp. It is within the power of the legislature to cure by retroactive enactment such omissions or irregularities in proceedings of public officers as might in the first instance have been dispensed with by it. The levy is an act by the officer which fixes the lien upon the property and determines the date from which the lien will attach, but it is not a jurisdictional or essential act necessary to the validity of the sale. In case the lien is not otherwise created, a sale without a levy transfers only the title of the tax debtor at the time of the sale (2 Freeman on Executions, 3d ed., sec. 280), and, unless levy is made necessary by statute, the sale is valid without it, and, where it is required by statute, its omission by the sheriff may be cured by subsequent legislative act: *Stanley v. Smith*, 15 Or. 505, 16 Pac. 174. And in this case the absence of the levy was cured by section 3135, B. & C. Comp.

3. Defendant also claims that the burden is upon the plaintiffs to establish the invalidity of the tax sale. By legislative act of 1901 (Gen. Laws 1901, p. 72: B. & C. Comp., secs. 3131-3136, inclusive), provision is made for the disposition of property purchased by the county at tax sales. Section 3131 provides: "If no redemption shall be made, title to the lands so sold shall vest in the county . . . without issuance of deed or other formality."

By section 3133, 3136, B. & C. Comp., the sheriff is authorized on the first Monday in July of each year to sell to the highest bidder the lands theretofore bid in by the county for taxes, and to which it shall have acquired title, as provided in section 3131. Section 3135 is curative of the irregularities occurring in tax proceedings resulting in the county's title, and also provides <sup>307</sup> for a deed to the purchaser at the sale of the county's title, under section 3131, and makes such deed "conclusive evidence of the regularity and existence of all proceedings necessary to pass title to the lands therein conveyed, and of title in the grantee, except" as to certain matters relating to the assessment, previous payment of the tax, etc.

Defendant relies upon his deed and its effect under section 3135, B. & C. Comp., as casting the burden upon the plaintiffs to show the invalidity of the tax sale. The well-established rule, when not modified by statute, is that the burden of proof is on the holder of the tax title to maintain his title by affirmatively showing that the provisions of the law have been

complied with: *Strode v. Washer*, 17 Or. 50, 57, 16 Pac. 926; *Bays v. Trulson*, 25 Or. 109, 35 Pac. 26; *Brentano v. Brentano*, 41 Or. 15, 67 Pac. 922; *Marx v. Hanthorn*, 148 U. S. 172, 13 Sup. Ct. Rep. 508, 37 L. ed. 410.

4. By section 3127, B. & C. Comp., in case of a tax sale to a private purchaser, the deed is made prima facie evidence that the provisions of the law have been fully complied with, but this does not apply to a purchase by the county, as no deed is provided for in such case.

5. Nor is there any other statute that has that effect, unless it is section 3135 above quoted, in which the deed is made conclusive evidence; but the part of the section referring to the evidentiary effect of the deed can only apply to the regularity and existence of such proceedings as are the foundation of the deed, and cannot operate as evidence of the regularity and existence of the proceedings necessary to transfer the tax debtor's title to the county. To give it that effect would make it evidence of facts with which it has no connection. The limit of its effect in that regard is to such facts as constitute a compliance with the law in the sale to the defendant, as prescribed by section 3133, B. & C. Comp., and therefore in this case the rule above quoted is not changed by statute, and the burden is on the defendant to prove the regularity of the tax sale proceedings: *Brentano v. Brentano*, 41 Or. 15, 67 Pac. 922; *Bays v. Trulson*, 25 Or. 109, 35 Pac. 26.

<sup>308</sup> 6. There is no evidence before the court that the property was advertised for sale or sold to the county. At the trial the officer who made the sale identified as his return on the tax warrant what we understand was a copy of the printed notice of the tax sale, cut from the newspaper, headed, "Sheriff's Sale for Delinquent Taxes," which was attached to the delinquent tax-roll, and upon which was interlined or written at the time of or after the sale, opposite the name and description of the property, the name of the purchaser and the selling price in each case. This so-called return is dated September 18, 1899, the date of the notice, but to which is attached this certificate of the officer:

"The foregoing return of delinquent tax sales for the year 1898 is true and correct in every detail.

"Dated the 27th of October, 1899."

This does not show an advertisement of the property for sale or a sale. The warrant for the collection of delinquent taxes must be executed and returned in like manner as an execution against property: B. & C. Comp., sec. 3118. The sheriff must make written return of an execution, setting forth

his doings thereon: B. & C. Comp., secs. 245, 1014. In *Hall v. Stevenson*, 19 Or. 153, 20 Am. St. Rep. 803, 23 Pac. 887, relating to a return on a writ of attachment, it is said: "The return must state what was done, and the presumption that the officer has done his duty is not sufficient to supply a material factor or circumstance which does not appear in his return." The return is mandatory, and must be in writing, and is the primary evidence of what was done by the sheriff in the execution of the warrant: 3 *Freeman on Executions*, 3d ed., 356.

7. Without a due return showing the advertisement of the property and the sale, there is no evidence of title in the county. These are essential elements in the proceedings, and the absence of them cannot be cured by the legislature: *Stanley v. Smith*, 15 Or. 505, 16 Pac. 174; *Ferguson v. Kaboth*, 43 Or. 414, 73 Pac. 200, 74 Pac. 466; *Marx v. Hanthorn*, 148 U. S. 172, 13 Sup. Ct. Rep. 508, 37 L. ed. 410. As we have <sup>309</sup> already seen, the return upon the warrant, which is the evidence of the sheriff's acts, does not show that there was an advertisement and sale of the property for taxes, and hence there is no evidence of the county's title, and it must fail. As the county acquired no title under the tax sale proceedings, defendant acquired none by the sale under section 3133, B. & C. Comp., which only authorizes the sheriff to make sale of lands to which the county had acquired title.

The decree of the lower court is affirmed.

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*The Legislature may Ratify and Confirm* any act which it might lawfully have authorized in the first instance, where the defect arises out of the neglect of some legal formality, and the curative act interferes with no vested rights: *Steger v. Traveling Men's Bldg. Assn.*, 208 Ill. 236, 100 Am. St. Rep. 225, and see cases cited in cross-reference note thereto. The legislature may validate or legalize retroactively judicial or execution sales, though the defects or irregularities therein are of so gross a character as to render them inoperative, so long as it does not undertake to infuse life into proceedings void for want of jurisdiction: *Fuller v. Hager*, 47 Or. 242, 114 Am. St. Rep. 916.

*A Tax Deed Creates no Presumption* that the facts upon which it is based, or which are recited therein, had any existence, in the absence of a statute providing the effect which shall be given it in evidence: *Miller v. Miller*, 96 Cal. 376, 31 Am. St. Rep. 229. Compare *Washington v. Hosp.*, 43 Kan. 324, 19 Am. St. Rep. 141. The legislature, however, has power to make tax deeds prima facie evidence that every requirement of the law necessary to their validity has been complied with: *Larson v. Dickey*, 39 Neb. 463, 42 Am. St. Rep. 595; *Lynde v. Lynde*, 162 N. Y. 405, 76 Am. St. Rep. 332.



## IN RE MILLER'S WILL.

[49 Or. 452, 90 Pac. 1002.]

**WILLS, LOST—Establishment—Burden of Proof.**—Secondary evidence is admissible to show the contents of a lost will, but the burden of proof is upon the proponent to clearly establish its execution. (p. 1054.)

**WILLS, LOST—Presumption of Revocation.**—If, when last seen, a will is shown to have been in the possession of the executrix, and it cannot be found, it must be presumed that she destroyed it. (p. 1054.)

**WILLS, LOST—Presumption of Revocation—Possession by Stranger.**—If the possession of a will, claimed to have been lost, is shown to have been intrusted to a third person, the burden of retracing it into the hands of the testatrix is upon the contestant to raise the presumption of revocation. (p. 1054.)

**EVIDENCE—Uncontroverted Testimony—Effect of.**—If a disinterested witness, who is in no way discredited by other evidence, testifies to a fact within his knowledge, which is not in itself improbable, or in conflict with other evidence, the witness must be believed, and the facts so given must be taken as legally established. (p. 1059.)

**EVIDENCE—Interested Persons.**—The testimony of witnesses is not to be disregarded merely because they are interested in the result. (p. 1061.)

**WILLS, LOST—Presumption.**—If, in a proceeding to probate a will claimed to have been lost, it is shown that the will was duly and regularly executed, the presumption is strong in favor of its existence, and its revocation must be clearly proven. (p. 1061.)

**WILLS, LOST—Declarations of Testator.**—If a will is claimed to have been lost, the declarations made by the decedent subsequently to the execution of her last will and within a reasonable time prior to her death not only showing the will to have been deposited as claimed with a third person, but that it was still there to within a few days of her death, and declarations tending to show her affection toward the devisees, with no change in her feelings toward them, corroborated by direct evidence that after the making of the declarations she had no opportunity to withdraw the will, or otherwise come into possession of it, are admissible for the purpose of raising the inference that the will had not been returned to her possession nor revoked. (p. 1062.)

Cochran & Cochran, for the appellant.

L. J. Davis, for the respondents.

**453 KING, C.** This was a proceeding in the county court of Union county, Oregon, for the purpose of proving an alleged lost will of Ferena Miller, who died in that county November 19, 1900. The petition for probate was filed by Edward Luis July 13, 1903, alleging that Ferena Miller died on the date and in the county mentioned, leaving a large estate therein, consisting of both real and personal property, with no lineal descendants surviving her; that the petitioner and

his sister, Clara Luis, had made their home with decedent from their infancy, with the understanding that they should inherit all of the Miller property; that a will was executed bequeathing to the petitioner all of the personal property, together with the forty acres of land upon which the dwelling and all other buildings were situated, and to him and his sister, Clara, share and share alike, all the remaining real property; that the land bequeathed to him is the northwest quarter of the northwest quarter of section 29, with appurtenances, and the property devised to them jointly consists of the east half of the east half of <sup>454</sup> section 19, west half of southwest quarter, southeast quarter of southwest quarter and southwest quarter of southeast quarter of section 20, northeast quarter of northwest quarter and northwest quarter of northeast quarter of section 29, all in township 5 south, range 39 east, Willamette meridian, in Union county, Oregon; that immediately after its execution the will referred to was deposited and left for safekeeping either with N. Tartar, since deceased, or with the First National Bank of Union, Oregon, but has been lost, and after diligent search cannot be found. Evidence was offered in support of the petition, resulting in an order being made by the county court to the effect that the will be admitted to probate.

On July 7, 1904, Jacob Muhrback, as contestant, filed a petition with the county court, praying that Luis be cited to appear and show cause why the order entered sustaining his petition should not be vacated, alleging that Ferena Miller died intestate, leaving no one capable of inheriting her estate, except contestant; that contestant is a brother of decedent, and that all her property descended to, and is inherited by, him under the laws of Oregon; that he is informed and believes that Luis, under an alleged will, claims to have succeeded to all the property of which she died seised, but, if such will was executed, it was revoked. Luis answered, admitting the residence and death of the decedent, and that she left no lineal descendants, but denied the other allegations. The cause, being at issue, was referred to H. R. Hanna as special referee for the purpose of taking the testimony therein, which was thereafter taken and reported to the court, after which (August 13, 1906) the county court set aside its former order, from which action an appeal was taken by proponent. The circuit court, on appeal, reversed the decree of the county court, sustained the allegations of the petition for probate, and decreed the legatees to be the owners, under the will, of the

property alleged to have been bequeathed to each, as above described. From this decree Muhrback appeals. Affirmed.

<sup>455</sup> The evidence discloses that in the year 1864 Adam Miller, with his wife, Ferena Miller, settled upon what is known as Catherine creek, in Union county, in this state, later removing to Clover creek in that vicinity, where they afterward continuously resided. Adam Miller died June 26, 1886 but his wife lived until November 19, 1900. Prior to the death of Adam Miller, being without children, they took into their home Edward Luis and his sister, Clara, the oldest of whom was about nine years of age, the boy a nephew and the girl a niece of Mrs. Miller. Some time prior to 1886 an effort was made to adopt Edward, resulting in a failure on account of an irregularity in the proceedings, which oversight was not discovered until steps were taken to administer upon Adam Miller's estate. The children, however, continued their home with Mrs. Miller until of age, after which Clara married one Geo. A. Aughey, but Edward remained on the farm, devoting his full time and labor in its improvement. At all times after being taken into the Miller home, both he and his sister were treated as members of the family, and were recognized by the people in that vicinity as such. On the death of her husband Ferena Miller succeeded to all his estate. A few years afterward she executed a will, in which Edward and Clara Luis were made her beneficiaries to share equally in all her property. A few years later, and after Clara married, this will was destroyed and revoked. After considerable delay she made a new will, being the one involved here. This will was executed in the office of C. H. Marsh, an attorney in Union, and witnessed by him and one Mrs. A. Tartar, who resided there. Before being signed, it was read in the presence of the witnesses to Mrs. Miller, who, after hearing it read, stated that the will was as she wanted and that it was her last will and testament. Marsh then inclosed the will in an envelope and delivered it to the testatrix, who, in company with Mrs. Tartar, went to the First National Bank of that place, and handed the envelope with will inclosed to "Will Wright," the cashier, who, after having her indorse instructions thereon, retained it for safekeeping.

<sup>456</sup> 1. Under our code (B. & C. Comp., sec. 791) a will must be in writing, except when made by a soldier or mariner in active service, but, when in writing, secondary evidence is admissible to show its contents. Like any other written

strument, when shown to have been lost, it may be established on proof of such loss, the burden of which is on the proponent, and its execution must be clearly established, but, when this is done, it may be admitted to probate unless shown to have been revoked: 16 Ency. of Pl. & Pr. 1065; 23 Am. & Eng. Ency. of Law, 2d ed., 147; Wallis v. Wallis, 114 Mass. 510; Harris v. Harris, 26 N. Y. 433. Contestant insists that the will was destroyed and accordingly revoked by the testatrix, but this charge proponent denies, asserting that it was never withdrawn from the bank. On this issue the result of this suit depends.

2. If, when last seen, the will is shown to have been in the possession of the testatrix, and cannot be found, it must be presumed, in the absence of other evidence, that she destroyed it: 23 Am. & Eng. Ency. of Law, 2d ed., 148; Collyer v. Collyer, 110 N. Y. 481, 6 Am. St. Rep. 405, 18 N. E. 110; Behrens v. Behrens, 47 Ohio St. 323, 21 Am. St. Rep. 820, 25 N. E. 209.

3. But, under our view of the evidence, the possession of the will is shown to have been intrusted to a third person, the bank, as a depository. The burden, therefore, of retracing it into the hands of the testatrix is upon the contestant. Especially is this true when shown that within a short time before her death declarations were made by decedent to the effect that the will was still in existence and in the bank, after which she could not have had access to it: Thornton on Lost Wills, sec. 62; Schultz v. Schultz, 35 N. Y. 653, 91 Am. Dec. 88; Dawson v. Smith, 3 Houst. (Del.) 335; In re Harris' Estate, 10 Wash. 555, 39 Pac. 148. It is conceded that the will, after being properly executed, was taken from the attorney's office by Mrs. Miller in company with Mrs. Tartar. As to what was afterward done with it there is some controversy. Mrs. Tartar, a disinterested witness, testifies that, as soon as the will was executed, it was taken to the First National Bank of Union, Oregon, and there delivered to <sup>457</sup> "Will Wright," cashier; that she was present, heard the conversation between them, and saw the envelope with will inclosed turned over to him; that no other persons were present at the time; that she and Mrs. Miller were very intimate friends; that Mrs. Miller was at that time visiting with her in Union; that decedent had previously made a will, appointing "Mr. Dobbs" administrator, but claimed to be dissatisfied with it, and said that there was some little disturbance when she made it; that she saw her destroy this first will by throwing it into the stove, saying at the time: "Some of these days when the

weather is good you go with me and I will make a new one,' which I [Mrs. Tartar] concluded to do"; and that the will here in question was thereafter executed and left in the bank as stated.

It is insisted that this testimony is inconsistent with one of the statements of the witness on cross-examination, when, in answer to an inquiry as to whether she knew what became of the last will, she stated:

"A. I could not tell you that. She took it home to Clover creek, sixteen miles from here, and took sick and had her hip out of joint, and I never was up there since.

"Q. Was she ever back to your residence at any time after this will was put in the bank? A. Oh, yes, yes. She was here once and I can't tell. I thought she was out of humor, and she had a little valise with her, where she generally carried papers, and she didn't talk to me anything about it. I don't know what she had in the valise. She went to town. She was mad over something. Clara was here and Ed was here, and she went to town. She was in the house with me awhile and then took the valise and went off, and I always believed in my own mind she took the will out of the bank, because she said Ed and Clara told her to take that will out of the bank—that somebody might get it and cause you a great deal of trouble and get everything you have got.' 'Well,' I says, 'a person wouldn't have common sense that would speculate on anything like that.' She went off after she expressed herself that way, and she come back with the valise in her hand, and never let go of it any more. She seemed to act troubled."

In this connection it will be observed that, while Mrs. Tartar was quite an intelligent witness, she was at the time of giving <sup>458</sup> her testimony seventy-seven years old, and accordingly easily confused. Assuming the statement of the witness, as claimed, and as it first appears, indicates that the testatrix withdrew the will from the bank, it is evident that she only intended it as her opinion, for nowhere does it appear that she claims to have any direct knowledge to that effect, and it is manifest that she derives this opinion only from the circumstances there stated. The witness was evidently trying to evolve a theory by which she could account for the missing will. She was so firmly impressed with the idea that it was at the bank that she had called there for it, and insisted upon a thorough search being made at that place, to which request the bank officials responded without hesitation, but unsuccessfully. A search had been made by

other banks and at various other places wherever deemed possible that it might be found, all without avail. She had seen the first will destroyed, witnessed the new one, and saw it deposited for safekeeping, and all efforts in trying to solve the mystery of its disappearance having failed, she recalled the incident in Mrs. Miller's visit at her residence of a few years before, when she abruptly left the house, carrying a satchel, and soon returned appearing worried, and as a result, on the impulse of the moment, concluded and gave it as her opinion or theory that Mrs. Miller had procured the will and taken it with her to Clover creek. Unless this opinion expressed under these circumstances can have sufficient weight to demonstrate otherwise, it must be held that thus far it is shown that the will, when last seen, was in the possession of a third person, the bank, and that contestant has not overcome the presumption recognized by our statute (B. & C. Comp., sec. 788) to the effect that a condition once shown to exist continues until the contrary is proved, or until such presumption is overcome by other proof. The retracing of the will into the possession of the testatrix is not established by the opinion of this witness, as expressed, unless sustained by other circumstances and by evidence corroborating that theory.

Will Wright testifies that he does not remember the will having been deposited with him; but does remember the first ~~459~~ will having been taken out of his bank by Mrs. Miller. Testimony by a witness to the effect that he does not remember a certain event, notwithstanding his opinion that he thinks if it had happened he would recall it, is not entitled to great weight as a rule. For example, if A, while passing through a large crowd, observes B, speaks to him of matters in which he has a special interest, and long afterward A should be asked if he saw B on that certain date, the answer would, without hesitation, most likely be in the affirmative. The testimony of A on that point would be entitled under the circumstances to much greater weight than would that of B, who conversed not only with A, but with numerous others, and who may not happen to remember seeing A nor recall the conversation. The reason for this is obvious. The matter discussed, while of special interest to A, was of no direct interest to B. A was specially concerned in the topic there discussed, and directed his attention only to the one person, while B was equally as much concerned, and conversed with numerous others, thereby forgetting A, who may distinctly remember him. Before us we have the testimony of the cashier of the bank saying that he has no recollection of this

particular transaction. By virtue presumably from day to day consi in the line of his work with peo calities. Papers of various kinds as well as withdrawn from, his ban for charging his memory with any When the will was left there a mer's wishes was indorsed thereon, on his part to be remembered. I during which doubtless innumerab persons were left with him for sal not surprising that he does not re action. Failure to remember inci such circumstances are not unusu membered the event on the part o been an exception to the general affairs, with occasionally that of s stance, with <sup>460</sup> which to charge looked to her as her particular as occasion. She always visited and Union, and had spent the winter a quently discussed the "will quest seen the first will destroyed and the second, which she swears pos posited in the First National Bank remembers an event can feel mor ence, while the one who only f cannot feel assured of its nonoccu and remembers, knows, but the "I do not remember," does not an opinion, and say "I think" t pire, etc., the strength of which alone on the circumstances surrou too often, upon the confidence th ability to remember all the dealin taken part. It being satisfactoril was deposited in the bank, and return to the possession of the tes tant, it results that Mrs. Tart that "she took the will to Clove supported by the circumstance of will, is insufficient, without other claim that she came into its poss safekeeping, especially when com

the circumstances shown by the record further discussed herein.

The testimony of Mrs. Tartar is harmonious on the point discussed, when taken in connection with her statements in reference thereto of three years previous in a former suit between Luis and Muhrback, involving the same property, the record of which has been introduced in evidence herein. The lapse of time between the trial of the two cases must be taken into consideration as to the memory of one of her age. When her evidence was taken in the first suit (June 19, 1903), it was much closer to the happening of the events concerning which she testified, and her statements were presumably more likely to be <sup>461</sup> accurate. However, the only material difference to be found in the entire testimony of the two cases is on this point. In the first suit, when questioned on this particular point, the witness said:

"A. I never saw Mrs. Miller from that time any more. The last time she was in our house. From the last time she was in our house she signed some papers in our house—mortgages in our house—she said she wished she had the money back on these papers. I said, 'They are mortgages, and you can't get the money back until the mortgages are satisfied.'

"Q. Did she say anything about the will at that time?

A. She did not. She said she didn't know what she was signing, and she was crying, and such talk as that.

"Q. She was talking about the will then? A. She didn't talk about the will, and took her valise and went up town and was gone away an hour, and when she come back she didn't talk about the will, but she watched the valise very close. She never talked about the will, but I always supposed she took it home and burned it.

"Q. So the last time she was down at your house she took her valise and went up town, and when she come back she guarded that valise very carefully? A. Very closely. Never let it out of her hand while she was in the house, and took it away with her.

"Q. And it is your opinion she destroyed that also? A. That is my opinion.

"Q. At the last time she was in your house in this talk with you she regretted ever having made this will, did she? A. No, sir; I can't, I don't know, that she said anything of that kind. She didn't mention the will. I supposed in my own mind.

"By Mr Crawford: Your supposition is not testimony.



"A. I know it, Mr. Crawford. She didn't say anything in regard to the will.

"Q. And after having that conversation with her is when she went up town under those circumstances? A. After she and I were talking together and she said she wished she could get her money back, what she signed for before, after we had that talk, she took her valise off the table and went to town, and she was gone some time, and come back, and never let that valise out of her hand again.

462 "Q. And that is the last time you ever saw her? A. Yes; the last time I ever saw Mrs. Miller."

In the suit under consideration it is obvious from these statements that the "trouble and dissatisfaction" referred to in her testimony arose over some mortgages she had signed in some manner, and not over the will. When asked three years later concerning this incident, with her memory probably confused for the instant, it may have occurred to the witness that the document concerning which the decedent was worrying when "crying" and "wishing she had her money back" was the will drawn, notwithstanding the will was never mentioned on that occasion. While the witness had always been a warm friend of the Miller family, at all times manifesting the kindest feeling and interest in them, and while her testimony supports proponent's contention, it is manifest in both suits that she endeavored at all times to tell the facts as she remembered them.

4. It is firmly established everywhere that, as a general rule, when a disinterested witness, who is in no way discredited by other evidence, testifies to a fact within the knowledge of such witness, which is not in itself improbable, or in conflict with other evidence, the witness is to be believed, and the facts so given are to be taken as legally established: *Kavanaugh v. Wilson*, 70 N. Y. 177; *Evans v. George*, 80 Ill. 51; *In re John Immel's Estate*, 59 Wis. 249, 18 N. W. 182.

The testimony of Mrs. Tartar is corroborated by that of proponent and Mrs. Aughey, each of whom testify to having made their home with the testatrix since they were very young; that both Mrs. Miller and her husband had always manifested the same interest in them as if they were their own children, and always promised that their property should all descend to them at their death; that they had many times heard her explain that she had made another will after destroying the first, giving its contents, and that up to within four or five days of her death she had

stated that the last will had been left with the First National Bank, and was still there, and that after she made her last statements to that effect she had no opportunity to come into <sup>463</sup> possession of the will. The interest manifested in the children by the testatrix and her husband up to the time of the death of each, as well as many of the circumstances tending to show their intention regarding their property, is also testified to by the witnesses to the first will. In considering the weight to be given to the testimony of Mrs. Tartar, we must take into account, so far as can be ascertained, not only her opportunity to know the facts, as well as reasons for remembering them, but incidents connected with the lives of the parties concerning whom she has testified, their habits, customs, affection toward the parties interested herein, relationship and experiences to the time of their death. In that connection the parental interest manifested is unquestioned; and, in fact, it was believed by all that the proponent was adopted by them, which impression continued until some time after the death of Adam Miller, when, in administering upon the estate, it was learned for the first time that the adoption proceedings were irregular and void. Knowing it was intended that they should inherit the property, both remained with them, and proponent devoted many years of his life and all his labor to the upbuilding of the farm, with the expectation that their promises would be fulfilled.

After learning that the attempted adoption of Edward was void, thereby precluding him from being her heir, Mrs. Miller executed a will by which she made Edward Luis and his sister, Clara, the beneficiaries, to share equally in all her property. Later we find that the sister married, soon after which the testatrix decided to destroy the will and execute a new one, by which she would reduce the interest to go to Clara and increase that to be devised to her brother. This may have been on account of being displeased with her marriage, but probably for the reason that Clara, by her marriage, was provided with a home, thereby needing less assistance, as well as for the further reason that her brother was to remain on the farm, thereby earning the greater interest. The new will was drawn accordingly, bequeathing to Edward the home place of forty acres, with all personal property and improvements, and the residue of the realty, <sup>464</sup> consisting of about three hundred acres, going to him and his sister equally. The whole course and conduct of the testatrix, not only manifested a determination that the

property at her death should go to them, but there is nothing in the entire record tending to show that after the second will was deposited at the bank she ever changed her mind or plans in any manner, or that the amicable relations between them underwent any modification, thereby tending to overcome the showing made by failure to find the will where deposited: *Spencer's Appeal*, 77 Conn. 638, 60 Atl. 289. Nor does it appear that decedent ever had any special interest in the contestant. Although a brother, he had lived in Ohio, and, as far as appears, was unheard of in Oregon until after her death. All these salient features point to the correctness of the statements of Mrs. Tartar on the subjects involved, as well as the truthfulness of the testimony of proponent and of Mrs. Aughey, who, although interested witnesses, are entitled to belief. In fact, there is nothing to discredit their testimony, except so far as their interest may be considered.

5. Some apparent inconsistencies appear in proponent's statements in the two suits, but, when his testimony in the two proceedings are considered as a whole, it is very evident that he intended to state only the facts as he remembered and understood them. The testimony of witnesses is not to be regarded merely because they are interested in the result. Other reasons for discrediting them must appear. As stated by Mr. Justice Gray, in *Hull v. Littauer*, 162 N. Y. 569, 57 N. E. 102: "Generally the credibility of a witness who is a party to the action, and therefore interested in its result, is for the jury; but this rule, being founded in reason, is not an absolute and inflexible one. If the evidence is possible of contradiction in the circumstances, if its truthfulness, or accuracy, is open to a reasonable doubt upon the facts of the case, and the interest of the witness furnishes a proper ground for hesitating to accept his statements, it is a necessary and just rule that the jury should pass upon it. Where, however, the evidence of a party to the action is not contradicted by direct evidence, nor by any legitimate inferences <sup>465</sup> from the evidence, and it is not opposed to the probabilities, nor, in its nature, surprising or suspicious there is no reason for denying to it conclusiveness": See, also, *Second Nat. Bank v. Weston*, 172 N. Y. 260, 64 N. E. 949; *Daniels v. Foster*, 26 Wis. 686.

6. Again, when once shown that the will was duly and regularly executed, the presumption of law is strong in its favor, and its revocation must be clearly proven: *Johnston v. Johnston*, 1 Phillim. 447, cited with approval in *Throck-*

morton v. Holt, 180 U. S. 552, 21 Sup. Ct. Rep. 474, 45-L. ed. 663. The will has been traced to the bank, the officials of which have no recollection of either its receipt or withdrawal. During her lifetime no one had authority to withdraw it but the testatrix. After diligent search it could not be found. In the absence of evidence to the contrary, it might be inferred from the failure to find the instrument where deposited that it had been withdrawn by the party executing it, which fact, when once deduced, would raise a prima facie presumption that it was revoked. Notwithstanding the deduction possible to be made from the showing that the will could not be found, the evidence, direct and circumstantial, when considered as a whole, is ample to overcome any inference possible to be drawn therefrom.

7. There being no presumption arising from this showing alone, but merely the possibility of an inference, the facts from which, when once inferred, might raise a presumption, and the onus being on those who assert the revocation, the question arises: Can the declarations made by decedent subsequent to the execution of her last will, not only showing it to have been deposited, as claimed, but that it was still there to within a few days of her death, and declarations tending to show her affection toward the devisees, with no change in her feelings toward them, thereby indicating the improbability of desiring to revoke the instrument, when corroborated by direct evidence that after the making of the declarations she had no opportunity to withdraw the will from the bank, or otherwise come into possession of it, be admitted for the purpose of having the court infer that the <sup>466</sup> will had not been returned to her possession nor revoked? The authorities on this subject are far from being uniform. Among those holding declarations of this kind inadmissible are *Leslie v. McMurtry*, 60 Ark. 301, 30 S. W. 33; *Walton v. Kendrick*, 122 Mo. 504, 27 S. W. 872, 25 L. R. A. 701; *In re Burbank*, 104 App. Div. 312, 93 N. Y. Supp. 866; *In re Kennedy's Will*, 167 N. Y. 163, 60 N. E. 442; *Gordon's Case*, 50 N. J. Eq. 397, 26 Atl. 268. This question does not appear ever to have been directly before this court, but in the case of *Young v. State*, 36 Or. 417, 59 Pac. 812, 60 Pac. 711, 47 L. R. A. 548, it is held that declarations of a decedent are admissible to identify the deceased by showing his conversation upon the subject and the account he gave of himself during his lifetime. The same reasons which would admit declarations for the purpose of identifying the decedent, thereby enabling an heir to succeed

to property, should make declarations admissible for the purpose of showing the existence of a will and that it had not been destroyed or revoked. The continuing validity of a will always depends upon the intention of the testator that the instrument purporting to be his last will and testament shall be and continue to be such. Then, why should not only his acts, but his declarations as well, be admissible, both as to the disposition of the property and the intention existing within any reasonable time before death, and after the execution of the will, as well as before? The early English cases held declarations made after the execution of the will inadmissible: *Wharram v. Wharram*, 3 S. W. & T. R. 301, 32 L. J. (P. M. & A.) 75; *Quick v. Quick*, 3 S. W. & T. R. 442, 33 L. J. (P. M. & A.) 146. But in 1876 these decisions were overruled in what is recognized as a leading case: *Sugden v. St. Leonards*, L. R. 1 P. D. 154. In this case, as in many decisions on the subject in this country, a dissenting opinion appears. In giving his reasons therefor, Mellish, L. J., said: "I am not myself prepared to say that the decision in *Quick v. Quick* is bad law. If I was asked what I think it would be desirable should be evidence, I have not the least hesitation in saying that I think it would be a highly desirable improvement <sup>467</sup> in the law if the rule was that all statements made by persons who are dead respecting matters of which they had a personal knowledge, and made ante litem motam, should be admissible. There is no doubt that by rejecting such evidence we do reject a most valuable source of evidence. But the difficulty I feel is this: That I cannot satisfactorily to my own mind find any distinction between the statement of a testator as to the contents of his will, and any other statement of a deceased person as to any fact peculiarly within his knowledge, which, beyond all question, as the law now stands, we are not as a general rule entitled to receive."

It is also suggested in some opinions in support of that view that there is no more reason for admitting evidence of this nature in reference to wills than in the case of deeds; but this position overlooks the distinction between a will and a deed, and the difference between the results which might often follow, if received in both instances, or rejected in both, as the case may be. By the execution of a deed title passes to the grantee; but in the making of a will nothing passes at the time, the status of the property remains unchanged, its execution in no way encumbers the title; it may be conveyed or mortgaged as before, and to the time of the death of its owner the property remains subject to any disposition desired. Any

declarations, therefore, which the testator may make after the date of the will cannot affect vested rights; but with a deed, when executed, the title has departed, and to admit the grantor's declarations after its delivery might impair, not the grantor's rights, but the vested rights of an innocent purchaser. In one case the declarations would impair vested rights, while in the other it would only affect the rights of those claiming an inheritance through the person making the declarations. The declarations after the will would follow the title and affect the interests of persons claiming title by reason of his death, but in no sense could they be affected as innocent purchasers for value. Nor can they have any rights in or to the property at all, if the deviser sees proper to declare otherwise, and if, by making a will, he can change the beneficiaries <sup>408</sup> at any time from his legal heirs to persons who would not otherwise inherit his estate, it is but reasonable and just that any declarations made within a reasonable time prior to his death, in reference to his wishes and intention, should be permitted to follow, and be admissible for the purpose of determining whether such will had in fact been executed; whether revoked, if made; and, if accompanied by any corroborating circumstances, to determine its contents, if lost. It is true that as a general rule the declarations of a deceased person, whether in writing or oral, are inadmissible. "But," says Mellish, L. J., in *Sugden v. St. Leonards*, L. R. 1 P. D. 154: "So inconvenient was the law upon this subject, so frequently has it shut out the only available evidence, so frequently would it have caused a most crying and intolerable injustice that a large number of exceptions have been made to the general rule." In discussing the same point in that case, Cockburn, C. J., observes: "The declarations of deceased persons are in several instances admitted as exceptions to the general rule—where such persons have had peculiar means of knowledge, and may be supposed to have been without motive to speak otherwise than according to the truth. It is obvious that a man who has made his will stands pre-eminently in that position. He must be taken to know the contents of the instrument he has executed. If he speaks of its provisions, he can have no motive for misrepresenting them, except in the rare instances in which a testator may have the intention of misleading by his statements respecting his will. Generally speaking, statements of this kind are honestly made, and this class of evidence may be put on the same footing with the declarations of members of a family in matters of pedigree, evidence not always to be relied on, yet sufficiently so to make

it worth admitting, leaving its effect to be judged of by those who have to decide the case."

In *Burge v. Hamilton*, 72 Ga. 568, the court, speaking through Mr. Chief Justice Jackson, said: "And after reviewing other English and many American decisions of eminent judges in this country, our own first chief justice thus announces the conclusions <sup>469</sup> of his own mind: 'Having thus, as briefly as I could, adverted to the conflicting decisions upon this vexed question, James Kent and Joseph Story, men unsurpassed for legal learning, being arrayed against Ambrose Spencer and Thomas Ruffin, to say nothing of Spencer Roane, than whom abler common-law judges never presided in the courts of this country, and differing as I do from a worthy brother and associate, for whom and for whose opinions I have the highest respect, I must say that I have not a scintilla of doubt resting in my mind that the testimony excluded should have been received by the circuit court.'" An examination of most of the cases holding declarations of this class inadmissible discloses that the conclusions there reached are largely due, whether consciously or not, to the fear that such declarations, even when conclusively shown to have been made, are unreliable. This fear is not without some foundation. But while the statements of a declarant may sometimes be false, and intentionally so, or when true may have been misunderstood, or may be inaccurately remembered, or misquoted from design, this can go only to the degree of credit to be given the testimony and not to its admissibility. Because evidence should be weighed with care is not sufficient alone to justify its exclusion. The possible evils which might result from the exclusion of this class of testimony are far more to be feared than are those which might accrue from the possibility of declarations admitted being untrue, misquoted, or otherwise inaccurately given: *Collagan v. Burns*, 57 Me. 449.

After a careful consideration of the subject, we are of the opinion that the great weight of authorities from the time of the decision in the *Sugden-St. Leonards* case (L. R. 1. P. D. 154), down to the present, as well as the better reasoning, sustain the admission of the declarations of a decedent made after the execution of a will as well as before, if made within a reasonable time prior to his death, and warrant us in holding such declarations admissible under the circumstances in the case before us. Among authorities supporting the rule here recognized are *Thornton on Lost Wills*, sec. 64; 23 Am. & Eng. Ency. of Law, 2d ed., 149; *Sugden v.* <sup>470</sup> *St. Leon-*

ards, L. R. 1 P. D. 154; In re Spencer's Appeal, 77 Conn. 638, 60 Atl. 289; Ewing v. McIntyre, 141 Mich. 506, 104 N. W. 787; McDonald v. McDonald, 142 Ind. 55, 41 N. E. 336; In re Page's Will, 118 Ill. 576, 59 Am. Rep. 395, 8 N. E. 852; In re Marsh's Will, 45 Hun, 107; Gavitt v. Moulton, 119 Wis. 35, 96 N. W. 395; In re Donnelly's Estate, 190 Pa. 417, 70 Am. St. Rep. 637, 42 Atl. 882; Clark v. Turner, 50 Neb. 290, 69 N. W. 843, 38 L. R. A. 433; Williams v. Miles, 68 Neb. 463, 110 Am. St. Rep. 431, 94 N. W. 705, 96 N. W. 151, 62 L. R. A. 383; In re Harris' Estate, 10 Wash. 555, 39 Pac. 148; Pickens v. Davis, 134 Mass. 252, 45 Am. Rep. 322; Lane v. Moore, 151 Mass. 87, 21 Am. St. Rep. 430, 23 N. E. 828; Davis v. Elliott, 55 N. J. Eq. 473, 36 Atl. 1092; Hoppe v. Byers, 60 Md. 381; Burge v. Hamilton, 72 Ga. 568.

The declarations of the testatrix having been properly admitted, they, together with the circumstances shown in connection therewith, so fully sustain the direct and positive testimony before us that we are satisfied the second will made was regularly executed and never revoked. The conclusion reached by the circuit court being in full accord with the facts as they appear from the record, the decree of the circuit court should be affirmed.

Mr. Justice Eakin, having tried the cause in the court below, did not sit in this case.

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*The Probate of Lost or Destroyed Wills* is the subject of a note to Williams v. Miles, 110 Am. St. Rep. 445.

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### MCLEOD v. DESPAIN.

[49 Or. 536, 90 Pac. 492, 92 Pac. 1088.]

**BILLS AND NOTES—Signing as Trustee.**—One who indorses as a guarantor is, as such indorser, personally bound, notwithstanding the fact that the word "trustee" is added to his name. (p. 1073.)

**BILLS AND NOTES—Assignment—Notice.**—A person who takes an assignment of a note made payable to the order of a third person as trustee is put upon inquiry as to all of the terms and conditions under which the note was executed, and is presumed to have had full knowledge thereof. (p. 1075.)

**TRUSTS.**—Notice of the existence of a trust imposes the duty of inquiry as to its character and limitations, and whatever is sufficient to put a person of ordinary prudence upon inquiry is constructive notice of everything to which that inquiry might have led. (p. 1075.)

**BILLS AND NOTES—Signing as Trustee—Notice.**—The word "trustee," added to the payee's name in a written instrument is



sufficient to put the purchaser upon inquiry as to all the terms and conditions under which it may have been executed, and in the absence of such inquiry knowledge thereof will be presumed. (p. 1077.)

**PRINCIPAL AND AGENT—End of Agency.**—An agency, though presumed to have continued until shown to have ceased, necessarily ends the moment that the transaction which created it has become complete. (p. 1077.)

**PRINCIPAL AND AGENT—Ratification of Acts.**—One of the most unequivocal methods of showing a ratification of an agent's act is the bringing of a suit based upon it. (p. 1079.)

**PRINCIPAL AND AGENT—Ratification of Part of Act.**—If a principal elects to ratify any portion of an unauthorized act of his agent he must ratify the whole of it. He cannot avail himself of such acts as are beneficial to him, and repudiate such as are detrimental, whether the ratification be expressed or implied. (p. 1079.)

**PRINCIPAL AND AGENT—Duty to Trace Application of Payment.**—One who pays his obligation to an agent of the payee who has the evidence of the debt in his possession is under no obligation to see that the payment is properly applied. (p. 1080.)

**PRINCIPAL AND AGENT—Insolvency of Agent.**—If a person acting as trustee for another for the receipt of payments on secured notes retains the securities which the payments are intended to cancel, his authority to receipt for payments does not cease until after his insolvency becomes known. (p. 1080.)

**CONTRACTS—Dates of Instruments.**—Where a transaction constituting a contract must be considered as a whole, even though it consumed more than one day, the date of the writings constituting such transaction is immaterial. (p. 1082.)

**PRINCIPAL AND AGENT—Guaranty by Agent.**—An agent may guarantee to his principal the payment of claims handled by him for such principal, especially when the agent is one of the beneficiaries in conjunction with the parties whom he is to and does represent. (p. 1086.)

**PRINCIPAL AND AGENT—Adoption of Act of Agent.**—A principal must adopt or reject the act of his agent as an entirety, and cannot receive the benefit of such agency without bearing its burdens. (p. 1088.)

**CONTRACTS—Statute of Frauds.**—Contracts, whether oral or partly oral and partly written, after being executed, are binding on the parties thereto, and are not affected by the statute of frauds. (p. 1090.)

**PRINCIPAL AND AGENT—Books as Evidence.**—The books and statements of a bank in which an agent is cashier, while acting for others in receiving money on a claim against the debtors of his principal, are admissible in evidence to show the payment by the debtors on the claim held by him as agent. (pp. 1091, 1092.)

**PRINCIPAL AND AGENT—Acts of Agent.**—If a person, while acting as agent, purchases a farm from the debtor of his principal and credits the purchase money paid him therefor to the agency account in a bank, in which he keeps any money received when paid by such debtors, his principal is bound thereby, and the debtor is entitled to a credit for the amount. (p. 1093.)

C. H. Carter, W. Minor and T. G. Hailey, for the appellants.

McCourt & Phelps, and J. A. Fee, for the respondent.

539 KING, C. The facts leading up to this suit, as we gather them from the record, are substantially as follows: In March, 1898, appellants borrowed \$28,000 from J. N. Teal, of Portland, Oregon, executing their promissory note therefor, payable to his order five years after its date at the Pendleton Savings Bank, Pendleton, Oregon, with interest at the rate of eight per cent per annum. To secure the payment of this note, three mortgages were also executed and duly recorded, covering certain lands in Umatilla county, Oregon. In June of the same year appellants, desiring to reduce the rate of interest and in order to sell their lands and apply the proceeds upon the indebtedness, wanted the privilege of paying the principal and interest before due, and, as Teal would not accede to these terms, but was willing to receive the full amount at any time, they made application for a loan to C. B. Wade, then cashier of the First National Bank, of Pendleton, Oregon. Norborne Berkeley testified that, as their agent, he made the application, and that the first time he spoke to Wade concerning the loan he answered: "We haven't got the money now, but can probably let you have it later"; that during the same week he renewed the request, and Wade replied: "I think we can get the money now, and will let you have it." After talking the matter over, he told Wade that, if he would buy the Teal note and hold it and allow them to pay it off in such sums as they could, it would suit them better than as it was, since they wanted to sell certain ranches and apply the proceeds on their obligation. Wade was to give them a lower rate of interest, and for his services in the transaction would charge \$1,500, all of which was agreed to; and after learning that Wade had received the note and mortgages from Teal, appellants executed eight promissory notes, made payable to "C. B. Wade, trustee," dated June 29, 1898, with interest at the rate of seven per cent per annum, payable semi-annually, "on or before five years from date." The notes aggregated \$29,500, as follows: Two for \$7,000 each, and two for \$2,500, two for \$1,500, one for \$3,500, and one for \$4,000. One of the \$1,500 notes <sup>540</sup> represented the bonus to Wade. All the signatures of the new notes were procured within a short time after Wade received the Teal note and mortgages duly assigned. The new notes were accordingly turned over to him, and, with the exception of the bonus note, were duly assigned to the parties advancing the money.

As a part of the transaction, appellants and Wade entered into an agreement concerning the payment and dis-

bursement of rents to be received on the property, which on June 30, 1898, was reduced to writing, and, omitting the signatures, is as follows:

"This Agreement, made and entered into this 30th day of June, 1898, by and between N. E. Despain, Florence L. Berkeley and Norborne Berkeley, Jr., her husband, Bernice Dickson, and Haldane Dickson, her husband, Albert M. Despain, Edith G. Despain, and N. E. Despain as guardian of the persons and estates of Louis B. Despain, Eleanor Despain and Constance A. Despain, minors, parties of the first part, and C. B. Wade, trustee, party of the second part, Witnesseth:

"That, Whereas, the first parties have borrowed of C. B. Wade, trustee, party of the second part, twenty-eight thousand dollars (\$28,000), payable on or before five years, and bearing interest at the rate of seven per cent per annum, said loan being secured by a note and mortgage for \$28,000, which note is secured by a real estate mortgage on certain city property in the City of Pendleton, and farm lands in Umatilla County, Oregon, same having been duly executed and delivered to J. N. Teal, of Portland, Oregon, by said first parties, and by said J. N. Teal duly assigned to second party hereunto;

"Therefore, in Consideration of the Premises, and for the further security of said C. B. Wade, trustee, said first parties hereto do sell, transfer, set over and assign to C. B. Wade, trustee, all the rents and profits of the property in the City of Pendleton, described in said mortgage from said first parties to J. N. Teal, for the period of five years, unless said sum of twenty-eight thousand dollars (\$28,000), and interest thereon, shall have been sooner paid to said second party.

"First Parties do Further Agree that they will, without expense to said second party, collect and deposit in the First National Bank of Pendleton, Oregon, to the credit of the second party, the rents and profits of mortgaged property within limits of the City of Pendleton.

541 "And Said Second Party Agrees (1) that of moneys so deposited by said first parties, if same be sufficient therefor, he will pay or cause to be paid to N. E. Despain, the sum of one hundred fifty dollars (\$150) per month; (2) that he will pay interest on said loan semi-annually; (3) that he will pay premiums on such fire insurance policies as may be procured, subject to approval of second party, by said first parties on property in City of Pendleton material to this agreement; and (4) that if, after such payments as hereinbefore

set forth are paid, there remains any balance of such rents and profits, the same shall be paid on principal of said loan of twenty-eight thousand dollars (\$28,000); provided, however, that if first parties shall be unable to pay taxes assessed against said property the party of first part may pay such taxes from such balance, if any there be."

It appears that after receiving the application Wade spoke to McLeod, Sturgis and others concerning it, explaining the time, terms and conditions desired, and suggested that they advance the necessary money, indicating it would be a safe investment, for the reason he would procure an assignment of the note and mortgages from Teal to himself, as trustee; and, as an additional safeguard, he would arrange to have all rents from the property, together with receipts of sales of lands, if sold, paid to him during the period of the loan, which he would apply in payment of the interest, when due, and credit the excess upon the principal. With this understanding McLeod furnished \$7,000, Lina H. Sturgis a like sum, while the balance of the funds was advanced by other parties not involved here. The money advanced, being sufficient for the desired purpose, amounting to \$28,000, was paid over to Wade, who, with full knowledge, consent and request of all concerned, paid the same to Teal. The assignment was in the usual form, dated June 29, 1898, and executed to "C. B. Wade, trustee"; the note being indorsed, "without recourse to J. N. Teal."

The new notes were given for the purpose of indicating and specifying in writing the terms of payment of the obligation represented by the Teal note and mortgages, as well as to indicate the interest each of the parties advancing the money might have in the entire indebtedness and mortgage security, including <sup>542</sup> the additional \$1,500 bonus note given. These notes were executed, assigned and accepted with the full knowledge and understanding of all the parties concerned that Wade, as trustee, was to hold the Teal note and mortgages, and neither the note nor mortgages should be deemed discharge until the amounts specified in the new notes should be fully paid. Wade accordingly entered upon his trust, retained possession of the Teal note and mortgages, received all rents and other proceeds from time to time, and, after paying the amounts excepted under the contract, credited the excess on the new notes until the \$29,500, with interest, was paid, except the sums involved in this suit, all of which were paid to him to apply on the notes; but the money for which a decree is here demanded was neither credited

thereon nor paid to the respondents. He so continued under the trust, without his right to do so being questioned, until September 8, 1903, when he became insolvent. After the execution of the new notes they were indorsed by Wade to the various persons entitled thereto. McLeod retained his note in his possession, while the Sturgis note was held by Hartman as her agent; but all credits on these notes were placed there by Wade, who was given the notes by the holders for that purpose as the money was paid to them.

Prior to the date Wade's insolvency became known, tracts of the mortgaged land were sold from time to time, and releases duly executed by Wade, as trustee, and the moneys received therefor in accordance with the understanding and agreement between the parties concerned. During all this time and for many years prior thereto, Wade was cashier of the First National Bank of Pendleton, Oregon, and plaintiff, McLeod, was a director and stockholder only. The money was deposited in this bank as received, and entered on its books under the account of "Wade-Despain Trust." As payments were made to the holders of the notes, checks were given by Wade, signed "Wade-Despain Trust." Like checks were given for all other disbursements made by him under the written agreement. In this manner Wade kept a memorandum of moneys received and paid on the notes, as <sup>543</sup> well as of all disbursements under the contract. When the notes were assigned to McLeod and Sturgis, Wade guaranteed the payment thereof in the following language, indorsed on the back of each note:

"This note is secured by a note of \$28,000, signed by the same parties, which is secured by real estate mortgages assigned to C. B. Wade, trustee. For value received I hereby guarantee payment of this note and waive protest, demand, notice of nonpayment thereof.

"C. B. WADE,  
"Trustee."

It is urged by counsel for respondents that during the entire transaction, and until his insolvency, Wade was the agent only of appellants, and that respondents are bona fide purchasers of the new notes, and that, by operation of law, these notes carry with them the Teal mortgages; that the new notes were intended to be substituted for the old, and by oral agreement these mortgages were to secure their payment; that this oral agreement is supplemented by the statement indorsed on the new notes given: "This note is se-

cured by a note of \$28,000, signed by the same parties, which is secured by real estate mortgages assigned to C. B. Wade, trustee." Appellants' counsel insist that Wade was only respondents' trustee and agent, and that, sufficient money having been paid him to cover the entire claim growing out of the deal, they were released from any further obligations. It appears that appellants' object in procuring the money with which to take up the Teal note and mortgages was for the purpose, first, of reducing the rate of interest from eight per cent per annum to seven per cent; second, to secure the privilege of paying the principal and interest at any time and in order that the realty could be sold and mortgages released as sales were made, thereby enabling the indebtedness to be extinguished as soon as practicable. To accomplish these objects they were willing to pay a \$1,500 bonus, and were not only willing to pay this additional sum, but consented to and did enter into the agreement whereby all the rents and proceeds from sale should be paid to the holder of the mortgage security. With notice of these conditions, consisting of both actual and constructive knowledge, respondents advanced the money with which to <sup>544</sup> purchase the Teal note and mortgages, and as a means of segregating and evidencing the respective interests therein of each of the several persons advancing the money, as well as to show a change in the terms of payment and rate of interest, the new notes were given. The transaction was, in effect, the same as if all the new terms and conditions of payment were indorsed on the old note and mortgage, the difference being, under the method adopted, that each person, if desired, might hold the written instrument evidencing his or her interest, while leaving the security in Wade's possession, thereby making it more convenient for all, in that Wade could act as agent and trustee for each party represented. In this way the sales were to be facilitated as well as the payment of the indebtedness insured, and thereby carry into effect one of the main objects in changing creditors. It is clearly apparent that the new notes were given and the negotiations perfected in this manner, and with this object in view. As evidence that there should be but the one debt and that neither the Teal note nor mortgages should be deemed paid or canceled, all were assigned to Wade as trustee; and to make certain that the note and mortgages should be kept alive, this fact was stamped on the back of the new notes as executed.

1. For the purpose of assuring the payment of the \$1,500 promised him, Wade not only consented to act as trustee for the holders of the notes, but was willing to guarantee payment of the notes held by respondents, and accordingly indorsed the notes as guarantor, and, as such indorser, was personally bound, notwithstanding the fact that the word "trustee" was added to his name: *Odgen City Ry. Co. v. Wright*, 31 Or. 150, 49 Pac. 975.

The date of the written agreement executed to Wade, as trustee, by appellants is immaterial, as the transaction must be considered as a whole, even though it consumed more than one day. While there is no direct testimony that Sturgis had actual knowledge of such understanding, it does appear that McLeod relied upon an agreement to that effect. On this point McLeod testified:

545 "Q. Did he (Wade) tell you anything about having these other notes further secured by having the city rents turned over to him? A. I asked him (Wade) how he was to pay the interest on these notes. He said the rents was to come to him, and if any of the property was sold they would apply it on these notes. That is the reason he gave on or before five years after date so that they could have a chance to sell it.

"Q. He also told you he would have these rents assigned to him to apply on the notes? A. He said he could pay the interest because he was getting the rents.

"Q. They hadn't been going to him prior to that time, had they? A. I don't know.

"Q. As I understood you on direct examination, you said Mr. Wade told you he was collecting the rents; are you entirely correct in that? A. Yes, sir; he said he was getting their rents.

"Q. Didn't he tell you he would have these rents turned over to him so they could be applied on the interest? A. Yes, sir; that is what he said, he was getting the rents.

"Q. On his explanation to you of how this \$28,000 note was assigned to him and held as security for the payment of the amount due on these others, you felt it was safe and you put up your money? A. I thought so or I would not have done it."

Mr. Hartman, the agent of Sturgis, testified:

"Q. He (Wade) was to hold that \$28,000 note and mortgage to secure the payment of this? A. Yes, sir.

"Q. That was the agreement at the time? A. Yes, sir; to be assigned by Despain and secured by this \$28,000 mortgage.

"Q. Wade was to hold it as trustee? A. He was to hold it as security for this note.

"Q. Do you know whether or not Mr. Wade collected the rents from this property? A. I so understood it."

<sup>546</sup> This testimony, taken together with the fact which is testified to by both McLeod and Hartman, that all the interest and moneys paid and credited on the notes came through Wade's hands and were indorsed thereon by him; that appellant's property was sold from time to time, and the mortgages released, with the full knowledge of both McLeod and the agent of Sturgis, and that all money received on the notes came from such sales and rents; that such sales were made and releases executed without objection on their part, and apparently with their approval, they receiving their portions of the money as applied in payment of interest, etc.—all furnish strong evidence tending to show full knowledge and notice of all the conditions and terms under which the notes were executed.

2. But, if it be assumed, as contended by respondents' counsel, that the new notes were executed with the object of thereafter being indorsed and sold by Wade for the purpose of raising the money with which to take up the Teal note and mortgage, it must then be conceded that, for the purpose of making this sale and applying the proceeds as agreed, Wade for the time being was the agent of the Despains, and, in that respect, their trustee, and continued as such until the consummation of the sale of the notes and application of the proceeds as directed. It would then follow that the word "trustee" was added that it might be known there was a cestui que trust, and that conditions were to be performed by the trustee for the beneficiaries. Then would not this word attached to the payee's name impart notice, or at least be sufficient to put the purchaser upon inquiry, as to the terms and conditions under which the trust was created? In *Wills v. Wilson*, 3 Or. 308, the court states the rule to be that, "when the circumstances are such as would excite suspicion and naturally attract the attention, a party will be presumed to have been put upon inquiry, and if he does not inquire he will be presumed to have known the facts." To the same effect are *Mercantile Nat. Bank v. Parsons*, 54 Minn. 56, 40 Am. St. Rep. 299, 55 N. W. 825, and *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115. In the



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547 case at bar respondent combination with several with which to take up the ing it. It clearly appears to do so safely and satisfactions were involved. The ing it were to be assigned secure the assignees of the He was to receive notes, each, with new terms including parties advancing the appear. All the money Wade's hands. In brief, for all parties until the time the money was paid, as agent for appellants in presence as agent for respondent circumstances, taken together to his name in the notes, attention and cause an average all the terms and condition was consummated.

In *Shaw v. Spencer*, 10 Am. Rep. 115, Mr. Justice says: "Notice of the authorities held to impose acter and limitations. Ar person of ordinary prudence notice of everything to which Among authorities to the Commercial Paper, 1st ed., section 27 (Ky.), 117; *Gaston v. Am* Eq. 98; *Duncan v. Jandor* L. ed. 142; *Union Pac. R. R.* U. S. 54, 26 L. ed. 693; 34 gess, 133 Mass. 511; Third 138, 34 Am. Rep. 304. A contrary rule. Indiana and words of this nature affix merely descriptio personae 441; *Powell v. Morrison*, 3 criticism of these cases by

as precedents. In *Speelman v. Culbertson*, the words, "administrators of the estate of John Babcock, deceased," appeared after the names of the payees; while in *Powell v. Morrison*, the note was payable to one "James Castello, Sheriff of St. Louis County." The court in announcing the opinion manifests much doubt as to the correctness of its position, while one of their number dissents.

In discussing this question in *Payne v. First Nat. Bank*, 43 Mo. App. 377, Mr. Justice Biggs, speaking for the court, says: "There is a class of cases in this state which hold that a note, payable to a person as executor, guardian, agent or sheriff, is prima facie the payee's individual property; that the words 'executor,' 'guardian,' etc., are merely descriptive personae; and that such words are not sufficient within themselves to put a purchaser of such a note on inquiry as to conditions or limitations (if any) of the payee's power to pledge or sell, . . . citing authorities of that state. The doctrine of the foregoing cases has for its foundation the reason that, in the execution of such trusts, the law contemplates that it will be necessary to collect or sell the trust property. Upon this reason the prima facie right of such payee to make any kind of disposition of the note is predicated. But, in our opinion, these cases are not applicable when the negotiation of instruments, or the sale of other property held by a trustee, is involved, and the instrument upon its face discloses the beneficial interest of another." This authority, after quoting with approval from *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115, and *Duncan v. Jaudon*, 82 U. S. (15 Wall.) 165, 21 L. ed. 142, adds: "These authorities are sufficient to show that the powers of a trustee as to the disposition of the trust property are quite the <sup>349</sup> reverse of those of an executor, guardian or sheriff." The appellate court of Missouri in *Sparrow v. State Exch. Bank*, 103 Mo. App. 338, 77 S. W. 168, also observes: "It must be confessed that the rule declared by the supreme court of the United States in *Central Nat. Bank v. Connecticut etc. Ins. Co.*, 104 U. S. 54, 26 L. ed. 693, and the cases in which it has been followed by that court, cannot be reconciled with that declared in the Missouri cases already alluded to. If the question here had not been authoritatively ruled by our own supreme court, we should be inclined to adopt that declared by the supreme court of the United States, since the reasoning in those cases by that great court in favor of the rule therein announced, it seems, are of the most cogent and persuasive nature."

3. We find on examination of the cases sustaining respondents' contention on this point that most of the authorities upholding that view manifest some doubt as to the soundness of their position. This point has not heretofore been directly before this court; but we find the great weight of authority, as well as the better reasoning, supports the rule that the word "trustee," added to a payee's name in a written instrument, is sufficient to put the purchaser upon inquiry as to all the terms and conditions under which it may have been executed, and in the absence of such inquiry knowledge thereof will be presumed. We also deem a recognition of this rule necessary to properly protect the beneficiaries of such trusts; otherwise, under the claim of being a bona fide purchaser, through the neglect of the assignee of an instrument to make inquiry, the cestuis que trustent in many instances would, without fault on their part, suffer great loss. The adoption of the rule here recognized protects the innocent without hardship to investors; while the contrary doctrine offers an inducement to purchasers of this kind of property to neglect making inquiry as to the import of the word "trustee," by which the innocent must often suffer at the hands of dishonest trustees in whose selection it often happens the beneficiary has no voice.

When considered in the light of the many circumstances surrounding the transactions leading up to this suit, we cannot <sup>550</sup> avoid the conclusion that, if the notes were purchased in the manner claimed, having received the assignment of the notes made payable to the order of Wade, as trustee, they had full knowledge of all the agreements, oral or written, connected therewith. Even though Wade was a trustee for the appellants in disposing of the notes until the completion of all the arrangements, as urged, as well as agent for respondents to the extent of furnishing the "gilt-edge paper" referred to and in securing the assignment of the Teal note and mortgages to him for the benefit of the assignees of the new notes, yet such agency for defendants, though presumed to have continued until shown to have ceased, necessarily ended the moment the transaction became complete. On the completion of the deal the makers of the notes, by agreement, were absolutely bound to pay to Wade, as trustee, all rents received, as well as all proceeds resulting from the sale of the property. There was no discretion left for them to do otherwise. Unlike that of a principal and agent, they were not at liberty to disregard Wade's demands, whether the various agreements were oral or writ-

ten, as the understanding between all concerned had been acted upon, Wade having entered upon the duties devolved upon him by the trust. The notes had been sold, mortgages assigned, and money advanced and paid as directed, of all which each of the parties thereto, whether obligors or obligees, had either actual or constructive knowledge. Wade thereby became fully recognized by respondents, not only by operation of law, but, in fact, as their trustee, to see that all the terms and conditions of the trust were carried out.

To insist that after the entire transaction was completed Wade was agent or trustee of appellants would be inconsistent with every principle governing business dealings between men, as this would make the mortgagors, through Wade as their agent, the holders of the securities given by them with an agreement to pay all proceeds of rents and sales over to themselves. Respondents would have been retaining the notes, and at the same time intrusting the mortgage securities to the possession <sup>551</sup> of the persons executing them. The record shows all persons interested to have at least good average business ability, which, when considered with the other facts, impels us to the conclusion that when the transaction became complete Wade became the trustee solely for the assignees of the notes, not only as claimed by respondents' counsel and, as evidently held by the learned court below, "merely as a receptacle or custodian raised by implication of law for the preservation of the mortgage security," but a trustee in the full sense of the word, with full authority to act for and in their behalf in the protection of their interests, including the authority to receive all payments to be applied on the notes until paid in full. In this connection it must be remembered that respondents were stockholders in the bank, while McLeod was a director. Wade had been for many years, and was then, the cashier. The notes presumably were all in his possession, except the two involved here, and all made payable, not only to him as trustee, but at the bank of which he was cashier. All money applied in the payment of interest and cancellation of any notes given in the transaction was paid to Wade at this bank. Except as to the amounts sued upon, the notes were always taken to Wade when each payment was made on the interest or principal, and was by him indorsed on the notes. The Teal note and mortgages, as well as all the notes, except those assigned to McLeod and Sturgis, were there held by him and in his possession. Mortgages were released which, with all payments made through him, were known, recognized

and acquiesced in by all concerned. Every act not only tended to give notice to the creditors of the existing conditions under which the trust was executed, but to impress more strongly on the debtors the fact that their agreements were recognized and that their payments were being made to the right person. That it was a case of misplaced confidence on both sides is self-evident. It is one of the numerous cases where one of two innocent persons must suffer because of the betrayal of a trust reposed in a third, and where the person most at fault must bear the loss: *Story on Agency*, 9th ed., sec. 127; <sup>552</sup> *Bamberger v. Geiser*, 24 Or. 203, 33 Pac. 609; *Kasson v. Noltner*, 43 Wis. 646.

4. In view of the facts and conditions stated, as gathered from the evidence, it conclusively appears that respondents were most at fault. For the purpose of bringing this suit they recognized Wade as their trustee, and one of the most unequivocal methods of showing a ratification of an agent's authority is the bringing of a suit based upon the agent's acts. They appear to recognize his authority where to their advantage, and to disclaim his acts where to their injury. It being to their advantage, he is recognized as the holder and trustee for the purpose of holding the Teal note and mortgage. The old note is recognized as having sufficient life to bridge the chasm between the mortgages and the new notes, but extinguished for any other purpose. Wade's authority is recognized as to moneys paid to him and credited on the notes, by reason of which the amounts so received are retained, but rejected as to the loss occasioned by his other receipts. It is elementary that this position cannot be upheld or recognized by a court of equity. When a principal elects to ratify any portion of an unauthorized act, he must ratify the whole of it. He cannot avail himself of such acts so far as beneficial to him, and repudiate its obligations whether such ratification be expressed or implied: *Mechem on Agency*, secs. 128, 130, 151; *La Grande Nat. Bank v. Blum*, 27 Or. 215, 41 Pac. 659; *Noble v. Nugent*, 89 Ill. 522; *Hovey v. Blanchard*, 13 N. H. 145; *Kasson v. Noltner*, 43 Wis. 646.

5. It is contended, under the rule announced in *Bamberger v. Geiser*, 24 Or. 203, 33 Pac. 609, that it was the appellants' duty, when paying the money to Wade, to see that it was properly applied in the discharge of the indebtedness, and the court below must have so assumed in reaching the conclusion manifested by its decree. But the decision in the case referred to it not applicable to the facts governing the controversy before us. In that case the assignee not only

received the note by assignment, but the mortgage was delivered into his possession and retained by him, while the money was paid to the first <sup>553</sup> mortgagees without any evidence of their right to receive it, and without even apparent authority to do so. In this case Wade, as trustee for the payee, retained possession of both the original note and mortgages, together with all other contracts, notes and writings, except the two new notes involved here, constituting the evidence of the terms, conditions and rate of interest under which the makers had the privilege of paying the portion of the original indebtedness owned by them, with the word "trustee" included, thereby imparting notice of the understanding and agreement that the amounts there specified could be paid to Wade as trustee. It, therefore, cannot be held, nor did this court in *Bamberger v. Geiser*, 24 Or. 303. 33 Pac. 609, hold, or mean to hold, that under such circumstances the persons making the payments were bound to see that the money was properly applied.

The principle here invoked was recognized in *Swegle v. Wells*, 7 Or. 222. There the defendants made application to Shaw & Henton, money brokers, for a loan, offering to secure the same by a real mortgage. They did not have the money, but reported the application to Swegle, who agreed to make the loan. It was agreed that the loan would be made in Henton's name, and the note made payable to him or bearer. A note and mortgage were executed accordingly, and the money paid into the hands of Shaw & Henton, who delivered it to the applicants. The note was then turned over to plaintiff, and while in his hands, before due, its maker paid the full amount therein to Shaw & Henton at their office. The defense raised was to the effect that the money was paid to plaintiff's agents, who were authorized to receive it, thereby canceling the note; while plaintiff there contended that Shaw & Henton were not his agents, and were without authority to collect the money, and that it was the duty of the defendant to have seen that the money was properly applied. Although a suit in equity was brought to foreclose the mortgage securing the note, the case was tried before a jury. This court there held that while the verdict of the jury was only advisory to the chancellor, not conclusive, and might be treated as a mere nullity if not supported by the evidence, <sup>554</sup> yet, there having been evidence to the effect that Shaw & Henton were in the real estate and brokerage business, and had been intrusted with the authority to make the loan, as well as with the authority to perfect the

transaction and take the note payable to Henton, or bearer, notwithstanding the plaintiff was the lawful owner and holder of the note for value before due, with the note in his possession, the evidence was sufficient to show authority in Shaw & Henton to collect the amount named in the note, and the verdict of the jury would not be disturbed, and equitable relief was accordingly denied. To the same effect, see 2 Kent, 613; Wardrop v. Dunlop, 1 Hun, 325; Williams v. Walker, 2 Sand. 325; Hatfield v. Reynolds, 34 Barb. 612; Lazier v. Horan, 55 Iowa, 75, 39 Am. Rep. 167, 7 N. W. 457; Palo Alto B. & I. Co. v. Mahar, 65 Iowa, 74, 21 N. W. 187; Thomassen v. Van Wyngaarden, 65 Iowa, 687, 22 N. W. 927; Kasson v. Noltner, 43 Wis. 646.

6. Wade's authority to represent respondents, whether expressed or implied, did not cease until after his insolvency became known, and not until after all payments appearing in the evidence were made; he during all this time retaining the securities which the payments were intended to cancel. In Hatfield v. Reynolds, 34 Barb. 612, one Purdy, an attorney for Hatfield, made a loan for him to Reynolds. Purdy retained the security in possession for safekeeping, received the interest regularly, and finally the principal was paid to him. Purdy died insolvent without accounting to Hatfield. The lower court there held that such bond and mortgage were left with Purdy only for safekeeping, and not for the purpose of collecting either principal or interest; and, he having acted without authority, defendant was liable. On appeal, this decision was reversed, the court holding that, as plaintiff left the bond and mortgage with Purdy for safekeeping, and evidently permitted it to remain for other purposes, allowed payments to be made upon it to Purdy, received the amount of these payments from him and suffered him to indorse them upon the bond, it would be deemed from these facts, coupled with the circumstances attending the <sup>555</sup> origin of the bond and mortgage, that authority to Purdy to receive payments was implied, and observes: "I do not perceive that if the defendant had taken the precaution to call for the production of the papers whenever he made a payment, he would have strengthened this implication. The authority is implied from the possession of the papers and the continued receipt of money upon them, which are facts, and not from the exhibition of the papers by the agent, which is only the evidence of the facts. . . . To have called for the bond and mortgage under the circumstances of this case, would have been a very prudent and proper precau-

tion, but it would have been only a precaution. It would have enabled the defendant to verify the authority of Purdy, but it would have been no more than verifying it."

7. After a careful consideration of the evidence, as disclosed by the record and law applicable thereto, we can reach no other conclusion than that Wade was the agent of respondents with full authority to collect the sums represented by the notes given, and so collected the money which was paid to him in trust for the benefit of respondents with their full knowledge and assent; and that sufficient having been paid to him in that capacity to cancel the principal and interest of all the notes given, they, together with the mortgages, should be canceled. The prayer of the answers to that effect should, therefore, be granted.

The decree of the court below should be reversed, and one entered here in accordance with these views.

#### ON MOTION FOR REHEARING.

KING, C. 8. Respondents, in their petition for rehearing, contend that we were in error in the statement in our former opinion to the effect that the signatures to the eight promissory notes, made payable to the order of C. B. Wade, trustee, were procured, and notes delivered, after he received the Teal note and mortgages duly assigned to him. It is true that the assignment of the <sup>556</sup> Teal instruments, as well as of the new notes, are dated June 29, 1898, and the written agreement between Wade and appellants is dated the day following; and, while the \$28,000 draft may have been forwarded to Teal by the Pendleton Savings Bank on July 1st, the money was actually paid to the bank for that purpose, and assignment of note and mortgages recorded, June 30, 1898. It is evident that respondents' counsel make no distinction between the dates as they appear on the instruments in evidence and the actual time when the various steps were taken, and that they overlook the governing feature that the various transactions, although requiring several days for completion, must be considered as a whole.

On these points various facts and circumstances sustain the conclusion heretofore reached, an instance of which we quote from the testimony of Norborne Berkeley as follows:

"Q. At the time this transaction was made, in what capacity, if any, were you acting for Mrs. Despain and the other defendants? A. I was acting as their agent in handling the affairs of the Despain estate.



"Q. Tell the court how it occurred. A. We owed Mr. Teal, or rather Mr. D. P. Thompson, I think, by a note made to J. N. Teal, \$28,000. I thought there was an understanding we could pay part of it off, and I wrote to Teal and asked if we could sell a ranch and apply the money, and he said, 'No.' I thought that possibly we might get the money somewhere else, and I went to Mr. Wade. The first time I asked him if he could let us have \$28,000, he said: 'No, we haven't got the money now, but can probably let you have it later.' And, probably during the same week, I went back to ask him about it, and he said: 'Yes, I think we can get the money now, and will let you have it.' I told him: 'If you will buy this note and hold it and allow us to pay it off in such sums as we can, it will suit us better, as we want to sell certain ranches and apply it whenever we can.' He was to give us a lower rate of interest. We were paying 8 per cent, and he agreed to let us have it for 7, for which he would charge us \$1,500. When Mr. Wade told me they had the money, I went down there, and he had some notes prepared in the bank aggregating \$29,500. The understanding was the first one of the <sup>557</sup> notes paid was to be the bonus note paid to get the money, and get the concession of interest, and to be allowed to pay the matter off as we wanted to. We had been informed that Mr. Teal had sent his note and assignment of his mortgage to the Savings Bank, so Wade informed me when we went in there. We went down, and he took up the note and assignment of the mortgage, and when we got back he showed me he had this note in his possession. I surrendered him the \$29,500 note, or notes, with the understanding they should be kept together.

"Q. Were you acting for them as agent in this transaction? A. Yes, sir.

"Q. You knew those notes were to raise that money to pay off that loan of Teal's? A. No, I didn't know that they really owed the money before he got the notes; that is, he had the Teal assignment and Teal note before the notes were delivered to him.

"Q. You say he had the money when the assignment was delivered to him. How do you know that? A. I didn't say he had the money. I said he had the \$28,000 note and assignment of mortgage when the notes were delivered to him."

It is argued that McLeod received his note June 29, 1898, and our attention is directed to certain testimony in support of this contention; but the answers cited do not support this theory, nor do we find anything in the record to

that effect. True, it is disclosed that McLeod gave a check to Wade on that date for \$7,000, for which he was to receive a note to be executed by appellants; but he does not state that the note was turned over at that time, and it is clear, from the record, that all the money necessary for taking up the Teal note and mortgages was advanced to Wade, and that the Teal instruments had been assigned to and were held by him as trustee, when this was done. All of this is consistent with Berkeley's statement to the effect that, when Wade told him he had the money, the notes were then prepared, and, on learning he had the assignment of the \$28,000 note and mortgages, the new notes were then delivered to him. McLeod's check, dated June 29th, is shown by the stamp of the bank thereon to have been cashed the following day. The testimony of both McLeod and Hartman indicates that it was the <sup>558</sup> understanding between all the parties that the new notes should be secured by an assignment of the Teal note and mortgages to Wade, as trustee, and should be held by him in that capacity; the legal title to remain in him until the \$29,500 consideration expressed in the new instruments should be paid in full, during all of which time the old note and mortgages should continue in full force and effect. By mutual consent he thereby became the holder and owner of the legal title to the indebtedness, as well as the party with whom defendants were expected to deal and to whom they were to make their payments. The claim of \$29,500 was, accordingly, represented by the various instruments in the aggregate, and, as formerly stated, was in the same position as if the contents, conditions and effect of all the new instruments and agreements had been written across or attached to the old note and securities, and made a part thereof, though the method adopted was more convenient by reason of the separate notes representing and distinguishing their respective interests, etc. It is, accordingly immaterial whether the signatures of the new notes were secured before or after June 29th, as they were of no binding effect until the entire transaction, including the assignment of the Teal note and mortgages, became complete, which, by relation, antedates the delivery of the notes, and which fact respondents are estopped to question, since the new notes, on which a decree is here sought, contained the indorsement: "This note is secured by a note of \$28,000, signed by same parties which is secured by real estate mortgages assigned to C. B. Wade, trustee." It is conceded that this indorsement was upon these notes at the time of their delivery. In fact, it is

that effect. True, it is disclosed that McLeod gave a check to Wade on that date for \$7,000, for which he was to receive a note to be executed by appellants; but he does not state that the note was turned over at that time, and it is clear, from the record, that all the money necessary for taking up the Teal note and mortgages was advanced to Wade, and that the Teal instruments had been assigned to and were held by him as trustee, when this was done. All of this is consistent with Berkeley's statement to the effect that, when Wade told him he had the money, the notes were then prepared, and, on learning he had the assignment of the \$23,000 note and mortgages, the new notes were then delivered to him. McLeod's check, dated June 29th, is shown by the stamp of the bank thereon to have been cashed the following day. The testimony of both McLeod and Hartman indicates that it was the <sup>558</sup> understanding between all the parties that the new notes should be secured by an assignment of the Teal note and mortgages to Wade, as trustee, and should be held by him in that capacity; the legal title to remain in him until the \$29,500 consideration expressed in the new instruments should be paid in full, during all of which time the old note and mortgages should continue in full force and effect. By mutual consent he thereby became the holder and owner of the legal title to the indebtedness, as well as the party with whom defendants were expected to deal and to whom they were to make their payments. The claim of \$29,500 was, accordingly, represented by the various instruments in the aggregate, and, as formerly stated, was in the same position as if the contents, conditions and effect of all the new instruments and agreements had been written across or attached to the old note and securities, and made a part thereof, though the method adopted was more convenient by reason of the separate notes representing and distinguishing their respective interests, etc. It is, accordingly immaterial whether the signatures of the new notes were secured before or after June 29th, as they were of no binding effect until the entire transaction, including the assignment of the Teal note and mortgages, became complete, which, by relation, antedates the delivery of the notes, and which fact respondents are estopped to question, since the new notes, on which a decree is here sought, contained the indorsement: "This note is secured by a note of \$28,000, signed by same parties, which is secured by real estate mortgages assigned to C. B. Wade, trustee." It is conceded that this indorsement was upon these notes at the time of their delivery. In fact, it is

through this indorsement that respondents maintain their rights to foreclose the Teal mortgages.

It is also necessarily conceded that the old note and mortgages remained in force at least until the new notes were executed, which being true, it follows that when the new notes were delivered the Teal note and mortgages, by reason thereof, were either paid or not paid. If not paid, they then remained in <sup>559</sup> full force and effect until the entire indebtedness was liquidated, and, Wade having been made their custodian, and it having been required, as a part of the conditions upon which the money was advanced, that he should hold the same for respondents, it cannot be seriously questioned but that the payments made under such circumstances were made to the party authorized to receive them, and respondents would be bound accordingly. In that event, it would become a purchase outright, concerning which respondents would necessarily be bound by Wade's acts as much so as if the money advanced had been furnished without the execution and receipt of the new instruments. On the other hand, if the execution of the new notes paid the old debt, it would follow that the former note and mortgages became extinguished, and, while the new notes contain the indorsement that they are secured by the Teal instruments, yet, if paid and extinguished, this fact could be admissible only for the purpose of proving an oral agreement to execute a mortgage to secure the payment of the money advanced, or, what is its equivalent, an oral agreement to revive a mortgage that has been fully paid, to include not only the canceled claim, but an additional note of \$1,500. Whether such agreement could be enforced in equity is not necessary to a determination of this suit. It is sufficient to observe that respondents do not seek a specific performance of such contract, nor is an issue to that effect disclosed by the pleadings.

But it appears here that the mortgages and note were duly assigned to Wade, and that Teal was paid in full by him with funds advanced by respondents for that purpose, thereby, up to that point, making it a purchase outright. Then, as evidence of the fact that neither the mortgages nor the note were deemed canceled, it was expressly understood and agreed, and so stamped upon each note issued, that it was secured by the old note and mortgages, thus clearly indicating that each was to remain in force and effect, to be available at any time there should be a default in the payment of any portion thereof, in accordance with the terms of the new notes, which not only secured the <sup>560</sup> interest

of each of the parties advancing the money with which the Teal note and mortgages were purchased, but contained the additional terms in reference to the interest and the time of payment granted to appellants. We thus find them retaining and using the old note and mortgages through Wade, as holder of the legal title, with which to secure the indebtedness represented by the new instrument. The illustration given by Sturgis' counsel, where a party may be made a trustee by mere operation of law to protect innocent holders of negotiable instruments, is not applicable to the case at bar. The notes here involved are held by persons who, in law as well as in fact, are parties to the agreement whereby Wade was made their trustee, and where, by express agreement stamped on the notes, it is provided that the old instruments shall secure the payment thereof, and that this security was to be held by this expressly created trustee. In the one instance the trustee is created by operation of law, and, in the other, by an express and implied agreement of all concerned. The act of Wade (in his effort to perfect the deal and thereby make certain the \$1,500 bonus, which he would otherwise have lost), in guaranteeing the payment of some of the notes, is not in any manner inconsistent with his position as agent for respondents during the transaction as well as after it became complete.

9. Nor are we aware of any rule precluding an agent from guaranteeing to his principal the payment of claims handled by him for such principal, especially, as in this case, where the agent was to be one of the beneficiaries in conjunction with the parties whom he was to and did represent. In this case, it appears that he was not only willing to guarantee the payment of some of the notes, but also consented to retain the old note and mortgage security, and that he received moneys from time to time, all of which constituted a means of aiding and insuring the payment of not only the full amount of money advanced, with interest, to the parties furnishing it, but his bonus as well, in proportion to the respective interests of each, thereby furnishing additional security to respondents for the money advanced by them. It is <sup>561</sup> hardly possible, nor is it reasonable, to assume that Wade was acting in any other capacity than as their agent, or to assume that, after the transaction was completed, he was agent for appellants in reference to matters here involved, for to do so would be to accept the conclusion that respondents adopted an extremely unbusiness-like method in this instance by retaining only the new notes, and, through Wade, as

appellants' agent, permitting the payors and mortgagors to retain the mortgage security. The mere statement of this theory is sufficient for the answer.

It is also urged that there is nothing in the evidence of either of the parties indicating any agreement to the effect that the proceeds of the sale of the lands should be paid to Wade, and by him applied on the mortgage indebtedness, it being insisted that the proceeds received from the rent only could be thus considered. After a re-examination of the testimony, we find that the conclusion reached on this point in our former opinion is not only clearly deducible from the proceedings taken as a whole, but is manifest from the testimony of McLeod, as well as of Hartman, Sturgis' agent. McLeod, after stating that Wade was to hold the old note and mortgage as security for the notes was asked:

"Q. Did he tell you anything about having these other notes further secured by having the city rents turned over to him? A. I asked how he was to pay the interest on these notes. He said the rents was to come to him, and if any of the property was sold they would apply it on these notes. That is the reason he gave on or before five years after date, so they could have a chance to sell it.

"Q. He also told you he would have these rents assigned to him to apply on the notes? A. He said he could pay the interest because he was getting the rents.

"Q. How did you get your interest payments you have on there? How was it paid to you and by whom? A. He gave that credit on the back of them, and he made a memorandum of it always and held it, and always gave me credit on the back for it.

562 "Q. Then you would bring in the note, and he would indorse the amount on the back? A. Yes, sir."

That McLeod knew of the transactions going on, and received the benefits without objection, is manifested by the following question propounded to him, and his answer thereto: "Did you ask him (Wade) about any releases of mortgages he had made at any time? A. He said he was releasing property."

10. That Sturgis knew of the transactions, and with such knowledge recognized Wade as her agent and received the benefits thereof during all of this time, clearly appears from the various facts and circumstances disclosed by the record. For example, she authorized Wade to draw \$7,000 from her bank account with which to procure the Teal note and mortgages securing the same. Both she and McLeod understood

that Wade should collect and receive the rents of the mortgaged property, that the debt should be paid in installments, and that Wade would hold the Teal mortgages as security for respondents' notes. They were largely interested in the bank in which he was cashier and trusted him with the money. They went to him for their payments and never approached the appellants, or any of them; and, in addition to these circumstances, Mr. Hartman, the agent of Sturgis, says:

"Q. Tell us what Mr. Wade told you about that note. A. He said he was taking it up—this large note of Teal's for \$28,000—and wanted to handle it here at a reduced rate of interest, so that when the rents were collected, and any property sold, it could be applied on the payment of the notes in partial payments."

Here we have the purpose made known to Hartman before the deal was consummated, which, being followed with the making of Wade trustee for all, and acceptance of the note with statement indorsed thereon, through which she, with others interested, seek this foreclosure, makes the conclusion inevitable that Sturgis, with other respondents, in law, as well as in fact, recognized Wade as her agent; and while Wade, during the transaction until its completion, was the pivot around which all the <sup>563</sup> parties to the deal were acting, and to whom they looked for its proper consummation, his relationship with appellants, so far as the questions here involved were concerned, was at an end on its completion, and he thereafter continued as the agent of respondents only. He was made the custodian of and held the legal title to the Teal note and mortgages on which appellants, by agreement, oral and written, were bound to pay all rents and proceeds of sales to him, and in accordance therewith all payments were made to him, which acts respondents, to say the least, impliedly approved and did not question so long as they received the benefits, but seek to avoid that part of the arrangements thus made and recognized which may appear to be to their injury. It is settled that such cannot be sanctioned by courts of equity. Respondents, under such circumstances, are estopped from questioning Wade's authority to receive payments from defendants on this indebtedness, and that he was acting as their agent throughout the proceeding. It is too well settled to admit of serious discussion that the principal must adopt or reject the act of his agent as an entirety, and cannot receive the benefit of such agency without bearing its burdens: *Coleman v. Stark*, 1 Or.

115; *La Grande Nat. Bank v. Blum*, 27 Or. 215, 41 Pac 659.

11. We are quoted, in effect, as saying that all oral agreements between the parties were subsequently reduced to writing. In this deduction counsel are in error; our statement being that, as a part of the transaction, an agreement was entered into concerning the collection and disbursement of rents which was afterward reduced to writing, being the instrument there quoted. But we neither said, nor meant to say, that all the transactions were included in the written contract, as many took place afterward. Nor was it necessary, under the status of the parties at the time suit was brought, that the written instruments should have included all dealings between them. Lands were sold and mortgage released, and the proceeds thereof having been accepted, and the oral agreements executed and acted upon, is sufficient to take the case out of the statute of frauds. <sup>564</sup> In fact, it is too well settled to admit of serious doubt that agreement whether oral or partly oral only, when once executed, is binding on all parties thereto. As formerly stated, the old note, although in Wade's possession, is treated and recognized, not as evidence merely, but as having sufficient life to continue the mortgages in force and to entitle respondent to maintain this suit for their foreclosure, but for all other purposes are treated as extinguished, for, if available only as evidence of the existence and effect of the mortgages, is to no purpose, as it could only tend to prove an intent to revive a canceled instrument, for which purpose it would be insufficient. In this connection it must be remembered that this is not an action on the notes, but a suit to foreclose the mortgages.

It is urged by counsel for Mrs. Sturgis that, as she did not file this suit, the statement in our former opinion to the above effect, to use counsel's language, "has been washed away by an avalanche from the record itself." True, she did not bring this suit, and appears only as one of the defendants; but, notwithstanding that feature, she has no interest in common with appellants, and was made a defendant only because of having an interest in the subject matter involved, and by reason of refusing to join as one of the plaintiffs. Although a defendant, she affirmatively pleads and formally sets up her interests, and makes similar averments and seeks the same relief as the plaintiffs. From this it follows that, whether she be termed a plaintiff or defend-



ant, or whether she joined in the filing of the suit, or subsequently saw proper to move and assert similar rights in the same manner through the same source, is immaterial, and, to say the most in favor of counsel's contention in this respect, is what might be termed a "distinction without a difference." The inconsistency of her position is manifest, whether we say, "for the purpose of bringing this suit," etc., or adjust our statement to what is, in effect, counsel's position on this point, and say, "for the purpose of seeking a decree of foreclosure in her favor she recognizes the old note as having sufficient life to entitle her to foreclose the mortgages for which she recognizes Wade <sup>565</sup> as her trustee, but considers the note extinguished, and denies Wade's trusteeship for any other purpose."

The transactions shown in this case clearly bring it within the principles announced and recognized in *Coleman v. Stark*, 1 Or. 115; *Wills v. Wilson*, 3 Or. 308; *Swegle v. Wells*, 7 Or. 222; *La Grande Nat. Bank v. Blum*, 27 Or. 215. 41 Pac. 659. And these decisions on the points here involved are in harmony with the great weight of cases in this country, many of which are cited in our former opinion. As is in effect clearly held in *Swegle v. Wells*, 7 Or. 222, "the ordinary rules relating to commercial paper," referred to by counsel for McLeod, cannot apply to such cases; nor can it make any difference that the verdict of the jury in that case, to which our attention is directed, was left undisturbed, as the conclusion here reached is in harmony with the result there, both as to the law and the facts under consideration.

12. Other points upon the merits are urged by counsel for respondents, but all of them, like some we have here re-examined, are discussed in our former opinion, and sufficient reasons are not advanced to entitle them to further consideration. Our attention, however, has been especially directed to the moneys paid to Wade by appellants, concerning which it is maintained that his receipts are insufficient to cancel the indebtedness. In this connection, our attention is called to the "Wade-Despain Trust Account," by reason of which it is claimed that an agency is shown between Wade and defendants; that it shows a deposit to the credit of that account of \$46,313.78, and a payment to the owners of the new notes of but \$18,650; that this account discloses \$7,000 yet due on the McLeod note, and \$1,157.45 on the Sturgis note; and that the balance of the deposits was applied in payment of interest on the notes, taxes and insurance for defendants, including moneys paid to the Berkeleys and Des-

pains, and in the cancellation of a certain note and mortgage on defendants' property in Union county, showing disbursements from this fund of \$1,501 more than received. The fallacy in this contention lies in assuming that appellants are bound by everything shown by the books and checks relative to the Wade-Despain <sup>566</sup> Trust Account. This account was adopted by Wade after he had entered upon his duties as trustee for the holders of the new notes, and was merely a method adopted for his own convenience, over which appellants had no control. The money was paid to Wade, out of which certain sums were to be first paid, such as the \$1 per month to Mrs. Despain and payment of taxes, etc., in accordance with the understanding of all; but it was immaterial to her, as well as to the other appellants, as to how the account was kept in the bank after having been paid to the party entitled to receive it. All in excess of the sum to be expended under the written agreement was paid to him for the purpose of reducing the principal and interest on the indebtedness covered by the mortgages, and was under the control of Wade only. He held the mortgages and original note, neither of which was extinguished until fully paid. Appellants, accordingly, paid the money to the holder of the legal title thereof, and it was not incumbent upon them to see that it was credited on the proper instrument: *Swegle v. Wells*, 7 Or. 222; *Hatfield v. Reynolds*, 34 Barb. 612.

The question as to the application of moneys received on the debt when collected by Wade became a matter between him and respondents only, and if applied as it should have been, the debt was canceled, while, if not so applied, to that effect, so far as the same may affect appellants, must be determined according to, and under, the well-known maxim that "equity looks upon that as done which should have been done," which would entitle the notes and mortgages to cancellation. In respect, therefore, to this account, it was opened by Wade as a trustee, and he thereby became the depositor, and, as such, alone had authority to draw upon it. A large part of the money deposited to the credit of the account is shown to have been paid to him by check, which checks were made payable to his order as trustee. The money, therefore, paid to and received by him was received in his trust capacity, and so far as any part thereof was paid to appellants or disbursed on expenses of the trust, they are properly chargeable, but so far as not thus paid, are chargeable against respondents. <sup>567</sup> The books, statements, etc., showing the condition of the account, constitute admissions

against his interest as trustee, and as such, were properly admitted in evidence for the purpose of showing the payments to him to be applied on appellants' indebtedness, for which they are accordingly entitled to credit thereon to the full amount of the sums shown by this account, as well as those disclosed by any other statements or receipts to have been received by him, in excess of disbursements made to and for them under their agreement. The moneys, therefore, drawn from this account, which are properly chargeable to the appellants, are the sums paid to Mrs. Despain for her support, to the Berkeleys, for collecting rents and for taxes, insurance, repairs, etc., amounting to \$17,756.50.

After a careful re-examination of the accounts, statements, deposit-books, etc., showing receipts and disbursements by Wade, under his trust, we find the sums for which respondents are chargeable to be as follows:

June 29, 1898, 8 notes payable to Wade as trustee, aggregating.....	\$29,500.00
Interest on same to December 30, 1904, date of last Credit.....	13,422.50
Aggregate amount paid to N. E. Despain.....	8,500.00
Amount paid to Norborne Berkeley.....	1,470.75
Amount paid to C. Berkeley.....	129.35
Amount paid for insurance, taxes, repairs, etc....	4,644.94
Aggregate interest on last four sums (approximate).....	3,425.00

Total.....	\$61,091.64
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Moneys received by Wade, as trustee, from appellants and their agents are as follows:

Between July 29, 1898, and September 11, 1903, cash from Snyder.....	\$13,685.69
July 18, 1898, cash from LaFontaine.....	5,500.00
March 7, 1899, paid to C. B. Wade from sale of Grande Ronde ranch.....	8,000.00
March 30, 1899, from sale of other property....	3,500.00
September 4, 1899, cash from Campbell from sale of land.....	302.00
September 8, 1903, cash from Florence Berkeley..	1,408.00
<sup>was</sup> December 8, 1903, cash from Peringer.....	1,050.34
Aggregate amount of interest on these payments from date of each thereof.....	11,414.80
Total amount of rents collected.....	17,756.50

Total credits.....	\$62,617.83
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It will be observed, therefore, from the statements, books, etc., introduced in evidence, that Wade, as trustee, received from appellants and for respondents, to be applied in the payment of the instruments secured by the mortgages, about \$1,200 more than sufficient for the cancellation thereof.

It is urged, however, that the item of \$3,500 was a loan to Wade by appellants, and that they should not be credited with this item; but we find nothing in the record to justify this inference, nor is there anything in the statement made by Berkeley to Hartman, testified to, when considered in connection with Berkeley's explanation thereof, to justify such conclusion. In fact, the receipt itself, which it is conceded was given for the money, is sufficient to rebut counsel's theory, it being as follows:

"Pendleton, Oregon, Mch. 30, 1899.

"Received from the Despain Estate on account of Wade trustee mortgage, against the estate property, thirty-five hundred dollars to be applied on notes in final settlement—interest in accordance with terms of mortgage.

"C. B. WADE, Trustee."

13. It is also contended that the \$8,000 received from the sale of the Grande Ronde ranch should not be applied on respondents' claim. This again overlooks the legal effect of the agreement by which Wade was made the holder of the legal title to the Teal note and mortgages which were not to be deemed canceled until the entire amount represented therein should be paid. The evidence discloses that this land was sold and deeded to Wade by the Despains for the consideration of \$8,000 over and above the mortgage liens thereon, under an express agreement that this sum should be applied on the mortgage indebtedness held by him against them, and that the deposit-books of the Wade-Despain Trust Account show that he received this money <sup>569</sup> from them, placing it to the credit of this fund. This transaction was the same in effect as if the Despains had sold the farm, subject to the mortgage, to any other person, and paid the \$8,000 received therefor to Wade on the mortgages, and he, in place of paying it to respondents under his trust, had loaned it to the purchaser, or to any other person with which either to cancel the lien on the farm sold or for any other purpose. In short, the question as to what he may have done with this or any other fund received from appellants for application on the mortgage indebtedness became, under the record herein, a matter for adjustment between the respondents and

Wade, as their agent, and could not, as a matter of law, concern appellants.

Under any construction that may reasonably be applied to the evidence, as well as from any inference that may logically be deduced from the record, it appears that more than sufficient funds have been paid to the party lawfully entitled to receive them for the cancellation of the indebtedness.

It follows that the petition for rehearing should be denied. Reversed. Rehearing denied.

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*The Addition of the Word "Trustee" to the Name of a person is notice of a trust, and calls for inquiry and examination: Marbury v. Ehlen, 72 Md. 206, 20 Am. St. Rep. 467. It has been held, however, that the fact that the word "trustee" is on the face of securities cannot put the purchaser to any inquiry beyond ascertaining whether the trustee has power to sell or otherwise dispose of them: Bank v. Looney, 99 Tenn. 278, 63 Am. St. Rep. 830. A person who is dealing with a tax collector personally and accepts his check signed "John A. Perkins, T. C.," is bound to know that "T. C." stands for tax collector, and that he has accepted the officer's check upon his trust fund held for the state: State v. Jahraus, 117 La. 286, 116 Am. St. Rep. 208.*

**CASES**  
**IN THE**  
**COURT OF CRIMINAL APPEALS**  
**OF**  
**TEXAS.**

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**FITZGERALD v. STATE.**

[52 Tex. Cr. 265, 106 S. W. 365.]

**CONCEALED WEAPONS—Carrying Pistol to Repair-shop.—**A person who carries a broken pistol to a blacksmith-shop to have it repaired, and not finding the blacksmith at home, carries it farther and returns to the blacksmith-shop where he has it repaired, does not violate the law against carrying concealed weapons. (p. 1096.)

Bryarly, Carter, Walker & Chamness, for the appellant.

F. J. McCord, assistant attorney general, for the state.

**266** **DAVIDSON, P. J.** Appellant was convicted of carrying a pistol. The state's case is that appellant was in the town of Center, Shelby county, loading his wagon with some purchases he had made from a store, when one of the proprietors observed a pistol in his coat pocket; he took him to one side and called his attention to it. Appellant replied it was out of repair and he brought it to a shop to be repaired. In support of this statement, himself and his son testified that the pistol was out of repair and could not be used, and that in going to the town of Center he brought the pistol to Shelbyville to a blacksmith, who repaired pistols, for the purpose of having it repaired; that it was broken and not in a condition to shoot. He proved by the blacksmith that he (appellant) did leave the pistol and that he repaired it, and that it was practically in a useless condition. It was also shown that, in bringing it from his home to Shelbyville en route to Center, appellant stopped at the blacksmith-shop to leave it, but the blacksmith was out of town and could not be found; that he went on to Center, carrying the pistol

with him, having it in his wagon among effects carried in the wagon; that when he got ready to leave Center he took it out of the wagon and put it in his pocket, so that he would have it convenient to leave with the blacksmith and not have to go through the wagon and disturb things to get it out. This is practically the case. The conviction seems to be predicated upon the theory that appellant had diverted himself from the proper line of travel, and that, therefore, he was guilty of carrying a pistol. Under some circumstances, as decided in *Stilly v. State*, 27 Tex. App. 445, 11 Am. St. Rep. 201, 11 S. W. 458, this would constitute a violation of the law, but these facts do not bring the case within the rule announced in the *Stilly* case. There, no excuse was offered by appellant, and none attempted to be shown in justification of his carrying the pistol, if it had been a pistol as contemplated by the statute. The contention here is sustained by the evidence, as we understand it, that appellant had a broken pistol, out of repair, and that he carried it to the shop for the purpose of having it repaired, and failing to find the blacksmith at home, carried it on, and returned to the blacksmith-shop and did have it repaired. Appellant had a right to have his pistol repaired, and the right to carry it to the party who could do the work. This was not a violation of the law, and if it was such a pistol as was <sup>267</sup> not prohibited by the statute from being carried, the fact that he may have gone to Center and carried it with him would make no difference. It is only such pistol as is contemplated by the statute that is prohibited from being carried. We are of opinion that the facts do not justify this conviction.

The judgment is reversed and the cause is remanded.

Henderson, J., absent.

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*One may be Guilty of Carrying a Concealed Weapon* while alone in his own home: *Dunston v. State*, 124 Ala. 89, 82 Am. St. Rep. 152, 27 South. 333. But where a pistol is placed in a man's pocket by other persons, and he does not know it is there, and has no intention of violating the law against carrying concealed weapons, he cannot be convicted of that offense: *Miles v. State*, 52 Tex. Cr. 561, post, p. 1106.

## JONES v. STATE.

[52 Tex. Cr. 303, 106 S. W. 345.]

**HOMICIDE—Res Gestae and Dying Declarations.**—Where a woman, about an hour after hearing shots fired (she remaining in bed during that time because ill), goes outside and finds her husband wounded, and in reply to her question he states that A has shot him, and fifteen minutes later he remarks that he is going to die, and he does die during the night, his statements are admissible in evidence on the trial of A for murder. (p. 1098.)

**JURY TRIAL—Verdict by Eleven in Homicide Case.**—Where it is agreed in open court by the parties in a homicide trial that one of the jurors may be excused, a verdict thereafter returned by the eleven remaining jurors cannot be upheld. The constitution places the right of trial by twelve jurors in a felony case beyond the power of the accused to waive. (pp. 1100, 1101.)

Davis & Davis, for the appellant.

F. J. McCord, assistant attorney general, for the state.

**304 DAVIDSON, P. J.** Appellant was convicted of murder and given a life sentence.

The evidence of this case is not as cogent as some cases of this character passed upon on appeal, yet, there is, in our opinion, enough to warrant us in concluding that the jury were correct in their finding.

Appellant was in the neighborhood of the homicide, had made threats against the deceased; deceased was a witness against him in a hog-stealing case. Appellant was seen the night of the homicide, and after the killing should have occurred, with a shotgun at what the witnesses term an "in-fair." This gun was handed to a named party to be kept until after the festive occasion had terminated. The deceased came to his death by means of a shotgun, both barrels of which was discharged into his body. About an hour after he was shot his wife, who was in bed, managed to reach him, and in answer to a question by her, appellant stated that deceased had shot him. This is the substance of the state's case. The defendant introduced evidence to the effect that he was in that neighborhood, and accounted for his presence there by showing that he was securing the signatures of certain parties to some appearance bonds that he was required by the sheriff to give under some criminal charges. He denied having a shotgun, and the party to whom the state's witness stated that appellant handed the gun at the "in-fair" denied receiving it. Appellant showed by some of his counsel, perhaps all of them, defending him



in the hog-stealing case, that the deceased was sufficiently favorable to appellant in that case for the district attorney to continue said case in order to secure other testimony. They also attack the widow of deceased by showing she had, on the day after the homicide, stated that deceased said nothing in regard to who killed him, and that she further so testified before the grand jury. They also introduced the constable, who stated that he saw tracks in a certain corner of the fence near the residence of the deceased made by a party who wore a larger size shoe than appellant. This was practically appellant's side of the case. Without going into a discussion of this testimony, we are of opinion that it was sufficient, if the jury believed the state's side of the case, and this they did.

A bill of exceptions was reserved to the action of the court in permitting the widow of the deceased to detail before the jury the statement of the deceased that appellant was the party who shot him, on the <sup>305</sup> grounds, first, that it was not *res gestae* and was too remote; and, second, that it was not brought within the rule of dying declarations. The facts show in this connection, as set out in the bill, that the wife was in bed at the time the shots were fired, having three days previously given birth to a child; that appellant was on the gallery with an older child at the time the shots were fired; that she lay there in bed about an hour, fearing to get up on account of her condition from childbirth; that her husband said nothing; that at about the expiration of an hour, she went out to see what was the matter, succeeded in getting him in the room, and then asked him who it was shot him. He said Boy Polk; she asked again, and he said Ivory Jones. It is further stated that Boy Polk was a name that Ivory Jones, appellant, was also known by, or called. One of the loads of shot took effect in the head, the other in the body. In about fifteen minutes, or such a matter, after he made the above statement, he remarked, "I allow to die," and during the night did die. Under the conditions above stated, we are of opinion that the evidence was admissible: See *Lewis v. State*, 29 Tex. App. 201, 25 Am. St. Rep. 720, 15 S. W. 642. Here there was about an hour intervening between the shot and the statement. His suffering was rather acute from the wound in the head, as well as that in the body, and evidently his mind was not in such condition as to manufacture and narrate a story. He had no opportunity to make a statement to anybody else, unless he had talked with his

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wife in another portion of the house. In Lewis' case, the time extended over possibly an hour and a half, and the deceased in that case was not in position to make a statement earlier, and her mind was also in a condition not to have manufactured the statement; at least, such was the theory upon which the testimony was held admissible. Under the Lewis case, we are of opinion that the alleged statement of the deceased was admissible.

Appellant attacked the charge on circumstantial evidence. We do not think there is any merit in that (see *Smith v. State*, 35 Tex. Cr. 618, 33 S. W. 339, 34 S. W. 960), and besides, the giving of the charge on circumstantial evidence was more favorable to appellant's rights than the facts justify. The statement of the deceased places the case possibly beyond the pale of circumstantial evidence into one of positive testimony.

We think the charge in every way is free from such criticism as requires a reversal of the judgment. It is therefore affirmed.

Henderson, J., absent.

#### ON REHEARING.

DAVIDSON, P. J. On a former day of this term the judgment herein was affirmed. There were two questions discussed in the opinion. Appellant files a motion for rehearing, setting up the fact that he was tried by only eleven jurors. This was not mentioned in the motion for a new trial; therefore, was overlooked. An inspection of the <sup>308</sup> record discloses that a jury of twelve men was impaneled and the trial proceeded. Pending the trial information was conveyed to the court, to the attorneys and appellant that a brother of one of the jurors had been killed. It was thereupon agreed in open court by the parties, appellant, of course, being present, that the juror should be excused on the account of the homicide of his brother. He was excused and participated no further in the trial. The verdict was returned by the remaining eleven jurors. The motion for a rehearing calls our attention to these matters, and urges that we set aside the prior affirmance and reverse the judgment because the verdict was returned by only eleven jurors. It may be further stated that the verdict was signed by each of the eleven jurors. In other words, it is conclusively shown that after the twelfth man was excused the case was tried by only eleven jurors. We are of

opinion that appellant's motion for a rehearing should be granted.

Article 5, section 13, of our state constitution, reads as follows: "Grand and petit jurors in the district courts shall be composed of twelve men; but nine members of a grand jury shall be a quorum to transact business and present bills. In trials of civil cases, and in trials of criminal cases below the grade of felony in the district courts, nine members of the jury, concurring, may render a verdict, but when the verdict shall be rendered by less than the whole number, it shall be signed by every member of the jury concurring in it. When, pending the trial of any case, one or more jurors, not exceeding three, may die, or be disabled from sitting, the remainder of the jury shall have the power to render the verdict; provided, that the legislature may change or modify the rule authorizing less than the whole number of the jury to render a verdict."

It will be observed from the reading of this section of the constitution that a petit jury in the district court shall be composed of twelve men. This being a felony case is not brought within the provision of the constitution which authorizes nine members of the jury, concurring, to render a verdict. Nor was the juror excused brought within that provision of said section which authorizes a jury to render a verdict where not exceeding three of them died or were disabled from sitting. Then we have a jury originally composed of twelve men, one excused by agreement of the parties, and a verdict rendered by eleven, which is prohibited by the above section of the constitution. Section 10, of article 1, guarantees to the accused a trial by an impartial jury, and that, as was seen in the section quoted above, means twelve jurors. Section 15 of the Bill of Rights is as follows: "The right of trial by jury shall remain inviolate." Article 10 of the Code of Criminal Procedure reiterates this provision of the Bill of Rights in precisely the same language. Article 21 of said Code of Criminal Procedure provides: "No person can be convicted of a felony except upon the verdict of the jury duly rendered and recorded." Article 22 of the same code enacts: "The defendant in a criminal prosecution for any offense may waive any right secured to him by law, except the right of trial by jury in a felony case."

It would seem that the constitutional provisions cited, as well as the <sup>307</sup> acts of the legislature in obedience thereto, place the right of trial by twelve jurors in a felony case,

even beyond the reach of the accused party waiving such right. These provisions have been the subject of adjudication in many opinions in this state, all of them holding as sacred the right of trial by jury in the face of a waiver by the accused where the prosecution is for a felony: See *Lott v. State*, 18 Tex. App. 627; *Stell v. State*, 14 Tex. App. 59; *Jester v. State*, 26 Tex. Cr. 369, 9 S. W. 616; *Huebner v. State*, 3 Tex. App. 458; *McCampbell v. State*, 37 Tex. Cr. 607, 40 S. W. 496; *Ogle v. State*, 43 Tex. Cr. 219, 96 Am. St. Rep. 860, 63 S. W. 1009. There are many other supporting cases which we deem unnecessary to collate.

The motion for rehearing is granted and the former affirmation set aside, and because appellant was tried without a constitutional jury the judgment is now reversed and the cause remanded.

Henderson, J., absent.

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*The Admissibility in Evidence of Dying Declarations* is the subject of a note to *State v. Meyer*, 86 Am. St. Rep. 637. To render such declarations admissible it is only necessary that they be made after the infliction of a mortal wound, after hope of recovery has been abandoned by the declarant, and after he has realized that death is impending: *Sims v. State*, 139 Ala. 74, 101 Am. St. Rep. 17, 36 South. 138; *Craven v. State*, 49 Tex. Cr. 78, 122 Am. St. Rep. 799, 90 S. W. 311.

*While Declarations, to be a Part of the Res Gestae*, must as a rule be substantially contemporaneous with the principal event, they need not necessarily be concurrent with it. In fact, time is not necessarily a controlling consideration: *State v. Foley*, 113 La. 52, 104 Am. St. Rep. 493, and cases cited in the cross-reference note thereto: *Taylor v. State*, 47 Tex. Cr. 122, 122 Am. St. Rep. 675, and cases cited in the cross-reference note thereto.

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## SANDERS v. STATE.

[52 Tex. Cr. 465, 107 S. W. 839.]

**NEW TRIAL to Procure Evidence of Acquitted Codefendant.**—Where two persons are jointly indicted for manslaughter and one is tried and convicted, and subsequently the other is tried and acquitted, a new trial will be granted the former to obtain the testimony of the latter which before was unavailable because of the pendency of the indictment against him, if it appears that the new evidence is material to the defense. (pp. 1102, 1103.)

Ingraham, Middlebrook & Hodges, for the appellant.

F. J. McCord, assistant attorney general, for the state.

468 RAMSEY, J. Appellant, a negro woman, was convicted of manslaughter in the district court of Nacogdoches county on indictment charging her with the murder of one Charley Slay, a white man, at her home in Nacogdoches, on the seventeenth day of July, 1907.

It was conceded on the trial and incontestably shown by the evidence that the defendant did not herself shoot the deceased, but the case was tried and the substantial issue submitted to the jury was the question of conspiracy between appellant and her brother, Roy, who was alleged to have fired the fatal shot that resulted in the death of Slay. Appellant herein was first tried, and, therefore, her brother indicted for the same offense could not, and did not, testify. This is a sufficient statement of the case to illustrate the questions discussed in this opinion.

Later, at the same term, Roy Sanders was tried and acquitted. The first contention of counsel for appellant is, there was no evidence in the record sufficient to justify the submission of the issue of conspiracy between appellant and Roy Sanders to take the life of deceased, Charley Slay. As presented in this record, we would be inclined so to hold. However, the case must be reversed on another question, and as the testimony may not be identical with the facts as they appear in the record before us, we content ourselves with this statement.

After the conviction of appellant, Roy Sanders was tried and acquitted of the same offense as that for which his sister Octavia was here convicted. She made a motion for a new trial, among other grounds setting up the facts of the acquittal of Roy Sanders, and that his testimony was and would be material to her defense, and that she was denied the benefit of this testimony by reason of the pendency of the indictment against him. The facts to which it is averred the said Roy Sanders would testify are set up at great length in the motion for a new trial filed and sworn to by her. There can be no doubt of the materiality of this testimony.

As further ground of the motion for a new trial, allegations of coercion of the jury are made, discussion of her case, and other misconduct. As we view the matter, the court should have granted a new trial. As stated in the case of *Rucker v. State*, 7 Tex. App. 549: "There can be no doubt at this day as to the rule of the correctness of the rule in proper cases as now established in this state, that where two are jointly indicted and one is tried and

convicted, and subsequently the other is tried and acquitted, a new trial will be granted the former to obtain the testimony of the latter, where it appears that the new evidence is legal <sup>467</sup> and competent and material to his defense: *Lyles v. State*, 41 Tex. 172, 19 Am. Rep. 38; *Rich v. State*, 1 Tex. App. 206; *Huebner v. State*, 3 Tex. App. 458; *Williams v. State*, 4 Tex. App. 5; *Brown v. State*, 6 Tex. App. 286. In the case of *Gibbs v. State*, 30 Tex. App. 581, 18 S. W. 88, a conviction for murder in the first degree was set aside and the case reversed on the sole ground that the appellant in that case had been denied the testimony of a co-defendant who on trial had been acquitted. That case is precisely in point and authority for our action in this case.

For the error stated, the judgment of the court below is reversed and the cause is remanded.

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*The Granting of a New Trial rests largely in the discretion of the trial judge: State v. Vallery*, 47 La. Ann. 182, 49 Am. St. Rep. 363; *Scammell v. China Mutual Ins. Co.*, 164 Mass. 341, 111 Am. St. Rep. 462. In order to justify a new trial on the ground of newly discovered evidence, such evidence must appear material: *Campbell v. Harris Lithia Springs Co.*, 74 S. C. 282, 114 Am. St. Rep. 1001, 54 S. E. 378; *State v. Danforth*, 73 N. H. 215, 111 Am. St. Rep. 600, 60 Atl. 839. Newly discovered evidence to discredit a witness, or which is merely cumulative, does not warrant a new trial: *State v. Stickney*, 53 Kan. 308, 42 Am. St. Rep. 284.

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### SAMPLE v. STATE.

[52 Tex. Cr. 505, 108 S. W. 685.]

**AGGRAVATED ASSAULT—Familiarity with Female.**—For a man to catch hold of a woman's dress with one hand and put his other hand on her leg under her dress is an aggravated assault, if done against her will. (p. 1104.)

**AGGRAVATED ASSAULT—Instruction as to Battery.**—Where the court instructs the jury that the defendant is charged with an aggravated assault and battery, the omission of the word "battery" in submitting the case and applying the law to the facts is not reversible error. (pp. 1104, 1105.)

**CRIMINAL LAW—Allusion to Defendant's Failure to Testify.** In a prosecution for aggravated assault a remark by the county attorney that there has been no witness upon the stand to contradict the testimony of the prosecutrix is not an allusion to the failure of the accused to testify in his own behalf. (p. 1105.)

V. L. Shurtleff, for the appellant.

F. J. McCord, assistant attorney general, for the state.

<sup>505</sup> DAVIDSON, P. J. Appellant was convicted for aggravated assault, and his punishment assessed at a fine of one hundred dollars.

The application for continuance will not be discussed, because a bill of exceptions was not reserved to the ruling of the court refusing to grant it.

The court instructed the jury that, "An assault becomes aggravated by indecent familiarity of the person of a female by an adult male against her will and without her consent." Complaint is made that this submits a different offense from that charged in the pleading. We are of opinion there is no merit in this contention. Appellant, an adult male, is charged with having committed an aggravated assault upon the person of <sup>506</sup> Kittie Green, a female. The proof shows that appellant caught hold of her dress with his left hand, putting his right hand on her leg up under her dress. This was an indecent familiarity with her person if against her will and without her consent, and she testifies the acts of appellant were against her will and without her consent. This, under our authorities, would constitute an aggravated assault and justify the court in so charging the jury.

The court further charged the jury that if defendant, an adult male, committed an aggravated assault upon Kittie Green, a female person, by catching hold of the clothes of the said witness, Kittie Green, with his left hand, and by putting his right hand under her clothing and upon her leg against her will and consent, that they would find him guilty, etc. This is not, as contended by appellant, a charge upon the weight of the testimony. It directly applied the law to the very facts testified by the witness, and if the jury should believe these facts beyond a reasonable doubt, he would be guilty; and the court instructed that, if they should find beyond a reasonable doubt these facts existed, he would be guilty of an aggravated assault. The court, in a general way, informed the jury that appellant was charged by complaint and information with the offense of aggravated assault and battery in and upon the person of Kittie Green, a female, alleged to have been committed in Hill county, on or about December 1, 1906, to which defendant has pleaded not guilty. Objection is reserved to this, because it is not a correct statement of the offense charged in the complaint and information. We do not think there is any merit in this. The court stated this in a general way in stating to the jury the offense of which appellant stood charged; but in submitting the case to the jury the question of battery

was not referred to, but they were told if appellant committed an aggravated assault by catching hold of the clothes, etc. This, we do not believe, has any merit.

It is seriously urged that the remarks of the county attorney, to wit: "There has been no witness upon this stand to contradict the testimony of this girl, Kittie Green," was an allusion to appellant's failure to testify in his own behalf. We do not believe that this is such an allusion to the failure of appellant to testify in his own behalf as is contemplated by the statute, if in fact it was such an allusion at all. As a matter of fact, there was no witness on the stand to directly contradict Kittie Green in regard to this matter. The defendant could have taken the stand, but did not. Scroggins was in a different part of the same room, but Kittie Green says that he could not have seen her at the time that appellant assaulted her, though he was visible to her. To give the statute such a construction as urged by appellant would be tantamount, practically, to almost preventing a discussion of the case with reference to the testimony of the state's witness, when only one witness was used, defendant being the only other witness who could testify to the same facts. This case does not come within the rule laid down in *Washington v. State* (Tex. App.), 8 Tex. Ct. Rep. 944, but is more nearly like the case of *Rippey v. State*, (Tex. App.), 10 Tex. Ct. Rep. 927. Of course, wherever the failure of the defendant <sup>507</sup> to take the stand in his own behalf is directly alluded to or so pertinently as to direct the jury's attention to such fact or failure, the statute would apply. The statute must be given a fair and reasonable construction.

As this matter is presented, we are of opinion it is not violative of the statute, and not of such importance as to require a reversal of the judgment, and it is therefore affirmed.

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*Comment on Failure of Accused to Testify.*—A Statement by a Prosecuting Attorney in the course of his argument in a criminal trial that certain evidence stands uncontradicted does not violate the rule which forbids any comment on the failure of the accused to testify in his own behalf: *State v. Snider*, 119 Iowa, 15, 91 N. W. 762; *Johnson v. Commonwealth*, 29 Ky. Law Rep. 675, 94 S. W. 631; *People v. Hammond*, 132 Mich. 422, 93 N. W. 1084; *State v. Crawford*, 95 Minn. 467, 104 N. W. 295; *State v. Ruck*, 194 Mo. 416, 92 S. W. 706; although the accused is the only person in a position to contradict such testimony: *State v. Hasty*, 121 Iowa, 507, 96 N. W. 1115. Some authorities, however, have shown a disposition to depart from this rule: *Smith v. State*, 87 Miss. 627, 40 South. 229; *Hoff v. State*, 83 Miss. 488, 35 South. 950.

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## MILES v. STATE.

[52 Tex. Cr. 561, 108 S. W. 378.]

**CONCEALED WEAPONS—Absence of Intention to Carry.—**

Where a pistol is placed in a man's pocket by other persons, and he does not know it is there, and has no intention to violate the law against carrying concealed weapons, he cannot be convicted of that offense. To make him guilty, it is not sufficient that the jury should believe that he might have known by the exercise of reasonable diligence that the pistol was in his pocket; the failure on his part to discover the pistol, in the absence of knowledge that it was there, or any intention to violate the law, does not make him guilty. (p. 1107.)

Hopkins & Milliken, for the appellant.

F. J. McCord, assistant attorney general, for the state.

<sup>563</sup> **RAMSEY, J.** Appellant in this case was charged with unlawfully carrying a pistol, and his trial resulted in a conviction.

There are a number of questions raised in the case, but the only one which we think it important to notice is the correctness of the court's charge, and whether appellant's special charge No. 5 should have been given.

Appellant, a short time before his arrest, had moved from the country to the town of Lewisville, in Denton county. On the day of the commission of the offense charged against him he had gone from his barber-shop to a restaurant some forty feet from his place of business, thence to the postoffice, and from there to a drygoods store, thence back to the restaurant, and shortly after this was arrested and searched by an officer, and a pistol found on his person. It was claimed by appellant that he had had this pistol in his overcoat pocket, and that same had been taken from his overcoat by someone and placed in his dresscoat pocket, which was hanging in his barber-shop, and that at the time he was walking about the street of Lewisville he was unaware of nor did he believe that the pistol was in the coat he was then wearing. The testimony tended to raise the issue that appellant did not know at the time he was out on the street that the pistol was in the pocket of the coat he was then wearing. In this state of the proof, the court gave the following charge applicable to this issue: "If you believe from the evidence that the defendant did have on or about his person a pistol as charged, but if you further believe that the defendant

did not know, or could not have reasonably known, that pistol was in his coat at the time he did so carry the same then you will acquit the defendant and say by your verdict not guilty." The following special charge was requested by counsel for appellant: "If the jury believe from the evidence that the pistol charged to have been carried by defendant was placed in his pocket by someone other than defendant, and that he did not know that said pistol was in his pocket at the time he put the coat on nor at any time prior to the time of his arrest, and that there was no intent on the part of defendant to violate the law, then you will acquit defendant." This special charge, in substance states the law correctly, and should have been given. To make defendant guilty of a crime it is not sufficient that the jury should believe that he might have known by the exercise of reasonable diligence that the pistol was in his pocket. In other words, the failure on his part to discover the fact that the pistol was in his pocket, in the absence of knowledge of this fact, or any intention to violate the law could not make him guilty: See *Lyle v. State*, 21 Tex. App. 153, 17 S. W. 425; *Mangum v. State*, 15 Tex. App. 362; *Schroder v. State*, 50 Tex. Cr. 111, 99 S. W. 1003.

The judgment of the court below is reversed and the case is remanded.

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*One cannot be convicted of carrying concealed weapons where he does no more than carry a broken pistol to a blacksmith-shop to have it repaired, and, not finding the blacksmith at home, carries it farther and afterward returns to the blacksmith-shop where he finds it repaired: Fitzgerald v. State, 52 Tex. Cr. 265, ante, p. 1095.*

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## EX PARTE WOODS.

[52 Tex. Cr. 575, 108 S. W. 1171.]

**CONSTITUTIONS**—Interpretation of must be Unvarying.—A cardinal rule in dealing with constitutions is that they are to receive an unvarying interpretation, and that their practical construction is to be uniform; a constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. (p. 1117.)

**STATUTES**—Construing Language in Ordinary Sense.—A prime object of all rules for the interpretation of statutes is to ascertain the will and intent of the lawmaker; this may often be done, and usually can best be done, by giving effect to the

guage used, considered and construed in its ordinary sense. (p. 1118.)

**STATUTES—Aiding the Meaning of One Provision by Reference to Others.**—It is a cardinal rule of construction that the meaning of one portion of an act may be aided by other provisions contained in the same act, and that that construction should be placed upon such legislation as will give the whole effect. (p. 1119.)

**OCCUPATION TAX—Lack of Uniformity in Operation.**—If a statute which imposes a tax upon the sale of nonintoxicating malt liquors provides that it shall not apply to regular druggists who, "as such, keep for sale as a part of a regular drug stock, such proprietary medicines as 'malt extract,' 'malt medicine' and 'malt and iron' used exclusively as medicine and not as a beverage," such statute violates a constitutional provision that all occupation taxes shall be equal and uniform upon the same class of subjects. (pp. 1117, 1124.)

**OCCUPATION TAX—Lack of Uniformity of Operation.**—An occupation tax upon the sale of nonintoxicating malt liquors cannot be sustained as a police regulation if it violates a constitutional provision that occupation taxes shall be equal and uniform. (p. 1121.)

**STATUTES.**—If the Words of a Statute are Free from Ambiguity or doubt, and express plainly and clearly the intent according to the most natural import of the language, there is no occasion to look elsewhere for their meaning. (p. 1122.)

**OCCUPATION TAXES—Want of Uniformity in Operation.**—A tax upon the sale of nonintoxicating malt liquors which applies only to prohibition territory cannot be sustained under a constitutional provision that occupation taxes shall be equal and uniform within the limits of the authority levying them. (pp. 1123, 1124.)

**CONSTITUTION—Unchangeable Character of.**—The constitution is the organic law of the land; it stands, and should stand, unless otherwise declared in the manner provided by law, unchanged and unchangeable. (p. 1125.)

T. H. McGregor, J. J. Eckford, O. L. Stribling and Bisland & Bruce, for the relator.

F. J. McCord, assistant attorney general, and Looney & Clark, for the state.

577 RAMSEY, J. On July 25, 1907, application was made by relator for a writ of habeas corpus to the Honorable W. L. Davidson, presiding judge of this court. The writ was granted and the application made returnable before the court at the Tyler term of last year. The matter was submitted at Tyler, but in view of the absence of Judge Davidson at the time of the submission and the recent accession of the writer to the bench, the court requested oral argument on the important matters involved.

The case has been ably and well briefed on both sides, and thoroughly presented on oral argument. Counsel for the state made a clear statement of the several matters involved in the application, and for convenience, and as con-

ducive to clearness, we adopt their classification of the propositions urged by the several attorneys for the applicant. As grounds for the discharge of the relator the following propositions are urged:

1. It is urged that the act in question is void because in conflict with section 35, article 3 of the constitution, in that it contains "more than one subject."

2. That the act is void because in conflict with section 20, article 16, of the constitution (local option clause), in that (a) it attempts to delegate to the people the power to levy a tax on the liquor business; (b) it attempts to enlarge the scope of the local option law; (c) the legislature is without power to enact any prohibitory law with reference to the sale of liquor, except as provided by section 20, of article 16, of the constitution.

3. That the act is void because in conflict with section 2, of article 8, of the constitution, in that the (alleged) tax is not "equal and uniform" within the meaning of the constitution.

4. That the act is void because the license tax is prohibitory, the penalties cruel and unusual and prohibited by section 13, of article 1, of the constitution; and, being so enormous, operate to deter the citizen from invoking the protection of the courts, and thereby deny due process of law, as prohibited by section 19, of article 1, of the constitution.

5. That the act is unconstitutional and void because the traffic regulated being nonintoxicating liquors, a harmless business is taken out of the domain of the police powers of the legislature.

6. That the act is in conflict with section 28, of article 1, and section 56, of article 3, of the constitution—in other words, that the act is a local or special law, and for that reason is void.

578 It will be perceived that all the grounds urged as a basis for the discharge of the relator raise constitutional questions. If the act under which he is charged is in contravention of the constitution of this state, and violative of same—and we shall hold that either of the propositions above stated are well taken—then it must follow that the relator is entitled to his discharge. The thirtieth legislature, page 212, undertook to levy, and did levy, an occupation tax on nonintoxicating malt liquors. By section 1 of this act it is provided, as follows:

"Section 1. In all counties, justices' precincts, towns, cities or other subdivisions of a county where qualified voters

thereof have, by a majority vote, determined that the sale of intoxicating liquors shall be prohibited therein, there is hereby levied upon all firms, persons, associations of persons and corporations, selling at retail nonintoxicating malt liquors, such as 'Uno,' 'Ino,' 'Frosty,' 'Tiptop,' and 'Tee-totle,' and all other such liquors an annual state tax of \$2,000, and counties, also incorporated cities and towns where such sales are made, may each levy an annual tax of not exceeding \$1,000 upon all such persons, firms or corporations: provided, that this section shall not apply to regular druggists or pharmacists, who, as such, keep for sale as a part of a regular drug stock, such proprietary remedies as 'malt extract,' 'malt medicine,' and 'malt and iron,' used exclusively as medicine and not as a beverage."

Among the contentions of relator is, that this section is in contravention of section 2, article 8, of the constitution, which, in respect to occupation taxes, reads as follows: "All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax."

It is also contended by counsel for relator that section 3 of the Bill of Rights is important to be considered in connection with this contention, and that a proper construction of section 2 of article 8 is aided by reference to section 3 of the Bill of Rights. This section is as follows: "All free men, when they form a social compact, have equal rights, and no man or set of men is entitled to exclusive separate public emoluments or privileges but in consideration of public services."

This court has seemed, in decisions heretofore, to have esteemed this section of the Bill of Rights as having some application to the uniformity or equality of taxing measures: *Ex parte Jones*, 38 Tex. Cr. 482, 53 S. W. 513. The constitution preceding that under which we are now operating contained the following provision: "Taxation shall be equal and uniform throughout the state," whereas the present constitution provides: "All occupation taxes shall be equal and uniform, upon the same class of subjects within the limits of the authority levying the tax." This has been held (*Fahey v. State*, 27 Tex. App. 146, 11 Am. St. Rep. 182, 11 S. W. 108), as applying to the whole state, as to legislative authority, and that of a county, city or town as their respective boundaries. So that the provision of the constitution here in question in fact provides that taxes shall be equal and uniform throughout the state, as applied to all

taxes levied for state use by the legislature. If the contention is true that <sup>579</sup> the act of the legislature complained of makes an exception in favor of druggists and pharmacists, and if it be true, as contended by relator, that the tax levied is not equal and uniform throughout the state upon the same class of subjects, then the tax levied is without authority of law, in contravention of the constitution, and the relator is entitled to be discharged. This is not a new question in this state. This matter has received consideration, both by this court and by the supreme court. Probably the most notable case in which this provision of the constitution has received construction was the case of the Pullman Palace Car Co. v. State, 64 Tex. 274, 53 Am. Rep. 758. In that case the state sought to enforce an occupation tax of two dollars a mile under that part of the act of March 24, 1881, authorizing the collection from every person, firm, etc., owning or running any palace-car, sleeping or dining cars, not owned by the railway company, of any railroad in this state.

Touching this matter and the contention that the act was invalid, in that the occupation tax sought to be laid was not equal and uniform, the court say: "The inquiry arises whether a law which thus imposes a tax on others than railway companies, for the pursuit of this business, while it exempts railway companies, therefrom, does not violate the provisions of the constitution referred to. That the tax contemplated by the act is an occupation tax is too clear for discussion. Does the business done by persons or corporations owning such cars and running them on the roads of others, or the business done by persons not owning but running such cars on the roads of others, and business done by railway companies on their own roads with such cars, embrace the same class of subjects of taxation? The subject of taxation is the thing or business done; the occupation followed for and on account of which the tax is imposed on persons and corporations that pursue it. The business or occupation of the owners of such cars running them on the roads of others, and of those who are not owners but run such cars on the roads of others, in so far as the particular occupation for which the tax is imposed is concerned, in no essential differs from that pursued by a railroad company that runs its own cars of the same kind for the same purpose over its own road. The same acts and facts make the occupation in either case, and it looks to the same end and purpose. That a railway company may pursue another business or

occupation than that taxed by the law in question cannot affect the question whether a business which it does pursue is the subject of taxation for the pursuit of which others are taxed; nor can the fact that it owns other property, without which the occupation in a given case could not be pursued affect the question. There are, however, some occupations taxed which are very kindred in the elements which make them up—i. e., the acts and things which constitute the occupation taxed. Here the facts which constitute the occupation are in part the same, but not entirely so; and hence are held to belong to different classes of occupations and not required to pay the same amount of tax. There is no act or fact entering into the occupation of running such cars as are mentioned <sup>580</sup> in the statute, over the road of another, which does not enter into the occupation of the road owner who runs over his own road the same kind of cars for the same uses and purposes, from which the road owner can be withdrawn from the class on which the statute imposes the tax. If the things done constitute in one person or corporation the taxed occupation, no one doing the same things can be omitted from the class taxed without a violation of the constitutional provisions; even though the omitted or excepted person or corporation may do more or other things than are necessary to constitute the taxed occupation, and though that done in excess may, within itself, constitute a distinct occupation subject to taxation, however kindred in nature the occupation may be. The legislature may classify subjects of taxation, and these classifications may, as they will, be more or less arbitrary; but when the classification is made, all must be subjected to the payment of the tax imposed, who, by the existence of the facts on which the classification is based, fall within it, unless exempted under some other constitutional provision. Nor can the constitutional requirement, in reference to occupation taxes, be evaded or its application rendered unnecessary by the fact that the person or corporation pursuing the occupation pays an income tax; nor by the fact that an occupation tax is paid upon a business kindred to that on account of which the given occupation tax is claimed: *Kelly v. Dwyer*, 7 Lea, 180; *Burch v. Mayor*, 42 Ga. 596; *Hirsch v. Commonwealth*, 21 Gratt. 785; *Woolman v. State*, 2 Swan (Tenn.), 353; *State v. Stephens*, 4 Tex. 137. It is suggested, if the statute is violative of the constitutional provision referred to, that it should not be held void in so far as it imposes the tax, but that those who by its terms are ex-

empted from its operation should be held subject to its provisions. The legislature alone can impose taxes and determine what occupations shall be taxed; and when it imposes an occupation tax and expressly declares that given persons or corporations shall not be subjected to it, the courts have no power to declare that they shall; but they have the power to declare that the act by which such a discrimination is made is inoperative upon those upon whom the burden is attempted to be imposed, because violative of the rule requiring equality and uniformity."

A similar matter was considered by this court in the case of *Ex parte Jones*, 38 Tex. Cr. 482, 43 S. W. 513. The applicant in that case had been arrested under an act of the Twenty-fifth Legislature, requiring the payment of occupation tax levied on peddlers, and was attacked for the reason that it contained the proviso, "That all ex-Confederates and ex-Federal soldiers, who, from old age, or other cause, may be incapacitated to do and perform manual labor and who are actual residents of the state of Texas, and are not inmates of any soldiers' home, or drawing any pension from the United States or state government, be and are hereby exempt from the payment of any such peddlers' occupation tax." In passing <sup>581</sup> upon this question, this court said: "Section 3 of our Bill of Rights would appear to inhibit any class legislation, and is as follows: 'Section 3. All free men, when they form a social compact, have equal rights, and no man or set of men is entitled to exclusive separate public emoluments or privileges, but in consideration of public services.' A proper construction of these constitutional provisions, together with an application of same to the occupation tax provisions before quoted, would appear to settle this question in favor of the applicant; for unquestionably the act exonerates and exempts from taxation, and constitutes certain classes therein named, privileged classes, who are authorized to pursue the occupation of peddling without the payment of any tax or the procurement of any license. This is obviously taxation which is not equal or uniform. However, this is not a new question in this state. In *Pullman Palace Car Co. v. State*, 64 Tex. 274, 53 Am. Rep. 758, almost this exact question came before our supreme court for decision. That was a case in which suit was brought by the state of Texas against the Pullman Palace Car Company, claiming an occupation tax for running and operating Pullman palace cars on lines of railroads in the state of Texas, said cars not being owned by any of the railroad companies



operating the railroad. The tax act under which this recovery was sought laid an occupation tax upon all persons or corporations operating Pullman palace cars on railroads in the state of Texas, except persons or corporations who owned said railroad; and the court held that this exemption rendered the law unconstitutional and void. Among other things, Judge Stayton, who rendered that opinion, said: 'If the things done constitute in one person or corporation the taxed occupation, no one doing the same things can be omitted from the class taxed without a violation of the constitutional provisions, even though the omitted or excepted person or corporation may do more or other things than are necessary to constitute the taxed occupation, and though that done in excess may within itself constitute a distinct occupation subject to taxation, however kindred in nature the occupation may be. The legislature may classify subjects of taxation and these classifications may be, as they will be, more or less arbitrary; but when the classification is made, all must be subjected to the payment of the tax imposed who by the existence of the facts on which the classification is based fall within it, unless exempted under some other constitutional provision.' And to the same effect, see, also, *Cooley on Taxation*, ed. 1879, pp. 128, 130, 138, 139, 153; 1 *Desty on Taxation*, pp. 94, 95, 122, 191-193; *City of New Orleans v. Home Mut. Ins. Co.*, 23 La. Ann. 449; *Sims v. Parish of Jackson*, 22 La. Ann. 440; *Livingston v. City Council of Albany*, 41 Ga. 21; *Lin Sing v. Washburn*, 20 Cal. 534; *Sutton's Heirs v. City of Louisville*, 5 Dana 28."

A similar question came before the court later in the case of *Ex parte Overstreet*, 39 Tex. Cr. 474, 46 S. W. 825, in which case the opinion of the court was delivered by Judge Hurt, then its presiding judge. In that case, the relator had been arrested for pursuing <sup>582</sup> the occupation of peddling buggies without first obtaining a license therefor. The contention of relator in that case was that the law under which he was arrested was unconstitutional, in that it discriminates between persons engaged in the same character of business, and the same was invalid by reason of an exception and discrimination contained in the act. The exception which it was contended rendered the act unconstitutional was as follows: "A merchant who pays an occupation tax as required by this article shall not be required to pay this special tax for selling articles named in this paragraph, when sold in his place of business, or in the county in which

his place of business is located." In discussing this question the court said: "Constitution, article 8, paragraph 1, provides: 'Taxation shall be equal and uniform. . . . It [the legislature] may also impose occupation taxes both upon natural persons and upon corporations, other than municipal, doing business in this state.' Section 2: 'All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax. But the legislature may by general laws exempt from taxation public property used for public purposes,' etc. It may be contended that as the merchant may not only peddle goods, but also engage in the regular mercantile business, therefore the pursuits are not in conflict, and that they are not the same occupation. This proposition is met by the opinion of Judge Stayton in *Pullman Palace Car Co. v. State*, 64 Tex. 274, 53 Am. Rep. 758. This case settles beyond any question the issue involved in the case in hand. Under the law, a merchant can sell any character of merchandise, peddle buggies, etc., in his county; in fact, engage in any mercantile business and peddle the articles named in subdivision 40, without paying as much occupation tax as the peddler of a buggy, washing-machine, etc. Now, we cannot comprehend how the fact that he could engage in the mercantile business to its fullest extent, as well as the peddling of these articles, without paying as much tax as the relator, would relieve the case of the constitutional prohibition that 'all occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax.' "

The same principle, in substance, was reaffirmed in the cases of *Poteet v. State*, 41 Tex. Cr. 268, 53 S. W. 869; *Rainey v. State*, 41 Tex. Cr. 254, 96 Am. St. Rep. 786, 53 S. W. 882. The relator in the *Proteet* case had been convicted of pursuing the occupation of a cotton buyer without obtaining license for that purpose. An act of the Twenty-fifth Legislature had imposed an occupation tax on cotton buyers, but contained the following provision, which it was contended rendered the proposed tax unconstitutional: "A merchant who pays an occupation tax, as herein prescribed, shall not be considered a cotton buyer, or buyer of wool or hides." In discussing this question, the court there said: "Under the provisions of our constitution the tax must be equal and uniform, and the legislature has no authority to exempt a merchant or any other class from the payment of this <sup>583</sup> tax, when it is imposed upon all others. It is no

answer that the party pays a tax as a merchant. The two callings are different and distinct. If the legislature has the authority to exempt a merchant from the payment of the tax, so it would any other class of citizens, and thus impose a burden upon one class from which the others are exempt, and for the same calling or pursuit."

The Rainey case (41 Tex. Cr. 254, 96 Am. St. Rep. 786, 53 S. W. 882) was a conviction under the same statute, and the holding is practically identical with that in *Proteet v. State*, 41 Tex. Cr. 268, 46 S. W. 825, 53 S. W. 869, and is cited for the reason, mainly, that it contains an express affirmation of the rule laid down in *Ex parte Overstreet*, 39 Tex. Cr. 474, as well as the case of the Pullman Palace Car Co. v. State, 64 Tex. 274, 53 Am. Rep. 758.

The case of *Hoefling v. City of San Antonio*, 85 Tex. 228, 16 S. W. 608, 20 S. W. 85, by our supreme court is to the same effect. And so far as we have been able to discover, there is no dissent in the authorities in this state from the proposition contained in the above cited cases. It is contended, however, by counsel for the state that under a proper construction of the statute in question, there is no exception, and that the legislature did not intend to except anyone from its operation. The presentation of this view by counsel for the state was very forceful, and is as strongly stated as it well could be.

The provision which it is claimed has the effect to make void the act is as follows: "Provided that this section shall not apply to regular druggists, or pharmacists, who as such, keep for sale as a part of a regular drug stock, such proprietary medicines, as 'malt extract,' 'malt medicine' and 'malt and iron' used exclusively as medicine and not as a beverage."

On this question counsel in their brief say: "To say that druggists are exempt from the tax imposed is to render meaningless and surplusage all reference to these proprietary remedies; but to construe the act as meaning that druggists should not be considered as coming within the provisions of the act by making sale of these remedies in the manner as therein stated, is to give meaning to all the language used, to save the bill unimpaired, and to accomplish the purpose of the legislation. We admit that the language employed is not as apt to express this idea as could have been employed, but that this was the legislative intent there can be but little doubt from the language used and the purpose of the act, and being so, the law should be construed so as to give it

effect. Our position is, that the provision was intended to mean as if it read, 'provided that this section shall not prevent the sale by regular druggists or pharmacists, who as such, keep for sale as a part of a regular drug stock, of such proprietary remedies as "malt extract," "malt medicine" and "malt and iron" used exclusively as medicine and not as a beverage.' This construction would change the phrase 'apply to' and interpolate in lieu the phrase 'prevent the sale by,' and also interpolate the word 'of' between the words 'stock' and 'such.' This court is authorized, and it would seem from the authorities to be its duty, when the intention of the legislature can be ascertained with reasonable certainty, <sup>584</sup> to alter and supply words in the statute so as to give it effect."

For a proper determination of the question here presented we must refer to our state constitution. The matter involves a proper construction of it. If, when so construed, there is no exception, then relator should be held. If there is an exception, and if the law violates the constitutional provision that occupation taxes must be equal and uniform, it must follow that the relator should be discharged. "A cardinal rule in dealing with written instruments is, that they are to receive an unvarying interpretation, and that their practical construction is to be uniform. A constitution is not to be made to mean one thing at one time and another at some subsequent time, when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying modes of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed; and there can be no such steady and imperceptible change in their rules as inheres in the principles of the common law. Those beneficent maxims of the common law which guard persons and property have grown and expanded until they mean vastly more to us than they did to our ancestors, and are more minute, particular, and pervading in their protections; and we may confidently look forward in the future to still further modifications in the direction of improvement. Public sentiment and action effect such changes, and the courts recognize them; but a court or legislature which should allow a change in public sentiment to influence it in the intention of its founders would be

justly chargeable with reckless disregard of official oath and public duty; and if its course could become a precedent, those instruments would be of little avail. The violence of public passion is quite as likely to be in the direction of oppression as in any other; and the necessity for bills of rights in our fundamental laws lies mainly in the danger that the legislature will be influenced, by temporary excitements and passions among the people, to adopt oppressive enactments. What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it": Cooley's Constitutional Limitations, 6th ed., pp. 68, 69.

The constitution governs. It is literally thus—a pillar of cloud by day and by night a pillar of fire; to give us light, and with us it is "to go by day and by night."

If we should, or are at liberty to, construe the act in question so as to hold that there is no exemption contained in it, it would manifestly follow that the objection which we are considering would not apply. We do not believe, however, that we could or should so hold. There are <sup>585</sup> many rules for the construction of statutes. It would not be denied that the prime object of all rules for interpretation is to ascertain the will and intent of the lawmaker. This may oftenest be done, and usually can best be done, by giving effect to the language used, considered and construed in its ordinary sense. Of course, we recognize that we are not imperatively required to give the language employed its literal meaning, if in the light of the entire law, previous legislation, or the evident purpose and intent of the legislature, a different construction should fairly be placed on the language used. Mere literalism when it leads to absurdity should, of course, be rejected, but where, in the light of the entire act, taking every part of it into consideration the language is clear, the meaning obvious and an exception is made in precise terms, we are neither required nor permitted to speculate as to what the legislature meant where such meaning does not appear in the language used, nor are we at liberty to search for a meaning not apparent on the face of the act to be construed.

Now, it should be remembered that the act in question is not an amendment of any prior act or existing statute, but for the first time levies a heavy tax upon nonintoxicating

malt liquors. Therefore, in construing the act it is not possible to do so with reference to any existing or prior legislation, but the construction must be of the act itself as it stands written on the statute book. Nor is there any kindred legislation to which the act is referable, or that might or could aid us in its proper interpretation. It is a cardinal rule of construction that the meaning of one portion of an act may be aided by other provisions contained in the same act, and that that construction should be placed upon such legislation as would give the whole effect. That cannot apply in this case, for the reason that the exception is contained in the first section of the act in question, and there is no reference thereto in any other portion of the act, nor anything in it which could aid us in the construction of the portion here under investigation. The exception, if there be an exception, is found in the first section of the act in question. There is no language used anywhere else in said act which could aid us in construing the intent and purpose of the alleged exemption. The tax levied is upon nonintoxicating malt liquors, including certain liquors specifically named and all other such liquors. Now, in the light of this tax so levied, we are confronted with an exception which provides that this section, that is, section 1, defining the occupation to be taxed, shall not apply to regular druggists or pharmacists who as such keep for sale, as a part of a regular drug stock, such proprietary remedies as malt extract, malt medicine and malt and iron, used exclusively as medicine and not as a beverage.

Now, the learned counsel for the state says that this article should be construed as if it read as follows: "Provided that this section shall not prevent the sale by regular druggists or pharmacists, who as such, keep for sale as a part of a regular drug stock of such proprietary remedies as malt extract, malt medicine, and malt and iron used exclusively <sup>see</sup> as medicine and not as a beverage." In other words, to uphold the law we should be required to strike out in the act in question the term "shall not apply," and substitute therefor the words "shall not prevent the sale by"; and, in addition to that, interpolate the word "of" between the words "stock" and "such." While we recognize the duty resting upon us to search diligently for the legislative intent in the language used, so that we may find it, and having found it, give it effect, we do not believe that we should declare the unambiguous language used in this section meaningless, strike out and strike down the clear and precise words

used of such ordinary signification as to rebut the presumption that they were used either ignorantly or inadvertently by the legislature, and interpolate words not used by them, and having made the elision in the one case and the interpolation in the other, with such alteration and substitution, undertake to give the act effect. This act of the legislature not only levies a tax, but makes provision for the arrest and conviction of persons engaged in the business named without the payment of such tax, and provides for punishment of offenders against same by a fine of not less than the amount of tax due and not more than double the sum. As a rule for the guidance of the courts in construing such statutes, it is said in *Ex parte Overstreet*, 39 Tex. Cr. 474, 46 S. W. 825, above quoted, that one test is and it seems to be both an infallible and a just test could the person claimed to be excepted be convicted under such statute? In the *Overstreet* case, Judge Hurt uses this language: "Let us suppose that the merchant was indicted for peddling buggies without a peddler's license, and the proof showed that he had obtained a merchant's license, but that he had peddled the buggies within the county in which his business was situated. Under such a state of facts, could he be convicted of pursuing the occupation of a peddler under subdivision 40 without license? He evidently could not, because the proviso expressly authorizes him to sell buggies within the county of his place of business."

Now, under this act, let us suppose that a druggist who has not paid the tax is found engaged in the sale of malt liquors, either as proprietary medicines or under the guise of proprietary medicines; either those named in the exception or others of the same character; or, for that matter, engaged in selling the very articles upon a sale of which at retail the tax has been levied. He is indicted and brought before the courts of his county and convicted, and an appeal is prosecuted to this court. Would we be justified by any rule known among men in upholding such a conviction in the light of the statute which specifically and in terms provides that the section alleged to have been violated shall not apply to him? In his defense he would point us to that portion of section 1 of the act levying a tax, which says: "Provided that this section shall not apply to regular druggists, or pharmacists, who, as such, keep for sale as a part of a regular drug stock, such proprietary remedies as malt extract, malt medicine and malt and iron, used exclusively as a medicine and not as a beverage," and invoke this pro-

vision <sup>587</sup> as a shield and a defense. Would we be justified in saying that while the exception is clear and explicit in its terms, that the legislature did not say what they meant, or mean what they said, and that we might reach out and punish him on some theory or suggestion that we are at liberty to strike out the words "shall not apply to," and insert the phrase "shall not prevent the sale by," and interpolate "of" between the words "stock" and "such"? We do not think so, but are clear that such exception, when invoked and by whomsoever invoked, must be and should be sustained by this court.

But it is urged with great force and much plausibility by counsel for the state that if the law in question cannot be upheld as a tax law, that it may be upheld, and should be upheld, as a police regulation, and not treated by the well-known tests applicable to taxing laws, and cites many authorities to sustain this proposition. We do not think this contention sound for several reasons. In the first place, the act in question is a tax law. As it appears in the published volume of the General Laws of the Thirtieth Legislature, its title is "Taxes—Providing Occupation Tax on Dealers in Malt Liquors." The sole and only effect of the law—its sole and only purpose—is to levy a tax on the occupation named, and to provide for its due enforcement and collection. And to say that it may be treated as a mere matter of regulation is to do violence to the law itself, and to nullify and emasculate the same. Nor do we believe, with all possible respect to counsel, that this view is important in any event, for that, if there is in fact a discrimination and the legislation is violative of the Bill of Rights, and in the face of the constitution, and that under whatever guise or under whatever pretext attempted, the result should not be different.

But it may be contended that we could and should uphold the contention of the state on the ground that the exception was not intended to apply to persons, but only to permit by legislative enactment the sale of certain proprietary remedies as medicines and not as a beverage, and this without reference to the distinctive occupation of those offering same for sale. That it would be within the authority of the legislature to have exempted the sale of certain proprietary remedies as medicines if the exemptions had applied to all persons without discrimination can admit of no doubt; but the legislature, as we view it, has not done this. If such



had been their intention, the specific naming of druggists and pharmacists was both idle and foolish.

Our own statutes and decisions furnish the safest rules for judicial interpretation. The first provision in numerical order and importance laid down in article 3268 of the Revised Civil Statutes is as follows: "The following rules shall govern in the construction of all civil statutory enactments: 1. The ordinary signification shall be applied to words except words of art or words connected with a particular trade or subject matter." The very first article of our Penal Code reads as follows: "The design of enacting this code is to define in plain language every offense against the laws of this state, and affix to each <sup>588</sup> offense its proper punishment." Again, it is provided in article 5 of the Penal Code, that "In the construction of this code each general provision shall be controlled by a special provision on the same subject, if there be a conflict." Article 6 of the Penal Code is as follows: "Wherever it appears that a provision of the penal law is so indefinitely framed or of such doubtful construction that it cannot be understood, either from the language in which it is expressed or from some other written law of the state, such penal law shall be regarded as wholly inoperative." In article 9 of the Penal Code it is said, among other things, that "No person shall be punished for an offense which is not made penal by the plain import of the words of a law." These articles have received frequent construction by this court and our supreme court, and the rule is almost uniformly laid down that "if the words used in the statute are free from ambiguity or doubt, and express plainly and clearly the intent according to the most natural import of the language, there is no occasion to look elsewhere": Board of Land Commrs. v. Weede, Dall. 361; Dodson v. Buntton, 81 Tex. 655, 17 S. W. 507; State v. Delesdenier, 7 Tex. 76; Holley v. State, 14 Tex. App. 505; Murray v. State, 21 Tex. App. 620, 57 Am. Rep. 623, 2 S. W. 757; Smith v. State, 18 Tex. App. 454; Engelking v. Von Wamel, 26 Tex. 469. This rule is almost uniformly adopted by the best text-writers. Endlich on Interpretation of Statutes, section 4: "Where the words of a statute are plainly expressive of an intent, not rendered dubious by the context, the interpretation must conform to and carry out that intent. It matters not, in such a case, what the consequences may be. 'It has, therefore, been distinctly stated, from early times down to the present day, that judges are not to mold the language of statutes in order to meet an alleged convenience

or an alleged equity; are not to be influenced by any notions of hardship; or of what in their view is right and reasonable or is prejudicial to society; are not to alter clear words, though the legislature may not have contemplated the consequences of using them; are not to tamper with words for the purpose of giving them a construction which is 'supposed to be more consonant with justice' than their ordinary meaning. Where, by the use of clear and unequivocal language, capable of only one meaning, anything is enacted by the legislature, it must be enforced, even though it be absurd or mischievous. If the words go beyond what was probably the intention, effect must nevertheless be given to them. They cannot be construed, contrary to their meaning, as embracing or including cases merely because no good reason appears why they should be excluded or embraced."

Now, bearing in mind that the law in question not only levies a tax but makes the failure to pay same a criminal offense subjecting the dealer to a heavy penalty, is it not clear that a person claiming the exemption could not be held as a criminal under the plain import of the language used, and if a druggist and pharmacist were arraigned and convicted under the law where, under the plain, every-day meaning of ~~the~~ the language used, he was in express terms excepted, to say to him by a sort of judicial legislation, under the name of construction, that he would be held criminally liable under a statute, the language of which permits him to pursue the business in question, he could well say, as did Macbeth of the Weird Sisters:

"And be these juggling words no more believed,

That palter to us in a double sense;

That keep the words of promise to our ear, and break it to our hope."

2. There is perhaps another and a stronger reason why this law must be held unconstitutional. By its plain terms it levies a tax of two thousand dollars on a person selling the articles named in prohibition territory, whereas no such tax is levied in any other territory. All persons are at liberty in other territory to sell the named articles without tax, unless it be the tax on the ordinary merchants. This is not, it is conceived, an equal and uniform tax throughout the limits of the state. Under this law, a citizen living in the city of Dallas may sell Uno, Ino, etc., to all persons that are willing to buy without let or hindrance, whereas in the neighboring town of Lancaster he will be subject to a tax, for state purposes, of two thousand dollars. Under this law,

in the county of Johnson, if one desires to sell these articles, he must pay a tax of at least two thousand dollars per annum, and a tax that may be four thousand dollars per year, whereas in the neighboring county of Tarrant he may sell it without tax. Suppose we substitute in the law for the words Ino, Uno, etc., the words "lumber, shingles and building materials." We would then have a tax levied in prohibition territory upon commerce on these useful articles in Johnson county in the sum of four thousand dollars a year, whereas in the adjoining county, among people wholly homogeneous, the merchants pay practically no tax at all. It was the intention and purpose of the founders of our government to prohibit and prevent this condition of affairs. In all the provisions of our constitution there is not one more necessary or by which greater store is set than the provision that taxation should be equal and uniform among all citizens within her boundaries. The patriots and freemen who founded our institutions and wrought and wove the people's will into our organic law understood the importance of giving to every man a free and a fair opportunity in the race of life. They must have understood, as do we, that at all times and among all people the taxing power had been a matter of signal condition. Such prostitution and discrimination of the taxing power in respect to the ordinary articles of commerce as are here attempted in this statute could, if so designed, bankrupt and beggar the merchants in half the domain of Texas, and so harass and outrage her people as almost to create a revolution. Nor will it do to say this law should be upheld on the pretense and pretext that it is an aid to the local option statute. If the liquors sold are in fact intoxicating, the seller may be convicted in the courts of the county for such sale. But, as a matter of fact, the articles proposed to be taxed and named in the act in <sup>590</sup> question are by express legislative enactments declared to be non-intoxicating. Their sale is legitimized and the authority of the government and the sanction of the state goes with the payment of the tax. Our courts have held that special provisions, methods of procedure, incidental remedies and matters of that sort, can be enacted, having a special and peculiar relation to the enforcement of our prohibition laws: Ex parte Dupree (101 Tex.), 105 S. W. 493. But it has never been held that any legislature can, under the guise of the enforcement of any statute, undertake to levy a tax on occupation in one section of the state and exempt by legislative authority another portion of the state from the pay-

ment of such tax on precisely the same articles. Such favoritism would be tyranny, and to prevent such discrimination was the purpose of the constitutional provision that taxation should be equal and uniform: *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 25 L. ed. 903; *Exchange Bank v. Hines*, 3 Ohio St. 1.

In argument we were appealed to with great earnestness to uphold the law in this case, with the statement that it was a serious matter to declare a law duly passed by the legislature unconstitutional. We are not unmindful of the responsibility assumed by us in so declaring, but it has been held, under our system, from time immemorial, that it is not only in our province so to do, but that in a clear case we should do so. If we are at liberty to extend or construe the constitution so as to permit something to be done which is prohibited by it, under the guise or in aid of legislation, deemed to be helpful and beneficial, the precedent is made, and in other and evil times this or some other court may seek the extension of judicial authority, without decision as a basis and a precedent in respect to some matter which may both vex and harass the citizen. The constitution is the organic law of the land; it stands, and should stand, unless otherwise declared in the manner provided by law, unchanged and unchangeable.

"The shouting and the tumult dies,  
The captains and the kings depart,"

but the constitution, while it remains our constitution, is the same yesterday, to-day and forever; it means the same thing everywhere and to all men—it is the shield of the weak, the protection of all alike; none are too poor to invoke its protection, and none too strong to escape its power. There is no place where its voice should not be heard and truly its lines should go through all the land.

It is as important to the citizen that his rights should not be invaded in violation of the constitutional guaranties as it is that an act of the legislature should be upheld. So that we hold that the duty to declare the law as it is rests upon us. It is a duty that we should neither refuse nor hesitate to perform. In a clear case; a refusal to meet the issue would be criminal—an evasion worse than weakness. We believe the act to be unconstitutional in that it strikes down the guaranty of the constitution that taxes shall be equal and uniform, and entertaining <sup>591</sup> this view, after a thorough investigation and deliberate consideration, it only remains for us with "firmness in the right, as God has given us to see the right," to declare it. *Fiat justitia ruat coelum.*

There are other grave and important questions presented by counsel for the relator about some of which we have serious doubts, but in view of our opinion on the questions above treated, we pretermit any discussion of them.

Let the relator be discharged.

Brooks, J., dissents.

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*Statutes Imposing a License or Occupation Tax* have frequently been declared unconstitutional on the ground of arbitrary discrimination. Thus a statute which forbids peddling except under a license, and which provides that citizens may be thus licensed but that aliens shall not be, is a denial of the equal protection of the law as to the latter and an unconstitutional discrimination against them: *State v. Montgomery*, 94 Me. 192, 80 Am. St. Rep. 386; *Commonwealth v. Hana*, 195 Mass. 262, 122 Am. St. Rep. 251. A statute permitting the sale by peddlers of agricultural products of the United States without a license, but forbidding the unlicensed sale of agricultural products of other countries, is unconstitutional as a regulation of foreign commerce: *Commonwealth v. Caldwell*, 190 Mass. 355, 112 Am. St. Rep. 334. As to the constitutionality of statutes exempting veterans of the Civil War from paying a license for carrying on a business, see *Laurens v. Anderson*, 75 S. C. 62, 117 Am. St. Rep. 885; *State v. Sheldroi*, 75 Vt. 277, 98 Am. St. Rep. 825. As to the constitutionality of statutes discriminating against foreign corporations in the matter of license taxes, see *State v. Hammond Packing Co.*, 110 La. 180, 98 Am. St. Rep. 459, and cases cited in the cross-reference note thereto.

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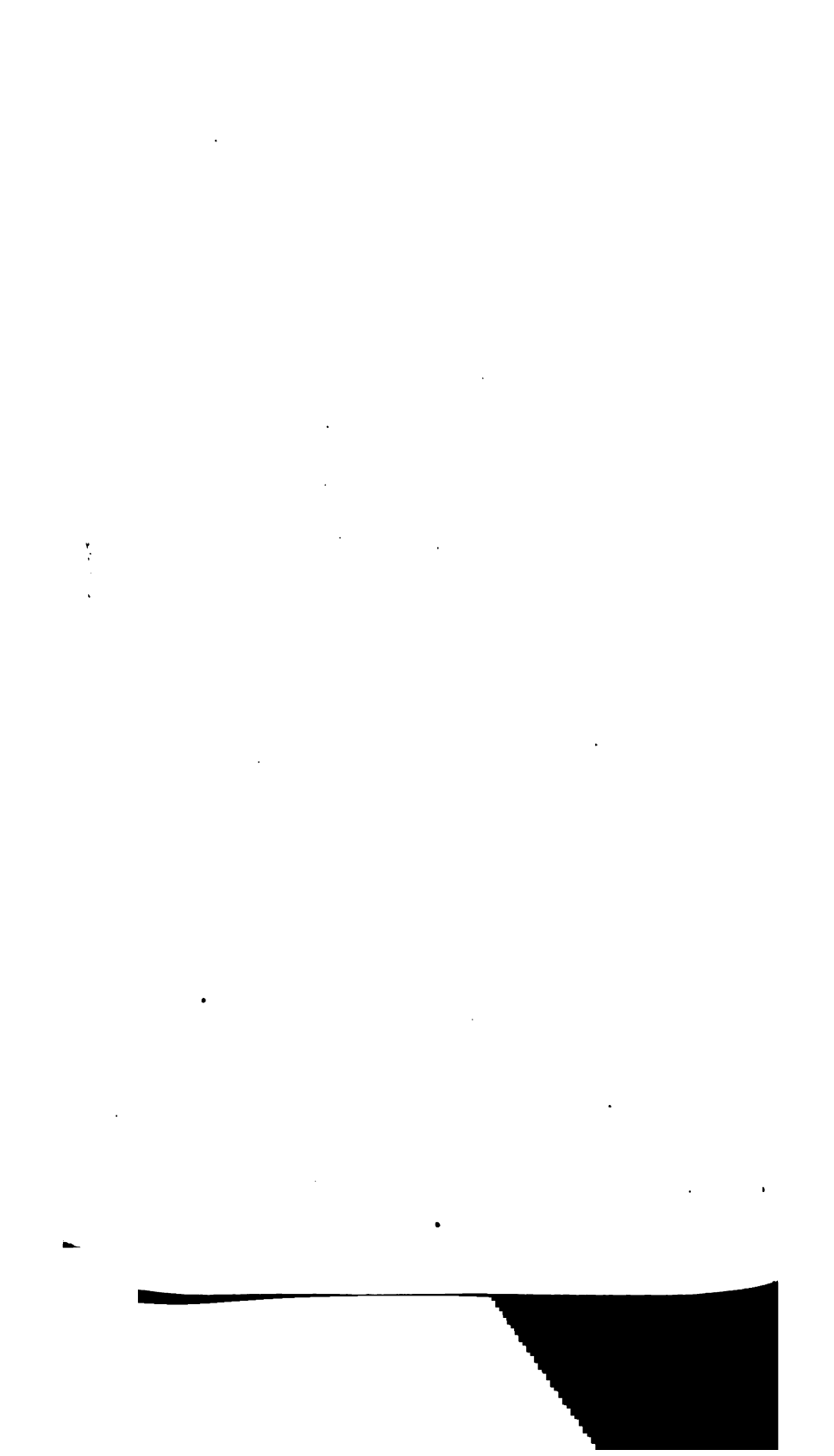
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**2. ACKNOWLEDGMENT OF DEED, Duty of Officer in Certifying to the Identity of the Person, When Sufficiently Performed.**—If a deed is produced to the proper officer for the purpose of obtaining his certificate showing its execution and acknowledgment by the person named therein, and a business man of long standing and good reputation introduces to such officer the person as the one named in and who executed the writing, this is competent evidence to show care and diligence on the part of the officer, and supports a finding and judgment relieving him from liability for damages resulting to a person from acting on the certificate of such acknowledgment, the person thus introduced having in fact been an imposter. (Ky.) *Commonwealth v. Johnson*, 368.

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3. **ABANDONMENT OF LAND** Acquired by Prescription.—After a good prescriptive title to lands has ripened, the person vested with such title cannot be held to have been divested of title, because of abandonment, so long as he continues to perform acts in relation to the lands and title thereto which are inconsistent with the idea of abandonment. (Ga.) *Dyson v. Knight*, 179.

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2. **EVIDENCE, Proper Course of When Writing is Offered Which Appears on Its Face to have been Altered**.—When a note is offered in evidence which on its face appears to have been altered, the proper course is for the presiding judge to determine, upon inspection and in view of the state of the evidence at the time, whether further proof in explanation of the alteration shall then be required before the instrument is admitted. His action in this respect rests in his sound discretion, to the exercise of which no exception lies. (Mass.) *Wood v. Skelley*, 516.

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2. **THE OWNER OF ANIMALS** *Ferae Naturae* is, as a general rule, liable for injuries done by them without any evidence of knowledge of their vicious nature or that he was negligent in permitting them to be at large. He is bound to take notice of their nature and also to secure them at his peril. (Ala.) *Hayes v. Miller*, 93.

3. **ANIMALS FERAÆ NATURAE**, Liability of Possessor of.—One who is in possession and control of a ferocious animal *ferae naturae* is liable for injuries inflicted by it upon a person in the public streets, irrespective of whether such possessor is the owner or not. (Ala.) *Hayes v. Miller*, 93.

4. **ANIMALS FERAÆ NATURAE**, Want by Possessor of Knowledge of Ferocious Character of.—In an action to recover damages for injuries received in the public streets from a wolf in the possession of the defendant, the plea that the animal was not known to be fierce or dangerous, and had been so domesticated as to lead persons acquainted with it to believe that it was harmless, does not present a plea in defense, but the facts so alleged are admissible in reduction of damages. (Ala.) *Hayes v. Miller*, 93.

*Cruelty to Animals.*

5. **CRUELTY TO ANIMALS**.—The Legislature has Authority to Enact Proper Laws for the prevention of cruelty to animals; and it may designate agents or officers charged with the execution of such laws. (Colo.) *Jenks v. Stump*, 137.

6. **CRUELTY TO ANIMALS**—Deprivation of Property Without Due Process.—A statute which provides that an officer of a humane society may take charge of any abandoned or mistreated animals, provide them with food, and detain them until the expenses are paid, without restricting the authority of the officer to cases of emergency or public necessity, and without providing any notice to the owner or opportunity for hearing, is unconstitutional as permitting a deprivation of property without due process. (Colo.) *Jenks v. Stump*, 137.

**APPEAL AND ERROR.**

1. **APPEAL**.—Questions not Presented for the consideration of the trial court cannot be reviewed on appeal. (Iowa) *Keil v. Wright*, 282.

2. **APPEALABLE ORDERS**.—An order confirming the sale of land and directing that a deed be made, is a final and appealable order. (Ky.) *Forrester v. Howard*, 394.

3. **APPEALABLE ORDERS**—Vacating in Lower Court.—If an order is appealable, it can be modified or vacated only on appeal or in the lower court for some of the causes specified in the statute. Otherwise, the court loses control of the case and power to modify its rulings. (Ky.) *Forrester v. Howard*, 394.

4. **APPEAL AND ERROR**—Error Respecting a Branch of the Case, When does not Warrant a Reversal.—If, in an action to recover for injury claimed to have been suffered by the plaintiff through the negligence of the defendant, the jury finds, either that the plaintiff did not exercise due care, or that the defendant was not negligent, the verdict must stand, if justified by the evidence, though there may have been error in another branch of the case. (Mass.) *Pitcher v. Old Colony Street Ry. Co.*, 513.

5. **APPEAL**—Waiver of by Payment of Fine.—If a judgment is entered imposing a fine, and the amount thereof is deposited with the clerk of the court under protest and to avoid being put in jail, the deposit must be considered as a voluntary payment of the fine and a satisfaction of the judgment, and no appeal will lie therefrom. (Or.) *Washington v. Cleland*, 1013.

**6. APPEAL AND ERROR—Construction of Statute Authorizing an Appellate Court to Issue a Writ of Mandate to Carry a Judgment into Execution.**—The statute of Nebraska providing for a special mandate to be awarded to the district court to carry a judgment into execution, and that the lien of the judgment shall continue for five years after the first day of the term of the district court to which the mandate may be directed, applies only to cases in which the appellate court, in reversing a judgment of the trial court, proceeds to render such judgment as the court below should have rendered, and does not have the effect of continuing the lien of the judgment which has been affirmed on the appeal and the execution of which was never stayed by any bond for supersedeas. (Neb.) *Harvey v. Godding*, 841.

**7. APPEAL AND ERROR—Effects in Special Findings.**—If a finding leaves some issue or material fact undetermined, it will be regarded as not proved by the parties having the burden of proof. (Ind.) *McAdams v. Bailey*, 240.

**8. APPEAL AND ERROR—Special Finding, When does not Establish Fraud.**—If the court does not find enough of the ultimate facts to make out a case of fraud, the appellate court must assume that they were not proved and that the appellees were successful in rebutting all adverse inferences which might have been drawn as matters of fact from what is contained in the special findings. (Ind.) *McAdams v. Bailey*, 240.

**9. APPEAL AND ERROR—Special Findings, Additions cannot be Made to on Appeal.**—Though certain facts found may justify the inference of fraud or call on appellees to show a fair contract, the appellate court cannot add to the special finding a fact, unless as a necessary conclusion from the facts found. (Ind.) *McAdams v. Bailey*, 240.

**10. APPEAL AND ERROR—Harmless Error.—An Error Committed in Striking Out a Part of an Answer is waived and rendered harmless, if evidence of the same facts is received under the answer of general denial.** (Ind.) *Couch v. State*, 221.

**11. APPEAL AND ERROR—Right of the Appellate Court to Consider Facts not Disclosed by the Findings.**—Where the findings are not sufficiently full to exclude a particular idea or theory, the appellate court may, nevertheless, give heed to a fact appearing in evidence, which does not admit of dispute, in order to uphold the judgment. Such a case may be regarded as one of a defect in form, or imperfection contained in the pleadings, which the statute provides shall be deemed amended in the supreme court. (Ind.) *Marion Trust Co. v. Bennett*, 228.

**12. APPEAL AND ERROR—Harmless Ruling.**—Though the court gives an erroneous instruction, this does not constitute a reversible error, if the facts upon which the instruction was given were found by the jury not to exist. (Mass.) *Colburn v. Marble*, 561.

**13. WRIT OF ERROR—Whether a New Suit.**—The suing out of a writ of error is practically the commencement of a new action. (Mo.) *Turner v. Edmonston*, 739.

## **ASSAULT.**

See *Aggravated Assault*.

## **ASSIGNMENTS.**

**1. AN ASSIGNMENT of Future Earnings** Which may Accrue under an existing employment is a valid contract, and creates rights which may be enforced both at law and in equity. (Mass.) *Citizens' Loan Assn. v. Boston etc. R. R. Co.*, 584.

**2. PARENT AND CHILD—Assignment of Expectancies.**—A written contract, whereby a son, in consideration of the payment of a sum of money to him by his father, releases his claim to any part of the latter's estate, is void. (Ky.) *Elliott v. Leslie*, 418.

**3. PARENT AND CHILD—Sale of Expectancy—Advancement.**—If a son makes a written contract with his father, whereby, in consideration of the payment of a sum of money to him by his father, he releases his claim to any part of his father's estate, though the contract is void, the money will be charged to the son as an advancement. (Ky.) *Elliott v. Leslie*, 418.

# **ATTACHMENT.**

See Judgments, 4.

# **ATTORNEY AND CLIENT.**

**1. ATTORNEY AND CLIENT—Lien on Property in Litigation—Appeal.**—An attorney who defends an action in which it is sought to recover property is not entitled to a lien thereon if he succeeds in saving it, but that question cannot be considered upon appeal, unless presented in proper time. (Ky.) *Forrester v. Howard*, 394.

**2. ATTORNEY AND CLIENT—Lien for Services.**—An attorney has a lien for his services under statutory notice thereof, upon money paid to the clerk in satisfaction of a judgment. (Iowa) *Hubbard v. Ellithorpe*, 271.

**3. ATTORNEY AND CLIENT—Lien on Alimony in Divorce Proceedings.**—An attorney has a lien upon alimony awarded in divorce proceedings, where the property rights of the parties are finally settled. (Iowa) *Hubbard v. Ellithorpe*, 271.

**4. ATTORNEY AND CLIENT—Negligence—Burden of Proof.**—A person seeking to avoid the payment of attorney's fees in a divorce proceeding, on the ground that such attorney has negligently failed to procure a larger fee from the defendant therein, has the burden of proof to show such negligence. (Iowa) *Hubbard v. Ellithorpe*, 271.

**5. ATTORNEY AND CLIENT—Lien for Services—Judgment.**—In enforcing an attorney's lien for services in a divorce proceeding against money due his client, a personal judgment against the client for the amount is proper. (Iowa) *Hubbard v. Ellithorpe*, 271.

**6. ATTORNEY AND CLIENT—Enforcement of Lien for Services—Necessary Parties.**—To establish an attorney's lien against a judgment for alimony paid to the clerk of the court, the defendant in the divorce proceedings is not a necessary party. (Iowa) *Hubbard v. Ellithorpe*, 271.

See Divorce, 6.

# **AUTOMOBILES.**

See Municipal Corporations, 4.

# **BAGGAGE.**

See Carriers, 1-10.

# **BANKRUPTCY.**

*Change of Title to Property.*

**1. BANKRUPTCY—Change of Title to Property.**—Under the bankruptcy law there is no change of title until the trustee is actually appointed and qualified, whatever may be the retroactive effect on the,

passing of the title when the appointment is actually accomplished. (La.) *Gordon v. Mechanics' etc. Co.*, 434.

2. **BANKRUPTCY.—The Trustee is not Bound to Accept Property** tendered by the bankrupt to the creditors, even if it is in existence, unless such acceptance would be beneficial to them, a fortiori when it would be prejudicial to do so. (La.) *Gordon v. Mechanics' etc. Ins. Co.*, 434.

3. **BANKRUPTCY—Property Which does not Pass to the Assignee.**—Under the bankruptcy act, property acquired after the filing of the petition and before the adjudication does not pass to the assignee. (Mass.) *Sibley v. Nason*, 520.

#### *Future Wages.*

4. **BANKRUPTCY, Right to Future Wages, When does not Pass by.**—The right to future wages to be earned under a contract in existence prior to the adjudication does not pass to the assignee in bankruptcy. (Mass.) *Citizens' Loan Assn. v. Boston etc. R. R. Co.*, 584.

5. **BANKRUPTCY, Effect of upon Assignment of Wages to be Earned in the Future.**—An assignment of future earnings which may accrue under an existing contract of service, although the employment is indefinite and the term and compensation are terminable at will, made to secure the payment of an existing debt, is valid, and is not affected by a subsequent adjudication in bankruptcy against the assignor, and the rights of the assignee may be enforced notwithstanding the discharge in bankruptcy of the assignor. (Mass.) *Citizens' Loan Assn. v. Boston etc. R. R. Co.*, 584.

#### *Discharge.*

6. **BANKRUPTCY—Discharge Pending Proceedings in Equity.**—Where a creditor holds a debt, not secured by lien, against which all exemption rights have been waived by the debtor, and the creditor, before the debtor's discharge in bankruptcy, files a proceeding in equity to obtain a judgment in rem against property set apart as exempt by the trustee in bankruptcy, in which proceeding a receiver is appointed and an injunction granted, the debtor may, on the trial of such proceeding, interpose his discharge in bankruptcy, obtained pending such proceeding, as a defense to the creditor's right to recover his judgment in rem and subject the exempt property to his debt. (Ga.) *Bowen & Thomas v. Keller*, 164.

7. **BANKRUPTCY, Effect of a Discharge in.**—A debt is not extinguished by the discharge of the debtor in bankruptcy. (Mass.) *Citizens' Loan Assn. v. Boston etc. R. R.*, 684.

#### *Action for Personal Injury.*

8. **BANKRUPTCY—Right of Bankrupt to Maintain Action of Tort After—An Action for Damages to His Person is not Transferable by the Bankrupt.**—He may, therefore, maintain an action for such damages suffered by him before his adjudication in bankruptcy. (Mass.) *Sibley v. Nason*, 520.

9. **BANKRUPTCY—Damages Recoverable, When may Include Loss of Time.**—Though, in an action by a bankrupt for personal injuries suffered by him before filing his petition, he is not entitled to recover the value of his wages strictly speaking, he may recover compensation on account of his pain and suffering and the value of his time while prevented from working. (Mass.) *Sibley v. Nason*, 520.

10. **BANKRUPTCY—Right of Bankrupt to Recover for Services of Physician Which have not been paid for and Against Payment of Which He is Protected by His Discharge.**—A plaintiff in an action for

personal injuries is entitled to recover for reasonable expenditures for nursing and physician's care rendered necessary by the wrongful act of the defendant, though the bill for such services arose prior to the discharge in bankruptcy. Because plaintiff may treat them as debts of honor, he may recover for them in an action for personal injuries due to the negligence of the defendant. (Mass.) *Sibley v. Nason*, 520.

### BANKS AND BANKING.

**1. BANKS AND BANKING—Misappropriation of Funds—Right to Retain.**—A person who accepts a draft issued by the cashier of one bank against funds held by its correspondent in payment of the individual indebtedness of such cashier, is charged with knowledge that the draft is drawn on the bank's funds, and cannot retain the fund thus diverted as against a showing that the cashier acted without authority. (Iowa) *Home Savings Bank v. Otterbach*, 367.

**2. BANKS AND BANKING—Misappropriation of Funds by Cashier—Estoppel.**—One not induced by any action of the officers of a bank to rely on the authority of its cashier to use the bank's funds for his own benefit, is bound to know that such cashier has no apparent authority to do so, and the burden of establishing an estoppel against the bank is upon him. (Iowa) *Home Savings Bank v. Otterbach*, 267.

**3. BANKS AND BANKING—Misappropriation of Funds by Cashier—Ratification—Right to Recover.**—An attempt on the part of a bank to hold its cashier individually liable for an amount which he has unlawfully diverted from the bank's funds, does not prevent the bank from following such funds and reclaiming them from the person to whom they have been wrongfully paid. (Iowa) *Home Savings Bank v. Otterbach*, 267.

**4. BANKS AND BANKING—Joint Conversion of Funds—Extinction of Liability.**—If two persons are jointly liable for the conversion of funds of a bank, the liability of both is extinguished only by the receipt by the bank of satisfaction from one of them. (Iowa) *Home Savings Bank v. Otterbach*, 267.

See *Officers*, 7.

### BASEBALL.

See *Nuisances*.

### BENEFICIAL ASSOCIATIONS.

**1. BENEFIT SOCIETY—Tribunals of the Order.**—It is competent for the members of a benefit society to agree that questions arising between them and the order relating to property rights may be referred to and settled by tribunals established within the order, and courts will not undertake to inquire into the regularity of the procedure adopted and pursued by those tribunals in reaching their conclusions. (Md.) *Donnelly v. Supreme Council Catholic Benevolent Legion*, 499.

**2. BENEFIT SOCIETY—Reasonableness of By-law.**—A by-law of a benefit society is reasonable and binding on a member which makes the payment of a permanent disability benefit dependent upon his being destitute of means of support at the time of his arrival at the age of expectancy. (Md.) *Donnelly v. Supreme Council Catholic Benevolent Legion*, 499.

**3. BENEFIT SOCIETY—Exclusive Jurisdiction of Tribunals.**—Where the tribunals of a benefit society have power to decide a disputed question, their jurisdiction is exclusive, whether there is a by-law stating such decision to be final or not, and courts cannot



be invoked to review their decisions of questions coming properly before them, except in cases of fraud. This is true whether the member does not press his claim at all before the tribunals of the order, or whether he carries it through the final tribunal, or whether he goes through only a part of the hearings which he might have in the order. It is the existence of a tribunal, properly erected and charged with the duty of determining the rights of the members as between themselves and the order, which is a bar to a suit in court of a member against such order in regard to any question so confided to the tribunals of the member's own choice. (Md.) Donnelly v. Supreme Council Catholic Benevolent Legion, 499.

#### **BIGAMY.**

1. **BIGAMY, Burden of Proof as to the Dissolution of the First Marriage.**—If, in a prosecution for bigamy, the first marriage is proved, as well as the continuance in life of the first wife, it is incumbent on the accused to show a divorce granted before the second marriage was celebrated. (Ind.) Fletcher v. State, 219.

2. **JURY TRIAL, Instruction upon Facts, What is not.**—An instruction on a trial for bigamy that the jury has the right to consider the fact, "if such be the fact," that in making application for the second marriage license the accused misstated his name and residence and concealed the fact of his former marriage, is not an assumption of the truth of a controverted fact. (Ind.) Fletcher v. State, 219.

#### **BILLS AND NOTES.**

1. **BILLS AND NOTES—Signing as Trustee.**—One who indorses as a guarantor is, as such indorser, personally bound, notwithstanding the fact that the word "trustee" is added to his name. (Or.) McLeod v. Despain, 1066.

2. **BILLS AND NOTES—Signing as Trustee—Notice.**—The word "trustee," added to the payee's name in a written instrument is sufficient to put the purchaser upon inquiry as to all the terms and conditions under which it may have been executed, and in the absence of such inquiry knowledge thereof will be presumed. (Or.) McLeod v. Despain, 1066.

3. **BILLS AND NOTES—Assignment—Notice.**—A person who takes an assignment of a note made payable to the order of a third person as trustee is put upon inquiry as to all of the terms and conditions under which the note was executed, and is presumed to have had full knowledge thereof. (Or.) McLeod v. Despain, 1066.

4. **BILLS AND NOTES—Holder in Due Course—Defenses—Negotiable Instruments Act.**—If a blank note is wrongfully filled out and delivered by one of the makers to the payee without notice to him that the instrument as delivered is not filled out in accordance with the authority given by the other makers to the one who fills it out and delivers, the payee does not become a holder in due course, under a negotiable instruments act providing that any such instrument when completed, to be enforced against any person who became a party thereto prior to its completion, must be filled up strictly in accordance with the authority given within a reasonable time, and the note is subject to the defense by the other makers, that it was not completed in accordance with their agreement. (Iowa) Ploeg v. Van Zuuk, 275.

See Alteration of Instruments.

#### **BOYCOTTING.**

See Monopolies, 2-3.

**BREACH OF PROMISE TO MARRY.**

1. **BREACH OF PROMISE OF MARRIAGE**—Evidence of Reputation for Chastity.—In an action by a woman to recover for the breach of defendant's promise of marriage, she should not be allowed, in rebuttal, to prove her good reputation for chastity. (Mass.) Colburn v. Marble, 561.

2. **BREACH OF PROMISE TO MARRY**—Want of Chastity as a Defense.—Actual unchastity, either before or after the making of the promise of marriage, if there has been no waiver of the condition, justifies the defendant in breaking the engagement for that reason. (Mass.) Colburn v. Marble, 561.

3. **BREACH OF PROMISE OF MARRIAGE**—Immodest Acts of Plaintiff.—Immodest or indecent conduct on the part of a woman, not amounting to unchastity, is not admissible in evidence in an action by her for a breach of promise of marriage, either in defense or in mitigation of damages. (Mass.) Colburn v. Marble, 561.

4. **BREACH OF PROMISE OF MARRIAGE**—Evidence of What was Told Defendant by a Third Person.—In an action for a breach of promise of marriage, the defendant is not entitled to prove that he stopped going with the plaintiff because of something told him by a third person. (Mass.) Colburn v. Marble, 561.

5. **BREACH OF PROMISE TO MARRY**—Want of chastity not known to defendant until after the commencement of an action for the breach of a promise to marry is nevertheless a good defense. (Mass.) Colburn v. Marble, 561.

6. **BREACH OF PROMISE OF MARRIAGE**—Fraud in Concealing Unchastity, What is not.—Mere silence on the part of a woman, without any inquiry on the part of the man, though resulting in the concealment of matter which would have broken the engagement if known, does not constitute fraud on her part. (Mass.) Colburn v. Marble, 561.

7. **BREACH OF PROMISE OF MARRIAGE** for an Insufficient Reason does not Bar a Defense Founded upon Good Cause not Known When the Breach Occurred.—If a man commits a breach of his promise of marriage on a ground other than the fornication of the woman with a third person, this does not waive such fornication nor prevent its operation as a defense to the action. (Mass.) Colburn v. Marble, 561.

8. **BREACH OF PROMISE OF MARRIAGE**—Mitigation of Damages.—The refusal of an instruction respecting fornication by the plaintiff who sues for a breach of promise of marriage is not error when, by its terms, it includes fornication committed by the plaintiff with the defendant. (Mass.) Colburn v. Marble, 561.

**BROKERS.**

See Insurance, 1-7.

**BUILDING AND LOAN ASSOCIATIONS.**

1. **BUILDING AND LOAN ASSOCIATIONS**—Maturity of Stock.—If shares of stock in a building and loan association have matured, the holder is no longer a stockholder in such association, but simply a creditor thereof, whose certificates of stock are valuable only as proof of the number of shares on which he is entitled to receive his money. (Iowa) Bohn v. Boone Building etc. Assn., 263.

2. **BUILDING AND LOAN ASSOCIATIONS**—Maturity of Stock—Right to Loan to Association.—When the shares of stock in a building and loan association held by a member have matured, he has a right to leave the money as a loan in the hands of the association,

unless such transaction is so clearly in excess of its corporate power as to be ultra vires. (Iowa) *Bohn v. Boone Building etc. Assn.*, 263.

**3. BUILDING AND LOAN ASSOCIATIONS—Power to Borrow Money.**—The power of building and loan associations to borrow money is implied from the general nature of the business they are organized to carry on. (Iowa) *Bohn v. Boone Building etc. Assn.*, 263.

**4. BUILDING AND LOAN ASSOCIATIONS—Loans to Retiring Member.**—A provision in the by-laws of a building and loan association that, upon the maturity of the shares of a member, he shall have no further interest in or profit thereon, does not prevent him from making a valid loan of the amount due to the association and taking its note therefor. (Iowa) *Bohn v. Boone Building etc. Assn.*, 263.

**5. BUILDING AND LOAN ASSOCIATIONS, Loans to—Authority of Officers.**—The president and secretary of a building and loan association have power to accept a loan from a retiring member whose shares have matured for the amount thereof, and to give him a note therefor, where the transaction is made a matter of record in pursuance of a practice or custom prevailing in the management of the corporate business. (Iowa) *Bohn v. Boone Building etc. Assn.*, 263.

**6. BUILDING AND LOAN ASSOCIATIONS—Estoppel to Plead Insolvency.**—A building and loan association cannot plead in avoidance of a retiring member's right of action on a note given him by the association for the amount of his matured stock, that it was in fact insolvent at the time of giving the note, and long prior to the date when it actually ceased to do business. (Iowa) *Bohn v. Boone Building etc. Assn.*, 263.

## **BURIAL RIGHTS.**

See Cemeteries.

## **CARRIERS.**

### ***Of Passengers—Baggage.***

**1. RAILWAY TICKET—Privity of Contract.**—Where a man pays his own money for a ticket which the railway agent agrees to deliver to the married daughter of the purchaser for her use in coming to his home, there is no privity between her and the railway company, and she cannot recover for injuries due to its failure to deliver the ticket. (Ga.) *Ogles v. Nashville etc. Ry. Co.*, 175.

**2. CARRIERS, Baggage, Liability for, When not Terminated by Delay in Taking Away.**—If the baggage of a passenger reaches its destination, and he delays in calling for it within a reasonable time, and it is then taken away by a third person and lost through the negligence of the carriers agents, it is answerable. (Ala.) *Central of Georgia Ry. Co. v. Jones*, 71.

**3. CARRIERS, Presumption of Negligence of on the Loss of Baggage.**—If a carrier has had the baggage of a former passenger in its depot or warehouse, it is, on the loss of such baggage, presumed, to have been negligent, and must assume the burden of disproving such negligence in an action by the owner to recover the value of the property so lost. (Ala.) *Central of Georgia Ry. Co. v. Jones*, 71.

**4. STREET RAILWAYS—Negligence in Suffering Baggage to Remain on the Floor.**—It is not negligence on the part of a street railway company or its employes, as a matter of law, to suffer baggage or a satchel to remain on the floor where a passenger has placed it, though it happens afterward that another passenger stumbles over it, and falling, is injured by striking her head against the door of the car. (Mass.) *Pitcher v. Old Colony Street Ry. Co.*, 513.

**5. STREET RAILWAYS, Care and Diligence Which must Exercise.**—A street railway company is not bound to exercise toward its passengers the utmost care and diligence in providing against injuries which can be averted by human care and forethought, but only the highest degree of care consistent with the practical carrying on of its business. (Mass.) *Pitcher v. Old Colony Street Ry. Co.*, 513.

**6. STREET RAILWAYS—Duty to Keep Aisles, Entrances and Exits Free from Obstructions.**—A street railway company is not bound, under all conditions, to keep aisles, entrances and exits free from all obstructions by the use of the highest possible degree of care. (Mass.) *Pitcher v. Old Colony Street Ry. Co.*, 513.

**7. STREET RAILWAYS—Custom not to have Racks for Baggage.** Evidence that it is customary not to have racks for baggage and parcels in a street-car and to permit passengers to put baggage and dress-suit cases on the floor is admissible, not for the purpose of proving a custom as such, but as bearing on the question whether the railway company exercised the degree of care required of it, and, on the contrary, evidence of a custom precisely opposite would be admissible for the same purpose. (Mass.) *Pitcher v. Old Colony Street Ry. Co.*, 513.

**8. CARRIERS—Delay of Salesman's Baggage.**—Where baggage agents neglect to forward the trunks of a traveling salesman on the same train on which he takes passage, having knowledge of the character of the trunks and that the salesman cannot transact his business without their contents, whereby the latter is delayed in his business, the carrier is liable for the damages naturally resulting therefrom. (Minn.) *Conheim v. Chicago Great Western Ry. Co.*, 623.

**9. CARRIERS.—A Passenger is Entitled to have His Trunks,** which he delivers to the baggageman at the station in proper season, go forward on the same train which he takes. (Minn.) *Conheim v. Chicago Great Western Ry. Co.*, 623.

**10. CARRIERS—Damages for Delay in Delivering Salesman's Trunk.**—Where a carrier delays to forward a traveling salesman's trunk containing his samples, the measure of damages is the value of the use of the property during the period of delay, including such incidental expenses and damages as were in the contemplation of the parties at the time the contract was entered into. (Minn.) *Conheim v. Chicago Great Western Ry. Co.*, 623.

#### *Of Goods in General.*

**11. CARRIERS, Liability of When Negligence Exposes Property to Damage After the Negligence Itself has Terminated.**—If a shipment of property is made, and, through the negligence of the carrier, is delayed, but after the delay, reaches its point of destination, where, before removal, it is damaged by a cyclone to which it would not have been exposed but for such delay, the carrier is answerable if there was not an unreasonable delay in removing the goods after notice of arrival. It is not essential to the carrier's liability that the loss should have occurred while he was in default. (Ala.) *Alabama Great Southern Ry. Co. v. Elliott*, 72.

**12. CARRIERS—Act of God—Inexcusable Detention.**—A common carrier is responsible for injury to goods by the act of God, if the goods were exposed to injury by the carrier's inexcusable detention. (Neb.) *Wabash E. R. Co. v. Sharpe*, 823.

**13. CARRIERS—Act of God—Wrongful Delay in Delivery.**—If a carrier wrongfully delays the transportation of goods, and because of such delay they are injured by flood, the carrier is liable. (Neb.) *Wabash E. R. Co. v. Sharpe*, 823.

*Of Perishables—Connecting Carriers.*

14. **CARRIERS OF MILK—Duties Required of.**—It is the public duty of a carrier of milk to provide reasonable facilities for its reception and delivery, including care during transportation. (N. H.) *Baker v. Boston and Maine R. R.*, 937.

15. **CARRIERS OF MILK—Compliance with Public Duty—Question of Fact.**—The question as to what facilities and accommodations are a reasonable compliance with the public duty of a common carrier of milk to the shipper is one of fact. (N. H.) *Baker v. Boston and Maine R. R.*, 937.

16. **CARRIERS OF MILK—Duties Required of.**—It is the duty of a common carrier of milk to provide suitable cars in which to transport it and to provide men to handle and care for it during its transportation. (N. H.) *Baker v. Boston and Maine R. R.*, 937.

17. **CARRIERS OF MILK—Contract Limiting Liability.**—A contract under which a shipper of milk agrees with a common carrier to provide men to care for the milk during transportation and to indemnify the carrier against all liability for damages to such men or the property, and under which the shipper is not afforded an opportunity of having the carrier perform its full duty in handling and caring for the milk during transportation, is unreasonable and void as an unlawful restriction upon the liability of the carrier. (N. H.) *Baker v. Boston and Maine R. R.*, 937.

18. **CARRIERS—Limitation of Liability.**—A contract limiting a carrier's common-law liability is unreasonable and void when transportation according to the carrier's public duty is not afforded the shipper as an alternative, and no reduction of rates is made as a consideration for the limitation. (N. H.) *Baker v. Boston and Maine R. R.*, 937.

19. **CONNECTING CARRIERS—Loss of Perishables.**—When, in an action against a railroad company for the loss of a shipment of tomatoes, the plaintiff shows a contract to re-ice the refrigerator-car at specified stations, and proves that the shipment arrived at its destination in a heated condition; and the defendant's evidence shows that the car, though not its contents, was inspected at the stations specified in the contract, but that the inspectors did not re-ice the car because they thought it unnecessary, an instruction to the jury that the defendant performed every duty it owed to the plaintiff is erroneous, in that it usurps the functions of the jury and assumes the existence of facts in favor of the defendant. (Md.) *Orem Fruit etc. Co. v. Northern Cent. Ry. Co.*, 462.

20. **CARRIER OF PERISHABLES—Duty to Ice Cars.**—A railroad company is not relieved from its contract with a shipper of tomatoes to re-ice the refrigerator-car at specified stations, by a rule of the company not to re-ice cars unless six hundred pounds of ice can be put in the tanks. (Md.) *Orem Fruit etc. Co. v. Northern Central Ry. Co.*, 462.

21. **CONNECTING CARRIERS—Presumption of Negligence.**—On proof that a carrier received goods in good condition which are subsequently lost or injured, the burden of proof rests upon it to show delivery in the same condition to the next carrier or to the consignee. (Md.) *Orem Fruit etc. Co. v. Northern Central Ry. Co.*, 462.

*Of Livestock.*

22. **CARRIERS—Care of Livestock.**—An act of Congress requiring carriers engaged in the interstate shipment of livestock to care for them while in transit, by unloading them for rest, water, and feeding once in every twenty-eight consecutive hours, unless prevented from so doing by storm, or other accidental cause, does not

relieve such carrier from liability for damages arising from negligence in properly caring for, feeding, and watering livestock in its charge, though the transportation thereof is delayed by storm. (Neb.) Chicago etc. Ry. Co. v. Slaterry, 825.

**23. CARRIERS OF LIVESTOCK—Shipping Contract.**—A carrier of livestock is not relieved of its responsibility to properly care for the stock while in transit, by reason of the terms of an express contract whereby the shipper agrees to accompany the stock, if the carrier, with knowledge of his failure to do so, proceeds under the shipping contract. (Neb.) Chicago etc. R. R. Co. v. Slaterry, 825.

**24. CARRIERS OF LIVESTOCK—Liability as Insurer.**—A carrier of livestock is an insurer of the safety of the property while in its charge for transportation. (Neb.) Chicago etc. R. R. Co. v. Slaterry, 825.

**25. CARRIERS OF LIVESTOCK—Liability—Evidence.**—The delivery of livestock to a carrier in good order, and their arrival at the place of destination in bad order, makes a prima facie case against the carrier, and it devolves upon the carrier to show that the loss or damage resulted from some cause which exempts it from liability. (Neb.) Chicago etc. R. R. Co. v. Slaterry, 825.

**26. CARRIERS OF LIVESTOCK, Care Required of.**—Unavoidable delay in the shipment of livestock affords no excuse to the carrier or a failure to exercise that degree of care required of it in the transportation of the stock. (Neb.) Chicago etc. R. R. Co. v. Slaterry, 825.

**27. CARRIERS OF LIVESTOCK, Liability of.**—In the transportation of livestock, the liability of a common carrier attaches, including liability for injuries thereto occasioned by the acts of the carrier's servants. (Neb.) Cleve v. Chicago etc. Ry. Co., 837.

**28. CARRIERS OF LIVESTOCK, Limitations upon Liability of.**—The absolute liability of a common carrier for the safe delivery of property committed to it for carriage is qualified when applied to livestock, and made subject to the exception that it is not an insurer against injury resulting from the inherent nature or propensities of the animals and without the fault of the carrier. (Neb.) Cleve v. Chicago etc. Ry. Co., 837.

**29. CARRIER OF LIVESTOCK—Burden of Proof.**—Where, by the contract, the shipper accompanies his livestock with tenders or caretakers, no presumption of negligence on the part of the carrier arises merely from the proof of the fact that loss or injury has attended the shipment, but the burden is on the shipper to show that the loss, if any, was occasioned by the negligence of the carrier. (Neb.) Cleve v. Chicago etc. Ry. Co., 837.

**30. CARRIERS OF LIVESTOCK—Evidence Necessary to Sustain Action for Injury Due to Delay.**—To recover damages for the alleged delay in the transportation of livestock, it is necessary to introduce some competent evidence tending to show the length of time ordinarily required to transport a shipment from the place where received to the point of delivery, and that a longer time was consumed than was necessary for that purpose. (Neb.) Cleve v. Chicago etc. Ry. Co., 837.

*Limitation of Liability by Contract.*

**31. CARRIERS—Limitation of Liability.**—Common carriers cannot relieve themselves from the consequences of their own wrongful acts by special contract. (N. H.) Baker v. Boston and Maine R. R., 937.

**32. COMMON CARRIERS—Contracts Limiting Liability.**—A common carrier cannot by contract relieve himself from the performance

of his common-law duty to use ordinary care to avoid injuring those with whom he knew or should have known his business would bring him in contract. (N. H.) *Baker v. Boston and Maine R. R. Co.* 937.

**33. CARRIERS—Contract Between Shipper and His Servant—Void Indemnity Contract.**—An agreement between a shipper and his servant engaged to care for freight during its transportation, and relating thereto, based upon a void indemnity contract between the shipper and the carrier, cannot avail the latter as a defense to an action by such servant to recover for injuries resulting from the carrier's negligence. (N. H.) *Baker v. Boston and Maine R. R.*, 937.

#### **CASHIER.**

See Banks and Banking, 2, 3.

#### **CEMETERIES.**

*Safe Condition of Grounds for Visitors.*

**1. CEMETERIES—Duty to Maintain Grounds in Safe Condition.** If visitors to a cemetery leave the roadways and walk across the grass-covered grounds, they are not entitled to expect the same character of passageway that is provided in the regular roadways. (Mo.) *Barry v. Calvary Cemetery Assn.*, 773.

**2. CEMETERIES—Duty to Keep Grounds in Safe Condition.**—Although a cemetery association knows that people are in the habit of wandering over the grounds regardless of the roadways, and impliedly invites the public to make such use of the grounds, it owes them no further duty than to keep the premises in a reasonably safe condition. (Mo.) *Barry v. Calvary Cemetery Assn.*, 773.

**3. CEMETERIES—Liability to Person Injured.**—Where one in visiting a relative's grave leaves the regular roadway and walks across the grounds, she cannot hold the cemetery association liable in case she steps into a small hole so concealed by grass that ordinary inspection would not disclose it, when there is no evidence how the hole was made or that the association knew of its existence. (Mo.) *Barry v. Calvary Cemetery Assn.* (Mo.) 773.

*Burial Rights.*

**4. CEMETERIES.—Dead Human Bodies** become after interment a part of the ground to which they are committed. (N. H.) *Wilson v. Read*, 973.

**5. CEMETERIES—Equity Jurisdiction.**—Courts of equity have jurisdiction to settle controversies as to the burial of the dead, the care of their remains after burial, and the preservation of their place of interment from wanton violation or unnecessary disturbance. (N. H.) *Wilson v. Read*, 973.

**6. CEMETERIES—Right to Reburial.**—Whatever right a person may have to protect the burial place of a relative, no decree of a court can effect the reburial of remains no longer in existence. (N. H.) *Wilson v. Read*, 973.

**7. CEMETERIES—Burial Rights.**—The relatives of a deceased person cannot prevent a cemetery lot owner from using the spot where the remains have been buried for a subsequent burial, unless such use would constitute a wanton invasion or unnecessary desecration of the original place of burial. (N. H.) *Wilson v. Read*, 973.

**8. CEMETERIES—Rights of Lot Owners and Relatives.**—The owner of a cemetery lot has no absolute right to disturb a grave already upon it, and the next of kin have no absolute right to prevent the removal of the remains of one buried there or other use of the

and, but the rights of each are bounded by rules of propriety and reasonableness determinable by a court of equity. (N. H.) Wilson v. Read, 973.

**CHARACTER.**

See Evidence, 11, 12; Homicide, 4-6.

Note.

Character or Reputation of Decedent. See Homicide.

**CHILDREN.**

See Deeds, 6; Witnesses.

Note.

Churches, judicial notice of creeds, 55, 58, 59.

**CLERK OF COURT.**

**CLERK OF COURT, Liability of.**—The clerk of a court is responsible for his errors unless he can show that he used reasonable care and diligence to avoid such error. (Ky.) Commonwealth v. Johnson, 368.

**COHABITATION.**

See Marriage.

**COLORED CHILDREN IN SCHOOL.**

See Constitutional Law, 15, 16.

**COMMERCE.**

**INTERSTATE COMMERCE—City Taxation of Railroad.**

Where a city has granted permission to a railway company, exclusively engaged in the transportation of interstate freight and passengers, to run its cars over the tracks of a local street railway company, in accordance with a contract between the two companies, the city cannot impose an annual tax on the business of the interstate company for running its cars over the city streets. (Ga.) City Council of Augusta v. Augusta etc. Ry. Co., 197.

**CONCEALED WEAPONS.**

See Weapons.

**CONFLICT OF LAWS.**

See Contracts, 11, 12.

**CONSTITUTIONAL LAW.**

*In General.*

1-2. **CONSTITUTIONS—Interpretation of must be Unvarying.**—A cardinal rule in dealing with constitutions is that they are to receive an unvarying interpretation, and that their practical construction is to be uniform; a constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. (Tex. Cr.) Ex parte Woods, 1107.

3. **CONSTITUTION—Unchangeable Character of.**—The constitution is the organic law of the land; it stands, and should stand, unless otherwise declared in the manner provided by law, unchanged and unchangeable. (Tex. Cr.) Ex parte Woods, 1107.

4. **CONSTITUTIONAL LAW—Amendment of Statutes—Special Act.**—If a constitution requires that all amendments of city charters shall be made by general laws, a special law attempting to amend the charter of a city is void. (Miss.) Monette v. State, 715.

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**5. RETROACTIVE LEGISLATION—Curative Statutes.**—It is within the power of the legislature to cure by retroactive enactment such omissions or irregularities in proceedings of public officers as might, in the first instance, have been dispensed with by it. (Or.) *Ayers v. Land*, 1046.

*Police Power, in General.*

**6. THE POLICE POWER** is the Power and Obligation of Government to secure and promote the public welfare, comfort and convenience of the citizens, as well as the public peace, health, morals and safety. (Ky.) *Berea College v. Commonwealth*, 344.

**7. POLICE POWER** and the Bill of Rights.—Even the things reserved to the people by the constitution in the Bill of Rights are impliedly subject to the police power. (Ky.) *Berea College v. Commonwealth*, 344.

**8. POLICE POWER** and the Duty of the Court with Respect Thereto.—The duty is upon the courts, upon proper application, to declare void an attempted exercise of the police power which is not fairly and reasonably related to a proper end. (Ky.) *Berea College v. Commonwealth*, 344.

**9. POLICE POWER—Statutes Void in Part Only.**—A statute prohibiting the receiving or teaching in an institution of persons of the white or colored races, or in any branch of the same institution kept within twenty-five miles of each other, though unconstitutional as to the latter provision, may be regarded as valid and carried into effect with respect to its other prohibitions. (Ky.) *Berea College v. Commonwealth*, 344.

*Regulation of Employment.*

**10. CONSTITUTIONAL LAW—Hours of Employment—Delegation of Power.**—The legislature alone has power to regulate hours of labor, and cannot delegate such power to either of the other co-ordinate departments of government; this is true whether the authority for such regulations is found in an express constitutional provision or is based upon the police power. (Colo.) *Burcher v. People*, 143.

**11. CONSTITUTIONAL LAW—Regulation of Hours of Labor in Laundry.**—Under a constitutional provision requiring the legislature to provide an eight-hour day for employes in mines and other unhealthful places, "or other branch of industry or labor that the General Assembly may consider injurious or dangerous to health, life or limb," the legislature must, in attempting to regulate any of the unenumerated branches of industry, first declare the same to be injurious to health, and a mere general prohibition of employment in a healthful occupation, such as the employment of women in a laundry, is not equivalent to such a declaration. (Colo.) *Burcher v. People*, 143.

**12. CONSTITUTIONAL LAW.—The Right of Contracting for One's Labor** is reserved and guaranteed to every citizen; it is subject to no restraint except where the public safety, health, peace, morals or general welfare demands it, and then only where the legislative department of government, in the exercise of its police power, selects a proper subject for its exercise and prescribes reasonable and appropriate regulations. (Colo.) *Burcher v. People*, 143.

**13. CONSTITUTIONAL LAW—Imposing Duties and Penalties on Corporations and Associations not Imposed on Individuals in Like Circumstances.**—A statute requiring every company, corporation or association, in the absence of written contract to the contrary, to make a full settlement with, and payment of money to, its employes engaged in manual or mechanical labor at least once in every calendar month, and imposing a penalty for the violation of this requirement, is unconstitutional, because of the fourteenth amend-

ment to the constitution of the United States. Such statute imposes duties and penalties on corporations, companies and associations not imposed on individuals in like circumstances. (Ind.) Toledo etc. R. R. Co. v. Long, 226.

**14. CONSTITUTIONAL LAW—Railroads—Negligence.**—A statute enacted with reference to railroad companies and grounding the liability for their negligence on the inherently dangerous nature of their business in operating their cars by the highly dangerous agency of steam, is not in violation of the constitution of the United States. (Miss.) Mobile etc. R. R. Co. v. Hicks, 679.

*Separation of White and Colored Pupils in School.*

**15. CONSTITUTIONAL LAW—Prohibition of the Teaching of White and Colored Children in the Same School.**—A statute prohibiting and penalizing the receiving for instruction or teaching of white and colored persons in the same school, or the attendance by any white person in a school where negroes are received as pupils, or of negroes where white persons are so received, does not violate the constitution either of the state of Kentucky or of the United States. Such legislation is a justifiable exercise of the police power. (Ky.) Berea College v. Commonwealth, 344.

**16. CONSTITUTIONAL LAW—Prohibition of Receiving and Teaching White and Colored Persons in Branches of an Institution Within Twenty-five Miles of Each Other.**—A statute prohibiting the maintenance of any institution of learning, or of distinct branches thereof within twenty-five miles of each other, where white and colored persons are received or taught, is an unreasonable exercise of the police power, and void. (Ky.) Berea College v. Commonwealth, 344.

See Elections; Statutes.

### CONTEMPT.

**CONTEMPT—Offensive Petition for Rehearing in the Supreme Court.**—Where an attorney in a petition for rehearing in a case in which the supreme court has upheld the constitutionality of a statute limiting the hours of labor, states that in his opinion the decisions favoring the power of the state to limit the hours of labor are all wrong, and written by men who have never performed manual labor, or by politicians and for politics, who do not know what they write about, he is guilty of contempt, which is not purged by an apology and a disavowal of any intent to commit contempt, and the offensive petition should be stricken from the files and the attorney reprimanded and directed to pay the costs of the contempt proceeding. (Nev.) In re Chartz, 915.

### CONTRACTS.

*In General.*

**1. CONTRACTS—Dates of Instruments.**—Where a transaction constituting a contract must be considered as a whole, even though it consumed more than one day, the date of the writings constituting such transaction is immaterial. (Or.) McLeod v. Despain, 1066.

**2. CONTRACTS—Validity—Misrepresentation—Rescission.**—If a person is ignorant of the contents of a written instrument from inability to read it, and signs it through mistake and misrepresentation, without negligence on his part, the contract is void, and he need not rescind it to avoid it. (Iowa) El Dorado Jewelry Co. v. Darnell, 309.

**3. CONTRACT—Refusal to Perform—Promise of Extra Pay.**—If one who has contracted to dig a cellar refuses, after part performance, to go on with the work because he encounters substantial difficulties

unforeseen when the contract was entered into which will increase the cost of excavation, a promise by the other party to pay extra compensation if the contractor will complete the work is enforceable; and it is not essential to the validity of this new contract that the original contract should be expressly rescinded. (Md.) *Linz v. Schuck*, 481.

4. **CONTRACTS—Unconditional Covenants.**—An unconditional, express covenant to repair a bridge or keep it in repair is equivalent to a covenant to rebuild it. (Miss.) *Mitchell v. Hancock Co.*, 706.

5. **CONTRACTS—Unconditional Covenant.**—An unconditional, express covenant to keep a bridge in good repair and that it shall remain safe for a stipulated period, is not excused because the bridge is washed away, or so damaged as to become unsafe. (Miss.) *Mitchell v. Hancock Co.*, 706.

6. **CONTRACT—Act of God.**—While an act of God will excuse the nonperformance of a duty created by law, it will not excuse the performance of a duty created by contract. (Miss.) *Mitchell v. Hancock Co.*, 706.

#### *Consideration and Mutuality.*

7. **CONTRACTS.—Adequacy or Inadequacy of Consideration** is a subject to be considered by the parties at the time they make the contract. There is no law regulating the amount of consideration necessary to support a particular promise. If the parties have capacity to contract, and there is no fraud or misplaced confidence, and there is any valuable consideration, the courts will enforce the contract according to its terms. (Ga.) *Atlanta etc. R. R. Co. v. Camp*, 151.

8. **CONTRACT.—A Mere Moral Obligation** is not such a consideration as will support a contract. (Md.) *Linz v. Schuck*, 481.

9. **CONTRACT, When not Mutual.**—If one party offers to furnish railroad ties for the rest of this year and the next, without specifying any class of ties or place of delivery, and the other party responds that he will take all the ties put on at a specified place within the next twelve months, provided they come up to regular specifications, the offer and the reply do not constitute a binding contract, because their terms are not the same. (Ky.) *Louisville etc. R. R. Co. v. Coyle*, 384.

10. **CONTRACT, Want of Mutuality, When Relieved by Part Performance.**—Where a contract is lacking in mutuality, a part performance may relieve it of this defect and render either of the contracting parties liable for damage for failure to complete performance. (Ky.) *Louisville etc. R. R. Co. v. Coyle*, 384.

#### *Conflict of Laws.*

11. **CONFLICT OF LAWS—Foreign Law Affecting the Remedy Only.**—If the law of a state wherein a contract was made affects only the remedy to enforce it, such law is not available in an action on the contract brought in another state. (Ala.) *Gallihier v. State Mutual Life Ins. Co.*, 83.

12. **CONTRACTS, Limitations Therein upon the Time to Sue, When not Available in Another State.**—If a provision in a contract of insurance fixes a limitation upon the time when suit may be brought, such limitation is not available in an action commenced in a state whose code makes void all agreements whereby the time for the bringing of actions is fixed at a period less than that prescribed by law. (Ala.) *Gallihier v. State Mut. Life Ins. Co.*, 83.

See Damages, 1, 2.

**CONTRIBUTORY NEGLIGENCE.**

See Negligence, 6-9.

**CONVERSION.**

See Trover and Conversion.

**CONVEYANCES.**

See Deeds; Vendor and Vendee.

**CORPORATIONS.***In General.*

1. **CORPORATIONS—Res Judicata.**—If a corporation is not a party to a bill to restrain another corporation from voting a large amount of the first corporation's stock, on the ground that the holding corporation is a trust, the judgment is not *res judicata* against the original corporation in a subsequent action to forfeit its charter. (Miss.) Southern Electric Securities Co. v. State, 638.

2. **CORPORATIONS—Rights and Duties.**—Corporations have not all the rights and powers of individuals, and cannot surrender their franchises, nor delegate their duties to others with the same freedom that an individual can abandon his occupation and turn over his business. (Miss.) Southern Electric Securities Co. v. State, 638.

3. **CORPORATIONS—Action by Agents.**—A corporation can act only through its agents, and these are selected by its stockholders. (Miss.) Southern Electric Securities Co. v. State, 638.

4. **CORPORATION—Suit by Minority Stockholders.**—The interest of the stockholders in a corporation entitles them to maintain a suit for relief against a fraudulent judgment rendered against it; and they are not precluded from maintaining such suit by the fact that one of them has taken an assignment of a certificate of sale of corporate property at execution under another judgment, for the benefit of the company. (Colo.) Paxton v. Heron, 123.

*Creation and Existence.*

5. **CORPORATIONS, Construction of Provision Respecting Creation of by Special Act.**—The provision of the state constitution providing that corporations, other than bank, shall not be created by special act should be so interpreted as to render it impossible for the general assembly by special act to alter an existing charter in such manner as in effect to make a new corporation. (Ind.) Marion Trust Co. v. Bennett, 228.

6. **CORPORATIONS—A De Facto Corporation cannot Exist under a statute under which no attempt was made to organize, nor under an organization attempted under a statute which was unconstitutional and therefore void.** (Ind.) Marion Trust Co. v. Bennett, 228.

*Directors—Disqualification to Pass on Claims.*

7. **CORPORATION.—A Director Who is a Claimant against the corporation cannot, either in person or by proxy, be counted as one of a quorum in passing upon the claim.** (Colo.) Paxton v. Heron, 123.

8. **CORPORATION.—A Director Who is a Claimant is Disqualified to Accept the Resignation of Other Directors and to fill the vacancies when the purpose thereof is to effect the allowance of his claim.** (Colo.) Paxton v. Heron, 123.

9. **CORPORATION.—Where Directors are Disqualified to Act, the fact that their names are affixed to the minutes adds nothing to the efficacy of their official action.** (Colo.) Paxton v. Heron, 123.

**Capital Stock—Change in Issue—Subscriptions and Release.**

10. **CORPORATIONS—Void Subscription to Stock.**—If a corporation has no power to subscribe to the stock of another corporation, such subscription is void, and the person taking such stock knowing of such illegality, does not bind its agent, who, assuming to bind the corporation and not himself, signs himself as agent. (Miss.) Merchants' etc. Packet Co. v. Streuby, 651.

11. **CORPORATIONS—Release of Subscribers to Stock.**—A corporation has no legal capacity to release an original subscriber to its capital stock from the obligation of paying for his shares, in whole or in part, by reducing the capital stock or by any other arrangement. (La.) Cammack v. Levy, 443.

12. **CORPORATIONS—Effect of Reduction of Value of Stock.**—When a corporation reduces the par value of the shares of stock, and thereafter one of the stockholders sells his shares as thus reduced, the purchaser's liability to creditors is measured by such reduced value; but if the reduction is void as to creditors, the original subscriber remains bound to them as before. (La.) Cammack v. Levy, 443.

13. **CORPORATIONS.—A Change in the Capital Stock of a Corporation cannot be Made Without Special Legislative Authorization.** (Ind.) Marion Trust Co. v. Bennett, 228.

14. **CORPORATIONS—Increase in Capital Stock, When Unconstitutional.**—A statute permitting a corporation created with a definite capital stock to enlarge such stock at the will of its stockholders is unconstitutional as an attempt to create a corporation, under a constitution providing that corporations shall not be created by special act. (Ind.) Marion Trust Co. v. Bennett, 228.

15. **CORPORATIONS, Subscription to Stock of, When Void Because of Want of Capacity of the Corporation.**—A subscription to the capital stock of a corporation which it has no capacity to issue is a nudum pactum and hence not enforceable. (Ind.) Marion Trust Co. v. Bennett, 228.

16. **CORPORATIONS, Subscription to Stock of, When cannot be Validated by Estoppel.**—As between a corporation and its stockholders, subscriptions to a wholly unauthorized issue of stock cannot be validated on the principle of estoppel. (Ind.) Marion Trust Co. v. Bennett, 228.

17. **CORPORATIONS, Subscription to Stock of, Right of Receiver to Enforce.**—Where the receiver of a corporation does not represent any particular creditor, he stands on no higher plane than the corporation itself, and cannot enforce subscriptions to stock which the corporation could not enforce. (Ind.) Marion Trust Co. v. Bennett, 228.

18. **CORPORATIONS—De Facto Issue of Stock.**—If the provisions of a statute authorizing an increase in the capital stock of a corporation are unconstitutional, there can be no de facto issue of stock thereunder. (Ind.) Marion Trust Co. v. Bennett, 228.

19. **CORPORATIONS.—An Issue of Stock of a Corporation cannot be Justified by one act of the legislature when it was clearly attempted under another, and the corporation never accepted the former act nor became entitled to enjoy its privileges.** (Ind.) Marion Trust Co. v. Bennett, 228.

20. **CORPORATIONS, Subscription for Stock, Notes Given for, When not Enforceable.**—An assumption of, or agreement to pay, notes issued on account of subscriptions to the stock of a corporation is not enforceable if the stock subscribed for cannot be issued by the corporation for want of authority. (Ind.) Marion Trust Co. v. Bennett, 228.

**21. CORPORATIONS—Subscription for Stock Partly Illegal.**—If there is an attempt to enforce a liability for a subscription to stock in a corporation or upon notes given for such subscription, and there is no means of distinguishing between the sums due for legal and those due for an illegal subscription to stock, the whole must fail. (Ind.) *Marion Trust Co. v. Bennett*, 228.

See Libel and Slander; Monopolies.

#### COTENANCY.

See Waters and Watercourses.

#### COUNTERCLAIM.

See Setoff and Counterclaim.

#### COURTS.

##### *Stare Decisis.*

**1. STARE DECISIS—Construction of Decisions.**—Observations of the court are to be limited to the facts before it. (Ind.) *McAdams v. Bailey*, 240.

##### *Jurisdiction.*

**2. JURISDICTION OF SUBJECT MATTER—Increase of on Appeal.**—On appeal from the judgment of a county court rendered in an action originally brought before a justice of the peace, the appellate court cannot permit the complaint to be amended to a sum in excess of the jurisdiction of the county court and subsequently render judgment for such sum. (Neb.) *Wilson v. White*, 852.

**3. ESTOPPEL to Deny Jurisdiction of Court.**—If Persons Sued in a United States Court as residents of Illinois enter a plea to the jurisdiction of the court, asserting that they are domiciled in Louisiana, and the plaintiff, acting upon this assertion, brings his action in a state court in Louisiana, the defendants are then estopped to plead to the jurisdiction of the latter court on the ground that they are domiciled in Illinois. (La.) *Caldwell v. Nelson Morris & Co.*, 446.

**4. JURISDICTION, CONCURRENT—State and Municipal Corporations.**—If the power to hear and determine minor offenses is given to a municipal corporation, but no words of exclusion or restriction are used, the remedies between the state and the corporation must be construed to be concurrent. (Or.) *State v. Ayers*, 1036.

#### COVENANTS.

**1. COVENANTS.**—When a Third Party Claims the Benefit of a covenant or contract between two other parties, it is incumbent upon him clearly to allege all the facts necessary to establish his claim. (Colo.) *Judd v. Robinson*, 128.

**2. COVENANT OF WARRANTY—Limitation of Action for Breach.**—Where a superior title is outstanding in a third person at the time of the execution of a warranty deed, the covenants of the deed are broken when that title is actually asserted and the covenantee obliged to yield thereto, so that the statute of limitations then commences to run rather than from the date of the delivery of the deed. (Minn.) *Brooks v. Mohl*, 629.

**3. COVENANT OF WARRANTY—Breach Without Actual Ouster.** The grantee in a warranty deed is not compelled, in order to have an action for breach of covenant, to surrender possession when an outstanding superior title is asserted, but he may extinguish such title by purchase. (Minn.) *Brooks v. Mohl*, 629.

**4. COVENANT OF WARRANTY—Measure of Damages for Breach.**—The measure of damages for breach of covenants of warranty, where there has been an eviction actual or constructive, is the consideration paid, with interest, together with costs and attorneys' fees reasonably and in good faith incurred in defending the title and resisting the eviction. (Minn.) *Brooks v. Mohl*, 629.

#### **CREDITORS' SUIT.**

**CREDITORS' SUIT—Parties Defendant.**—If a debtor pays for real property and causes it to be conveyed as a gift to another, the creditors of the municipality have a right to maintain a suit to reach such property without making the grantor of such conveyance a party defendant. (Ala.) *Southern Ry. Co. v. Hartshorn*, 68.

#### **CRIMINAL LAW.**

**1. CRIMINAL LAW—Reference to Common Law for Definition of Crime.**—Although no common-law offenses are recognized in a state, it is quite proper to go to the common law for a definition of a crime denounced by a statute. (Or.) *State v. Ayers*, 1036.

**2. EVIDENCE—Conviction of a Crime cannot be Proved on Cross-examination of the Defendant.**—Under a prosecution for illegally selling intoxicating liquors, the accused cannot be compelled, on cross-examination, though he voluntarily offered himself as a witness, to answer whether he has ever been convicted of illegally keeping intoxicating liquors for sale. Such conviction can be proved only by the record thereof, though a statute provides that the conviction of a witness of a crime may be shown to affect his credibility. (Mass.) *Commonwealth v. Walsh*, 559.

**3. CRIMINAL LAW—Allusion to Defendant's Failure to Testify.** In a prosecution for aggravated assault a remark by the county attorney that there has been no witness upon the stand to contradict the testimony of the prosecutrix is not an allusion to the failure of the accused to testify in his own behalf. (Tex. Cr.) *Sample v. State*, 1103.

**4. EVIDENCE of Other Crimes is Admissible on a Criminal Prosecution** where its tendency is to show the motive on the part of the accused for the commission of the crime for which he is on trial. (Ky.) *Commonwealth v. Everson*, 365.

See *Insanity*.

#### **CRUELTY TO ANIMALS.**

See *Animals*, 5, 6.

#### **CUSTOMS AND USAGES.**

**1. CUSTOM AND USAGE, Difference Between.**—There is a distinction between custom and usage. The former refers to those usages which have existed and been universally recognized for so long a period as to have acquired the force of law and to be binding without regard to the assent of the individual; and the latter refers to the established method of dealing adopted in a particular place or by those engaged in a particular trade or vocation, which acquires legal force because people make contracts with reference to it. (Ala.) *Byrd v. Beall*, 60.

**2. USAGE, Evidence of, When Inadmissible.**—Where a contract is clearly unambiguous and free from words which may have a different meaning, no evidence can be received of a usage which will change the plain meaning of the contract. (Ala.) *Byrd v. Beall*, 60.

**3. A USAGE, to be Binding,** must either be known to the party sought to be affected or so general and so generally known as to justify the presumption that such party knew and contracted with reference to it. (Ala.) Byrd v. Beall, 60.

**4. USAGE, When not Proved.**—Where, upon a plea of a particular usage respecting the acceptance of lumber sold, the witness being asked whether there was any, and what it was, and having answered that in all of his experience he never knew a millman to refuse to settle in the manner named, this does not prove the generality of the custom or usage, nor that any usage was generally recognized as binding. (Ala.) Byrd v. Beall, 60.

**5. A USAGE must be, with Some Exceptions, Reasonable, and not oppose nor alter established legal principles, nor upon a given statement of facts make the rights or liabilities of individuals other than they are at the common law.** (Ala.) Byrd v. Beall, 60.

**6. USAGE, When too Unreasonable to be Binding.**—A usage which compels a shipper of lumber to abide by the mere unsworn report of the consignee, in whose selection he has no choice, transmitted to the shipper by the unsworn statements of the party ordering the lumber, cannot be allowed. (Ala.) Byrd v. Beall, 60.

**Note.**

**Customs and Usages, judicial notice of, 54, 56.**

**DAMAGES.**

**For Breach of Contract.**

**1. DAMAGES, Measure of for Failure to Pay for Property When It has no Market Value.**—Where property is sold and the purchaser refuses to receive or pay for it, and the market price cannot be determined with reasonable certainty, or when there is no purchaser for the property except the one who has broken the contract to purchase, the measure of damages is not restricted to the difference between the market price and what was agreed to be paid for the property, but may be the difference between the sum so agreed to be paid and that for which the seller was obliged to sell it to some other person. (Ky.) Louisville etc. R. R. Co. v. Coyle, 384.

**2. MEASURE OF DAMAGES for Refusal to Carry Out a Contract to Purchase Ties to be Manufactured.**—Where one agrees to purchase railroad ties to be afterward manufactured, but refuses to comply with his contract, the measure of damages for the ties which have not in fact been manufactured is the difference between the contract and the market price, which, when there is no person to whom sales can be made except the defendant in the action, may be regarded as the price for which the plaintiff might purchase like property from others. (Ky.) Louisville etc. R. R. Co. v. Coyle, 384.

**For Personal Injuries.**

**3. DAMAGES.—Injury to Feelings is an element of actual and not of exemplary damages.** (La.) Bourg v. Brownell-Drews Lumber Co., 448.

**4. DAMAGES.—A Claim for Damages for Mental Suffering is personal to the individual affected, and is not heritable.** (La.) Bourg v. Brownell-Drews Lumber Co., 448.

**5. DAMAGES in Cases of Tort.—Loss of Profits from Business may be recovered as part of the damages in cases of tort, and evidence of what the business of the plaintiff produced on a general average is competent for the consideration of the jury in estimating his loss.** (Ky.) Gregory v. Slaughter, 402.



**6. DAMAGES for Personal Injuries, When not Excessive—Excessive Verdict.**—If a person negligently struck by an automobile has his hand badly cut and permanently injured, one of his fingers broken, and is so severely bruised on various parts of his body as to confine him to his home for several weeks, a verdict for two thousand five hundred dollars' damages is not excessive. (Ky.) *Gregory v. Slaughter*, 402.

**7. RAILROADS—Negligence—Excessive Verdict.**—If a railroad foreman at the time he is killed through its negligence is a young man, in good health, industrious, and of good habits, and leaves a widow with four children from two to eight years of age, a verdict against the company for seven thousand five hundred dollars is not excessive. (Miss.) *Mobile etc. R. R. Co. v. Hicks*, 679.

**8. NEGLIGENCE—Damages for Personal Injuries—Right of Jury to Estimate.**—In the absence of evidence, the jury in estimating the value of the services of a physician in a personal injury case may avail themselves of their common knowledge in determining the expense properly and reasonably incurred in endeavoring to effect a cure. (N. H.) *Moran v. Dover etc. Ry. Co.*, 994.

*Injury to Pregnant Woman.*

**9. NEGLIGENCE—Injury to Pregnant Woman—Recovery for Mental Suffering.**—A woman injured during pregnancy by the negligence of another is entitled to recover damages for her mental distress due to her fear or apprehension before the birth of the child that it will be deformed in consequence of such negligence as well as for her disappointment at the birth of a deformed child. (N. H.) *Prescott v. Robinson*, 987.

**10. NEGLIGENCE—Injury to Pregnant Woman—Recovery for Mental Suffering After Birth of Child.**—A woman injured during pregnancy by the negligence of another, resulting in the birth of a deformed child, cannot recover for her mental suffering after its birth and her prospective mental suffering and disappointment caused by its deformed condition, nor for the child's pain, suffering and inability to labor. (N. H.) *Prescott v. Robinson*, 987.

See *Animals; Death*.

## DEAD BODIES.

See *Cemeteries*, 4-6.

## DEATH.

**RAILROADS—Death by Wrongful Act—Consolidation of Actions.**—If a widow and children sue as the legal representatives of the husband for his wrongful death caused by the negligence of a railroad company, and the widow also sues as his administratrix for damages sustained by the decedent, only one of the suits can be maintained, and as all of the damages sustained can be recovered in either, the consolidation of the two suits is not prejudicial to the defendant. (Miss.) *Mobile etc. R. R. Co. v. Hicks*, 679.

## DECEIT.

See *Fraud*.

## DEEDS.

*Execution, Delivery and Recording.*

**1. DEEDS—Acknowledgment—Necessity for.**—As between the parties, an acknowledgment is not essential to the validity of a deed,

**except in the conveyance of a homestead. (Neb.) Martin v. Martin, 315.**

**2. DEEDS—Delivery.**—A pleading alleging that a deed was made and executed, sufficiently pleads a delivery. (Neb.) Martin v. Martin, 815.

**3. DEEDS—Delivery.**—A delivery of a deed to a third person by the grantor, with directions to deliver it to the grantee named therein, constitutes a good delivery of the deed. (Neb.) Martin v. Martin, 815.

**4. DEEDS, Delivery, Necessity for.**—Actual Manual Delivery is not Essential to give effect to a deed. (Neb.) Fryer v. Fryer, 850.

**5. DEEDS, Delivery Recording, When Equivalent to.**—The placing of a deed on record by the grantor, with intent and for the purpose of passing the title to the grantee, renders evidence of the actual manual delivery and formal acceptance unnecessary. (Neb.) Fryer v. Fryer, 850.

*Construction—Parol Evidence.*

**6. DEED—Construction of Word "Children."**—In a deed to a person for life, "and on her decease to such child or children, they being heirs of her body, that she may leave in life," the word "children" includes only the first generation of offspring, and hence excludes children of a deceased child of the life tenant. (Ga.) Smith v. Smith, 177.

**7. EVIDENCE BY PAROL to Explain a Deed.**—Where a conveyance of real property is to M. J. S., "for the use, benefit, advantage in trust for said M. J. S. for her life, for her sole and separate use, and on her decease to such child or children, they being the heirs of her body, that she may leave in life," the court properly excludes parol evidence to show the intention of the grantor. (Ga.) Smith v. Smith, 177.

*Condition Against Sale of Liquor.*

**8. DEEDS—Condition Against Sale of Liquor, Validity of.**—A condition in a deed against the manufacture or sale of intoxicating liquor on the premises is valid as between the grantor and grantee. (Colo.) Judd v. Robinson, 128.

**9. DEEDS—Condition Against Sale of Liquor—Subsequent Purchasers.**—A covenant in a deed forbidding the manufacture or sale of intoxicating liquor on the premises is not enforceable against a subsequent purchaser without notice, actual or constructive, of the covenant. In such cases the rule applies that a recorded deed is constructive notice of its contents to all persons claiming what is thereby conveyed, under the same chain of title, from the same grantee, but it is not notice to other persons. (Colo.) Judd v. Robinson, 128.

**10. DEEDS—Covenant Against Sale of Liquor—Who can Enforce.** The right of grantees from the common grantor to enforce, inter se, covenants against the sale of liquor, entered into by each with the grantor, is confined to cases where there has been proof of a general plan or scheme for the improvement of the property and its consequent benefit, and the covenant has been entered into as part of a general plan to be exacted from all purchasers, and to be for the benefit of each purchaser, and the party has bought with reference to such general plan or scheme, and the covenant has entered into the consideration of his purchase. (Colo.) Judd v. Robinson, 128.

*Conveyance of Expectancies.*

**11. EXPECTANT INTEREST, Conveyance of.**—A conveyance of an expectant interest to a stranger is invalid at common law. Courts

of equity, however, upheld assignments of mere possibilities based on valuable consideration where the enforcement of the agreement would not contravene their own rules of public policy. (Ind.) *McAdams v. Bailey*, 240.

12. **CONVEYANCE of Expectancies, When not Deemed in Fraud of the Ancestor.**—A conveyance by one whose interest or right is fixed by law is not subject to the rule that a conveyance of a bare expectancy is in fraud of the bounty of the testator. (Ind.) *McAdams v. Bailey*, 240.

13. **CONVEYANCE of Future Interest, When Sustained.**—Though attempted conveyances of bare expectancies by presumptive heirs are narrowly watched by courts of equity, and the burden is on the grantee to repel an inference of constructive fraud, it cannot be affirmed that such courts look with disfavor upon what are construed as executory contracts for the transfer of future interests where a common honesty requires that they be carried out. (Ind.) *McAdams v. Bailey*, 240.

14. **CONVEYANCE of Future Interest, When not Against Public Policy.**—It is not against public policy for a son to unite with his mother in a conveyance of real property to convey all his present interest and such future interest as he may acquire therein on her death, and the conveyance will be given the effect of a transfer to the grantee of any future interest which the grantor may thereafter acquire. (Ind.) *McAdams v. Bailey*, 240.

15. **CONVEYANCE of Expectancies and of Reversionary Interests.**—A transfer of an expectancy or of a reversionary interest is not necessarily subject to the same inhibitions founded upon public policy. Any person owning a contingent interest in real or personal property may sell it for such sum as may be agreed upon by himself and the purchaser, provided there is no trust relation between them and the purchaser acts in good faith. (Ind.) *McAdams v. Bailey*, 240.

16. **CONVEYANCE of Contingent Interest—Inadequacy of Consideration.**—Mere inadequacy of consideration does not afford a sufficient reason for setting aside a conveyance of a contingent interest in property, although the doctrine is otherwise as respects sales by expectant heirs of their supposed interest in the lands of living ancestors. (Ind.) *McAdams v. Bailey*, 240.

17. **CONVEYANCE of Future Interests—Overruling 139 Ind. 111, 38 N. E. 334.**—In so far as the sales of future interests in property based on contract, devise or statute are placed in the category of wagering contracts and forbidden, where there is no fraud or undue influence, the case of *Chambers v. Chambers*, 139 Ill. 111, 38 N. E. 334, is overruled. (Ind.) *McAdams v. Bailey*, 240.

#### *After-acquired Title.*

18. **CONVEYANCE of Subsequently Acquired Interest Resulting from Estoppel.**—Irrespective of courts of equity, it has always been possible to convey subsequently acquired interests by the operation of the principles of estoppel. (Ind.) *McAdams v. Bailey*, 240.

19. **CONVEYANCE with Warranty, Effect of.**—The effect of a warranty deed is to conclude the warrantor, so that his present and future rights are extinguished or passed to his grantee. (Ind.) *McAdams v. Bailey*, 240.

20. **CONVEYANCE of a Future Interest Without Consideration or for a Consideration Received by Another.**—If a son unites with his mother in a conveyance of an interest in real property then held by him, and also of such future interest therein as he will acquire at her death, such conveyance is binding upon him, although he receives no consideration and the consideration actually paid by the grantee

was paid over to her, and the son had nothing to do with the negotiation of the transfer. (Ind.) *McAdams v. Bailey*, 240.

**21. CONVEYANCE of Future Interest, When Sustained as in the Nature of a Family Contract.**—Where a son conveys a future interest to be acquired by him on the death of his mother, without taking any part in the negotiations preceding the transfer and permitting her to receive such consideration as was paid, the transaction is not necessarily constructively fraudulent, but may be sustained as in the nature of a family transaction, which is favored in equity. (Ind.) *McAdams v. Bailey*, 240.

#### *Warranty and Estoppel.*

**22. ESTOPPEL AND WARRANTY.**—An estoppel may exist because of a covenant of warranty, although the truth appears by the instrument. Hence, though it appears by the conveyance that the grantor does not hold a present or perfect estate in the lands described, yet any interest subsequently acquired by him may pass to the grantee as a result of a covenant of warranty. (Ind.) *McAdams v. Bailey*, 240.

**23. CONVEYANCE.**—A Warranty is Usually Considered as Co-extensive with the Granting Clause, and hence a conveyance of the grantor's interest is satisfied by passing a present interest, but if the conveyance goes further and purports to convey an interest subsequently to be acquired, the grantor is estopped from claiming that interest when acquired. (Ind.) *Adams v. Bailey*, 240.

#### *Quitclaim Deeds.*

**24. QUITCLAIM DEED, Effect of on Subsequently Acquired Title.** Although an ordinary quitclaim deed does not estop the grantor from asserting an after-acquired interest, yet a distinct recital in the deed, without covenants, showing that the parties proceeded on the theory that a particular interest was thereby conveyed, may be as effectual to create a title as a warranty. (Ind.) *McAdams v. Bailey*, 240.

**25. A QUITCLAIM DEED is not Ineffectual to Convey any Possible Future Interest which may accrue to the grantor.** (Ind.) *McAdams v. Bailey*, 240.

**26. QUITCLAIM DEED.**—The Grantor Under a Quitclaim Deed occupies the same position that his grantor did. (Mo.) *Turner v. Edmonston*, 739.

See Acknowledgments; Covenants; Evidence, 14, 15; Taxation, 5-10; Vendor and Vendee.

Note.

Definition of nuisance, 591, 594.

### DESCENT AND DISTRIBUTION.

**DISTRIBUTION OF ESTATE—Estoppel Against Heir.**—An heir who, in ignorance of his rights, disclaims to the other heirs his interest in the estate, is not thereby estopped after distribution from asserting title against them, if they were not misled to their injury; nor does an estoppel arise in favor of a grantee of one of the distributees who did not know of the disclaimer and was not deceived or misled. (Ga.) *Peyton v. Stephens*, 170.

### DIVORCE.

#### *In General.*

**1. DIVORCE Because of the Physical Incompetency of the Woman.**—A husband is entitled to a divorce because of the incom-

petency of his wife for sexual intercourse known to her, but not to him, before the marriage, though it may be possible by resort to surgery to remove such incompetency. (Ky.) *Mutter v. Mutter*, 351.

2. **DIVORCE, Marriage Before Decree of is Final**—A marriage contracted after the entry of the decree nisi and before the final decree of divorce is illegal and void. (Mass.) *Commonwealth v. Stevens*, 555.

3. **DIVORCE—Reconciliations—Dismissal—Intervention**.—If a wife begins an action for divorce and before answer filed the parties become reconciled and resume the marital relation, a dismissal of the action carries with it a pending application for alimony, and the wife's attorney cannot revive such application for his own benefit by means of intervention. (Neb.) *Petersen v. Petersen*, 812.

#### *Alimony and Counsel Fees.*

See Attorney and Client, 3.

4. **ALIMONY, Denial of Because of the Fault of the Wife**.—Alimony must be denied to a wife where the divorce is granted for her physical incompetency known to her before the marriage and concealed from her husband, if the statute requires the denial of alimony to the spouse "in fault." The word "fault," as used in the statute, means more than wrong or error, and includes blemishes and defects. (Ky.) *Mutter v. Mutter*, 381.

5. **ALIMONY, When not Allowable to a Wife**.—In Kentucky, alimony is not allowed to a wife shown to be in fault, where a divorce is granted to the husband because of such fault. (Ky.) *Mutter v. Mutter*, 381.

6. **DIVORCE—Liability of Husband for Costs and Attorney's Fees**.—In a suit by a wife for divorce in which her husband files a counterclaim and obtains a divorce for some fault or defect on her part, he is liable for the costs and also for the compensation of her attorneys in prosecuting the suit, though not for alimony. (Ky.) *Mutter v. Mutter*, 381.

#### **DORMANT JUDGMENT.**

See Judgments, 3.

#### **DYING DECLARATIONS.**

See Homicide, 4-6.

#### **EIGHT-HOUR LAW.**

See Constitutional Law, 10-13.

#### **EJECTMENT.**

See Judgments, 10.

#### **ELECTIONS.**

##### *Voting Machines.*

1. **CONSTITUTIONAL LAW—Elections—Voting Machines**.—Under a constitution requiring officers to be "chosen by written votes," a statute providing for the use of a voting machine is unconstitutional, where the voter must trust everything to the perfection of its mechanism and cannot see whether it is properly working or not. (Mass.) *Nichols v. Board of Election Commrs.*, 568.

##### *Ineligible Candidate.*

2. **ELECTION, Effect of Where an Ineligible Candidate Receives a Majority of the Votes Cast**.—The votes cast for an ineligible candidate

must, in the absence of proof that they were given with knowledge on the part of the electors of such ineligibility, be counted, and they therefore prevent the declaration of the election of an eligible candidate receiving the next highest number of votes. (Ind.) *State v. Bell*, 203.

**3. ELECTION—Votes for an Ineligible Candidate—Presumption as to Knowledge of the Want of Eligibility.**—It cannot be presumed that the voters willfully or obstinately cast their votes with notice that he for whom they were cast was ineligible to be elected or to hold the office. (Ind.) *State v. Bell*, 203.

**4. ELECTIONS.—If an Ineligible Candidate Receives the Greatest Number of Votes Cast at an election, it is void, and does not result in the election of the person receiving the next highest number of votes, where it is not shown that the electors voted with knowledge of the ineligibility.** (Ind.) *State v. Bell*, 203.

*Election Contest—Disqualification of Tribunal.*

**5. ELECTIONS—Common Council—Qualification of Members.**—In the determination of an election contest before the common council of a city, it acts in a judicial capacity, and a member thereof who is a party to the proceeding is not qualified to take part in its decision. (N. H.) *Rollins v. Connor*, 983.

**Note.**

**Elections, deceased persons, effect of votes cast for, 218.**  
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**EMINENT DOMAIN.**

**1. EMINENT DOMAIN—Use of Streets—Special Damages—Effect of Ordinance.**—An ordinance granting the use of public streets

to a railroad company for the construction and operation of its road does not prevent an abutting owner from recovering damages to his property caused by such construction, although the ordinance contains a provision vacating the portions of the streets to be so used. (Neb.) *Stehr v. Mason City etc. Ry. Co.*, 872.

**2. EMINENT DOMAIN—Special Damages—Closing of Street.**—The right of the owner of an abutting lot to damages for the whole or partial closing of a street is not restricted merely to a recovery for an interference with the right of ingress and egress in front of his property, and with the right to light and air, but he is entitled to recover for all such damages, direct and consequential as he may suffer by reason of the interference with his right of property. (Neb.) *Stehr v. Mason City etc. Ry. Co.*, 872.

**3. EMINENT DOMAIN—Special Damages.**—If there has been a disturbance of a right which the owner of real estate possesses in connection with his estate, and which gives it additional value, by reason of which disturbance he sustains special injury, in respect to such property in excess of that sustained by the public at large, he is entitled to recover all the damages, both direct and consequential, resulting therefrom, including all damages arising from the exercise of the right of eminent domain, which cause a diminution in the value of the property. (Neb.) *Stehr v. Mason City etc. Ry. Co.*, 872.

**4. EMINENT DOMAIN—Measure of Recovery.**—Where a land owner's property is sought to be taken for a water supply for a municipality, he is entitled to recover the full value of the land as it was at the time of the taking, which is its value for the purposes of sale. (Mass.) *Sargent v. Inhabitants of Merrimac*, 528.

**5. EMINENT DOMAIN—Measure of Recovery for Land Taken for a Water Supply.**—The market value of land sought to be taken to supply water to a municipality is made up of the value of the land in the market apart from its special adaptability for water supply purposes, plus such sum as the purchaser would have added to that value because of the chance that the land in question might some day be used as a water supply. (Mass.) *Sargent v. Inhabitants of Merrimac*, 528.

**6. EMINENT DOMAIN—Evidence of the Value of Land for a Special Purpose.**—Though land is sought to be taken for use as a water supply for a municipality, the presiding judge may, in his discretion, refuse to receive the evidence of experts tending to show its value for a special purpose, where it does not appear that the value of the land cannot be shown without departing from the usual rule. (Mass.) *Sargent v. Inhabitants of Merrimac*, 528.

**7. EMINENT DOMAIN—Value of Land Where Taken for a Special Purpose—Instructions for the Jury.**—Where land is sought to be taken for a water supply or other public use, the jury must be instructed that its market value is not to be increased by the fact that it had been taken for the special purpose in question. (Mass.) *Sargent v. Inhabitants of Merrimac*, 528.

**8. EMINENT DOMAIN—Evidence of Value of Property for a Special Use.**—Though property is sought to be acquired for water supply of a municipality, the land owner is not entitled to prove by what communities or municipalities the water could be used for a water supply. (Mass.) *Sargent v. Inhabitants of Merrimac*, 528.

**9. EMINENT DOMAIN—Instruction as to the Consideration of the Value of Property for a Special Purpose.**—In a proceeding to obtain compensation for land taken by a municipal corporation for a water supply, the following instruction is proper: "I said that you could consider the evidence of the uses to which this property was adapted, all the uses. Upon that, in connection with those uses, you

can take into account in the Sargent case the fact that there was or was not, as you find it to be from the evidence, a supply of water upon the premises. If that would give an added value to the property in the mind of any purchaser in the open market and in the mind of any seller in the open market, you could take that into account, but you could not use it to mark up a price beyond the fair market value of the property, you could not give to the Sargents in their case the value of the land, for instance, to the town of Merrimac as a water supply. That you are not to do. If the fact that it was adapted to use as a water supply, if you find that to be a fact, would have affected the mind of anybody in dealing with the property, that you can take into account, but that is the extent to which you can go, and you may think that that, practically, as the land was situated, did not affect its value at all. On the other hand, you may think that it added to or decreased its value." (Mass.) *Sargent v. Inhabitants of Merrimac*, 528.

10. **EMINENT DOMAIN**—Instruction Respecting Special Value of the Property to the Municipality Seeking to Acquire It.—In a proceeding to obtain compensation for land taken for a water supply by a municipality, it is proper to instruct the jury that the petitioner is not entitled to recover beyond the fair market value of the land to the respondent. (Mass.) *Sargent v. Inhabitants of Merrimac*, 528.

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#### EMPLOYER'S LIABILITY.

See Master and Servant.

#### ESTATES OF DECEDENTS.

See Executors and Administrators.

#### ESTOPPEL.

##### *In General.*

1. **ESTOPPEL**.—The Fundamental Element of an Estoppel is that the party sought to be estopped has said or done something in reliance on which the person, in whose favor the estoppel is invoked, has acted or relied to his prejudice. (Md.) *Maryland Telephone etc. Co. v. Ruth*, 506.

2. **ESTOPPEL**—Acceptance of Benefits.—If a widow, for the purpose of procuring an absolute title to a homestead, pays each of the heirs an adequate sum for their interests, which they accept and retain, they are estopped from asserting title to such homestead as against the widow's grantee who purchased with their knowledge and in good faith. (Neb.) *Staats v. Wilson*, 806.

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*Pleading.*

3. **ESTOPPEL IN PAIS**—Necessity of Pleading.—An estoppel in pais, in order to be available, must be pleaded. (Mo.) *Turner v. Edmonston*, 739.

4. **LACHES**—Necessity of Pleading.—Laches relied upon as an estoppel must be pleaded in order to be available. (Mo.) *Turner v. Edmonston*, 739.

See Courts, 3.

**EVIDENCE.**

*In General.*

1. **EVIDENCE**—Communication Between Husband and Wife Overheard by a Third Person.—Though neither husband nor wife is permitted to testify to any communication between them, yet if such a communication is overheard by a third person, his testimony with respect thereto is admissible. (Ky.) *Commonwealth v. Everson*, 365.

2. **EVIDENCE**—Interested Persons.—The testimony of witnesses is not to be disregarded merely because they are interested in the result. (Or.) *In re Miller's Will*, 1051.

3. **EVIDENCE**—Dying Declarations—*Res Gestae*.—The proper test as to the admissibility of the declarations of a person since deceased, made soon after an accident, on the ground that they are part of the *res gestae*, is whether they relate to the principal transaction, are explanatory of it, and are made under such circumstances of excitement still continuing as to show that they are spontaneous, and not the result of deliberation or design; and the fact that such declarations are made in response to questions of an attending physician when such injured person is first restored to consciousness does not affect their admissibility. (Iowa) *Christopherson v. Chicago etc. R. Co.*, 284.

4. **EVIDENCE** to Show that a Team by Which the Plaintiff was Injured was Controlled by the Defendant.—Where a plaintiff has been injured by a team and dray, which the defendant refused to admit belonged to him, it is proper, as tending to show his ownership, to receive in evidence a report signed by the defendant and produced by the manager of a casualty company in which the defendant stated his ownership, though the purpose for which such statement was made does not appear. (Mass.) *Sibley v. Nason*, 520.

5. **EVIDENCE**, Exclusion of Because It Tenders a Collateral Issue.—Whether relevant evidence is or is not to be held incompetent on the ground that it involves the trial of a collateral issue depends upon the view taken of it by the presiding judge, and is a matter which must be left largely in his discretion, although his decision is not necessarily final. (Mass.) *Sargent v. Inhabitants of Merrimac*, 528.

6. **EVIDENCE**—Uncontroverted Testimony—Effect of.—If a disinterested witness, who is in no way discredited by other evidence, testifies to a fact within his knowledge, which is not in itself improbable, or in conflict with other evidence, the witness must be believed, and the facts so given must be taken as legally established. (Or.) *In re Miller's Will*, 1051.

*Judicial Notice.*

7. **EVIDENCE**—Judicial Notice.—The court judicially knows that a designated town in the state is not on a railroad. (Ala.) *Green v. Lineville Drug Co.*, 17.

*Law of Other States.*

8. **EVIDENCE**.—The Law of Another State must be Proved like any other fact. (Mass.) *Commonwealth v. Stevens*, 555.

9. **THE COMMON OR UNWRITTEN LAW of Another State** may be Taken to be the Same as the law of this state. (Mass.) Commonwealth v. Stevens, 555.

10. **EVIDENCE—Statutes of Another State, Evidence of does not Include Marginal Notes of Decisions.**—Cases mentioned in the marginal notes of statutes offered in evidence are not thereby brought before the court. The cases should be specifically put in if it is desired to prove the effect of the statutes as construed by the courts of the state in which they are in force. (Mass.) Commonwealth v. Stevens, 555.

*Reputation and Character.*

11. **EVIDENCE—Reputation, When not Admissible.**—In a civil action, evidence of good character or reputation is not admissible for the purpose of meeting evidence of specific acts of misconduct. (Mass.) Colburn v. Marble, 561.

12. **EVIDENCE OF CHARACTER.**—Character is not to be Shown by Evidence of Specific Acts, but only by evidence of reputation. (Mass.) Colburn v. Marble, 561.

*Secondary—Letters and Deeds.*

13. **EVIDENCE, SECONDARY—Production of Letter.**—A party is entitled to a reasonable time to comply with a request to produce a letter which is sought by his adversary to be offered in evidence, and if it appears that the letter is in his possession or is easy of access, a demand therefor made at the trial is sufficient, and if the letter is not then produced within a reasonable time, secondary evidence of its contents is admissible. (Or.) Scott v. Christenson, 1041.

14. **EVIDENCE—Copy of Deed.**—The Certificate of an Unofficial Person that a paper is a "true and correct copy of an original deed now in my hands, with the indorsements thereon," does not render the same admissible to prove the contents of the original deed. (Ga.) Dyson v. Knight, 179.

15. **EVIDENCE.**—The Execution of a Lost Deed Embracing Lands in Two Counties cannot be proved, as to land in one of the counties, wherein the deed was never recorded, by a certified copy from the record of the other county, in which it was duly recorded, and without first proving the execution of an original deed, a copy of the same taken from the records of a county in which the land in controversy is not situate cannot be received in evidence. (Ga.) Dyson v. Knight, 179.

See Alteration of Instruments; Customs and Usages; Criminal Law; Homicide.

**Note.**

**Evidence of character or reputation of decedent.** See Homicide.

**EXECUTION.**

1. **MUNICIPAL CORPORATIONS, Execution, Property of, When Subject to.**—Property held by a municipal corporation for other than governmental purposes is subject to levy for the payment of its debts. (Ala.) Southern Ry. Co. v. Hartshorn, 68.

2. **EXECUTION—Necessity of Acts in Making a Levy.**—If the statute requires a precedent act before a levy can be made, the performance of that act is necessary, and an official return thereof should be by appropriate entry. (Ga.) Dorminey v. De Lang, 193.

3. **EXECUTION—Levy of, Acts Which Need not Appear by the Return.**—If the statute does not require the entry of a precedent act as an essential to the making of a levy, then the validity of the levy rests upon the performance of the act, and not on the official return. (Ga.) Dorminey v. De Lang, 193.

4. **EXECUTION**—Amendment of Entry of Levy.—Where a fieri facias against two defendants is levied on land "as the property of the defendant," the court may, after the sale, allow the officer, who is still in office and present in court, to amend his entry of levy by naming which of the two defendants' property was levied upon. (Ga.) *Dorminey v. De Lang*, 193.

5. **EXECUTION**.—The Legal Title to Property Remains in the Judgment Debtor until the execution and delivery of the sheriff's deed. (Colo.) *Paxton v. Heron*, 123.

6. **EXECUTION SALE** After the Judgment Ceases to be a Lien. The title of a purchaser made after the lien of the judgment had expired is the same only as if it had never been a lien, and does not divest title acquired from the judgment debtor during the life of the lien. (Neb.) *Harvey v. Godding*, 841.

### EXECUTORS AND ADMINISTRATORS.

**ESTATES OF DECEDENTS**—Contests Over Compensation.—A legatee who contests an executor's claim of ownership of part of the estate is entitled to reasonable compensation for counsel fees and expenses out of the funds of the estate. Such compensation is not dependent upon the success of his litigation. (N. H.) *Bean v. Bean*, 978.

### EXEMPTIONS.

1. **EXEMPTION**—Purpose and Construction of Statute.—The statute of exemption was conceived in mercy for the unfortunate debtor, and is to be construed in that spirit, but it is not to be construed to give him what in common honesty does not belong to him. The statute was made to cover, as with a shield, what the unfortunate debtor has in his possession when the officer comes with a writ to take it from him; it was not made to arm him, as with a sword, to levy contribution on his neighbor. (Mo.) *Caldwell v. Ryan*, 717.

2. **EXEMPTION**—Setoff of One Judgment Against Another.—Where one sues for the conversion of exempt property, and the defendant has previously recovered judgments against the plaintiff larger in amount than the judgment asked by the latter, the proper procedure, when the plaintiff has reduced his claim to judgment and mutual executions have come into the hands of the sheriff, is for the latter to set off one execution against the other, satisfying the smaller by applying the amount thereof as far as it will go to satisfy the larger, and then levying the balance and indorsing the fact of setoff on both writs in his returns. (Mo.) *Caldwell v. Ryan*, 717.

3. **EXEMPTION**—Pleading and Judgment.—Where a plaintiff's cause of action is not based on an infringement of his rights under the exemption statute, a plea that the judgment sought should, when recovered, be adjudged exempt from execution, has no place in the office of pleading. (Mo.) *Caldwell v. Ryan*, 717.

See Setoff and Counterclaim, 5.

### EXPECTANCIES.

See Assignments, 2, 3; Deeds, 11-16.

### FELLOW-SERVANTS.

See Master and Servant, 8-13.

### FORCIBLE DETAINER.

1. **FORCIBLE DETAINER**—Necessity of the Relation of Landlord and Tenant.—To maintain a writ of forcible detainer, the relation

of landlord and tenant must exist, and the reservation of rent in some form and allegiance to the title are distinguishing characteristics of the contract by which the relation of landlord and tenant is created. (Ky.) *Alexander v. Gardner*, 378.

**2. FORCIBLE DETAINER—Land Owner and Purchaser of Timber.**—Where a conveyance of a land owner to a purchaser of timber is such that the relationship of landlord and tenant is created between them, the former, on the expiration of the time for the removal of the timber and the reverting to him of the property remaining on the premises, may maintain a writ of forcible detainer against the purchaser who remains in possession. (Ky.) *Alexander v. Gardner*, 378.

### FOREIGN LAWS.

See Evidence, 8-10.

### FRAUD.

**1. DECEIT—Truth of Representations.**—If a seller, for the purpose of inducing another to buy a certain article, informs him that it can be safely used in a certain manner when he neither knows nor cares whether his statement is true or false, he is liable for any danger arising from a misrepresentation made by him. (N. H.) *Cunningham v. Pease House Furnishing Co.*, 979.

**2. DECEIT—Negligence—Action for.**—A person who acts upon a false representation made for the purpose of inducing him to change his position may recover the damages he sustains in an action of deceit, when the maker of the statement knew it to be false, and in an action of negligence when he ought to have known it to be so. (N. H.) *Cunningham v. Pease House Furnishing Co.*, 979.

**3. DECEIT—Misrepresentations—Fraud.**—In an action for deceit in the sale of personalty, a suspicion by the seller that his representations as to the quality of the thing sold are false is the legal equivalent of knowledge of their falsity, and is fraudulent. (N. H.) *Shackett v. Bickford*, 933.

**4. DECEIT—Misrepresentations—Fraud.**—If, in an action for deceit in the sale of personalty, it is shown that representations as to the quality of the thing sold made by the seller were untrue, and he knew it, or he made them without belief in their truth, or with a conscious indifference, not caring whether they were true or false, the fraudulent character of his act is established. (N. H.) *Shackett v. Bickford*, 933.

### *Frauds, Statute of.*

**5. CONTRACTS—Statute of Frauds.**—Contracts, whether oral or partly oral and partly written, after being executed, are binding on the parties thereto, and are not affected by the statute of frauds. (Or.) *McLeod v. Despain*, 1066.

### FRAUDULENT CONVEYANCES.

**CONVEYANCE BY INSOLVENT DEBTOR, Burden of Proof that It was Made in Good Faith.**—If an Insolvent Husband Conveys Real Property to His Wife, the burden must be assumed by her of showing that the conveyance was made in good faith. (Neb.) *Harvey v. Godding*, 841.

See Husband and Wife, 4-6.

### GAMING.

**1. POOLSELLING on Horseraces.**—The act of selling for gain pools upon a horserace grossly disturbs the public peace and welfare,

and openly outrages public decency, within the meaning of a statute providing a punishment for the commission of such an act. (Or.) *State v. Ayers*, 1036.

2. **POOLSELLING on Horseraces—Public Nuisance.**—The sale of pools on the result of a horserace on the racecourse of a private association where the public assembles is a public nuisance, affecting the general welfare, and punishable as such. (Or.) *State v. Ayers*, 1036.

3. **GAMBLING and Gambling Devices.**—The selling of pools on a horserace is not the playing of a game by a device within the meaning of a statute constituting such act a crime. (Or.) *State v. Ayers*, 1036.

4. **GAMBLING DEVICE.**—A pool ticket on a horserace is not a gambling device. (Or.) *State v. Ayers*, 1036.

#### GARNISHMENT.

**GARNISHMENT—Rights of Judgment Creditor.**—A judgment creditor stands in exactly the same attitude in relation to a garnished fund that the judgment debtor does. (Miss.) *Shuler v. Murphy*, 708.

#### GIFTS.

**SAVINGS BANK—Transfer of Passbook by Delivery.**—A gift or transfer of a deposit in a savings bank may be accomplished by the delivery of the bankbook without any written assignment. (Mass.) *Bryant v. Abington Sav. Bank*, 552.

See Parent and Child.

#### GUARDIAN AND WARD.

1. **MINOR AND TUTOR.**—A Private Sale by a Tutor of his minor's land to pay debts is a nullity. (La.) *Touchy v. Gulf Land Co.*, 440.

2. **MINOR AND TUTOR—Avoidance of Sale by Latter.**—In avoiding a private sale of land which has been made by his tutor, a minor is bound to account to the purchaser for the proceeds used in paying debts for which the estate was liable, but he is not required to tender such proceeds prior to instituting suit to recover the property. (La.) *Touchy v. Gulf Land Co.*, 440.

3. **MINOR AND TUTOR—Estoppel to Repudiate Sale.**—Where a tutor has made a private sale of his minor's land, the minor is not estopped to repudiate the sale by the fact that shortly after emancipation he approves the tutor's account, nor by the circumstance that the proceeds of sale are used to pay debts of the succession, if he is not informed that the sale was private and for less than two-thirds of the appraised value of the property. (La.) *Touchy v. Gulf Land Co.*, 440.

#### HABEAS CORPUS.

1. **HABEAS CORPUS to Take Person Under Sentence of Death Out of the Jurisdiction of the Court Sentencing Him.**—If an accused has been tried, found guilty of murder and sentenced to death, and an appeal has been taken from the judgment resulting in an affirmance, and the defendant is confined for safekeeping in the jail of a county other than that in which he was convicted and sentenced, the court of the county where he is so confined has not jurisdiction to issue a writ of habeas corpus to take possession of the prisoner and thereby prevent the execution of the judgment against him in the county where he was so sentenced, on the ground that he has become insane. (Ala.) *Ex parte State*, 79.

2. **HABEAS CORPUS—Conflict of Jurisdiction not to be Permitted by.**—If a court had a right to the custody of a person under sentence of death for the purpose of carrying out the sentence, an-

other court has not jurisdiction to take such person out of the custody of such court to inquire whether the sentence should not be suspended because of his alleged insanity. (Ala.) *Ex parte State*, 79.

Note.

Highways, nuisance in, right of private person to abate, 603.

### HOMESTEAD.

1. **HOMESTEAD, Statutory Requirements for the Conveyance of.** The requirements of the statute for the conveyance of a homestead must be strictly adhered to. (Neb.) *Weatherington v. Smith*, 855.

2. **HOMESTEAD—Estoppel.**—Neither husband nor wife can be estopped from asserting the homestead right as against a grant or mortgage not executed in the mode prescribed by law. (Neb.) *Weatherington v. Smith*, 855.

3. **HOMESTEAD, Abandonment of by Removal During Insanity of the Husband.**—If a husband, because of his insanity, is confined in an asylum, and the wife removes to another state, his absence in the asylum and hers in the other state cannot operate, as against him, to an abandonment of their homestead. (Neb.) *Weatherington v. Smith*, 855.

4. **HOMESTEAD, Insanity of One Spouse and Conveyance by Another.**—The insanity of one spouse does not withdraw him or her from the protection of the homestead law, and a conveyance of the homestead by the other is void. (Neb.) *Weatherington v. Smith*, 855.

### HOMICIDE.

#### *Manslaughter.*

1. **HOMICIDE—Involuntary Manslaughter is the Killing of Another Person in Doing Some Unlawful Act** not amounting to a felony nor likely to endanger life, but without the intention to kill, or where one kills another while doing a lawful act in an unlawful manner. (Ky.) *Westrup v. Commonwealth*, 316.

2. **HOMICIDE—Involuntary Manslaughter.**—Where a husband neglects to provide necessities for his wife or medical attention in case of her illness, he is guilty of involuntary manslaughter, provided she is in a helpless state and unable to apply elsewhere for aid, and the death, though not intended or anticipated by him, was the natural and reasonable result of his negligence. (Ky.) *Westrup v. Commonwealth*, 316.

3. **HOMICIDE—Involuntary Manslaughter—Neglecting to Procure Physician for Wife in Childbirth.**—The failure of a husband to provide for the attendance of a physician on his wife in childbirth does not support his conviction for involuntary manslaughter though her death follows, where such failure was at her suggestion and due to her and his belief that such attendance was unnecessary and might be harmful, and where he sent for a physician soon after the birth, at the suggestion of other women, on the occurrence of alarming symptoms, and was at all times a kind and affectionate husband. (Ky.) *Westrup v. Commonwealth*, 316.

#### *Evidence—Character and Dying Declarations.*

4. **HOMICIDE—Res Gestae and Dying Declarations.**—Where a woman, about an hour after hearing shots fired (she remaining in bed during that time because ill), goes outside and finds her husband wounded, and in reply to her question he states that A has shot him, and fifteen minutes later he remarks that he is going to die,

and he does die during the night, his statements are admissible in evidence on the trial of A for murder. (Tex. Cr.) *Jones v. State*, 1097.

**5. MURDER—Evidence—Dying Declarations.**—If the deceased is suffering from a mortal wound at the time of making a statement as to the circumstances surrounding the affray, and his physician advises him that his case is hopeless and that he will probably die under an anesthetic about to be administered before an operation is to be performed, and he dies a few moments later, such statement is admissible in evidence as a dying declaration. (Or.) *State v. Thompson*, 1015.

**6. MURDER—Self-defense—Evidence of Character of Deceased.**—If, in a murder case, there is evidence tending to show that the defendant acted in self-defense, proof that the deceased was a violent and dangerous man is competent whether that fact was known to the defendant or not, for the purpose of aiding the jury in determining who was in fact the aggressor, and the nature and character of the assault, if one was made by the deceased. (Or.) *State v. Thompson*, 1015.

See Insanity; Trial, 7.

**Note.**

**Homicide, character or reputation of the decedent, attack upon, what constitutes, 1035.**

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## HOESERACING.

See Gaming.

## HOSPITALS.

1. **RAILROAD HOSPITAL—Liability to Patients.**—A hospital association formed to provide medical services to the employes of a certain railroad company, and maintained by involuntary deductions from the wages of these employes, is not a charitable institution within the rule that exempts such institutions from liability to patients. (Mo.) *Phillips v. St. Louis etc. R. R. Co.*, 786.

2. **RAILROAD HOSPITAL—Liability to Patients.**—A hospital association formed to provide medical service to employes of a certain railroad company, and maintained by involuntary deductions from the wages of these employes, is not exempt from liability to patients by the mere employment of competent surgeons, but it must go further and competently treat the patients received. Such associations occupy the position of ordinary physicians and surgeons. (Mo.) *Phillips v. St. Louis etc. R. R. Co.*, 786.

3. **HOSPITAL ASSOCIATION—Liability of Railroad Company to Patients.**—A hospital association, with a separate corporate charter, having for its officers the chief officers of a railroad company, and for its object the treatment of employes of the railroad company exclusively, maintained by involuntary deductions from the wages of these employes, requiring notice to the chief surgeon and claim agent of the railroad company whenever an employe is removed to the hospital, and making the surgeons of the association the surgeons of the railroad company, is at least the agent of the railroad company (if not in fact the railroad company itself masquerading under another name), for whose negligence in the treatment of patients the railroad company is liable. (Mo.) *Phillips v. St. Louis etc. R. R. Co.*, 786.

4. **RAILROAD HOSPITAL—Admission by Surgeon as to Patient's Condition.**—A letter written by the chief surgeon of a railroad hospital to the assistant general auditor of the railroad company stating that a patient who has been in the hospital is mentally unbalanced, when neither of them knew that the patient had already been killed by a street-car after leaving the hospital unattended, is admissible in evidence in an action for the death against the railroad company. (Mo.) *Phillips v. St. Louis etc. R. R. Co.*, 786.

5. **RAILROAD HOSPITAL—Liability for Death of Insane Patient.** Where the chief surgeon of a railroad hospital, knowing that a patient is insane, permits him to be placed unattended on a train to make his way home in a large city, the death of the patient, after leaving the train, by being struck by a street-car may reasonably be expected. (Mo.) *Phillips v. St. Louis etc. R. R. Co.*, 786.

## HUSBAND AND WIFE.

*Contract Renouncing Marital Rights.*

1. **HUSBAND AND WIFE—Contract Concerning Marital Rights.** Husband and wife cannot make a valid contract renouncing their marital rights. (N. H.) *Hill v. Hill*, 966.

2. **HUSBAND AND WIFE—Contract for Separation—Renunciation of Marital Rights.**—If covenants in a contract between husband and wife respecting their property rights are not independent of, and cannot be separated from, covenants in the same contract renouncing their marital relations and rights, the entire contract is void. (N. H.) *Hill v. Hill*, 966.

3. **HUSBAND AND WIFE—Renunciation of Marital Relations—Evidence.**—If the renunciation of marital relations between husband

and wife is one of the purposes sought to be accomplished by a contract between them, this express intent cannot be contradicted by extraneous evidence. (N. H.) *Hill v. Hill*, 966.

*Separate Property of Wife.*

**4. HUSBAND AND WIFE and Her Separate Property Resulting from a Gift by Him to Her.**—If a husband conveys property to his wife as a gift when he is solvent and not in contemplation of insolvency, and the gift is not excessive in view of his circumstances at the time, and she sells this property subsequently and has in her possession money resulting therefrom, this is her separate property, and if loaned by her to him, places her in the same position as any other creditor. (Neb.) *Harvey v. Godding*, 841.

*Conveyance to Wife.*

**5. HUSBAND AND WIFE and His Right to Prefer Her as a Creditor.**—A husband, being a debtor of his wife, has the right to make a preference in her favor. (Neb.) *Harvey v. Godding*, 841.

**6. PURCHASER IN GOOD FAITH, Wife, When is from Her Husband.**—A wife to whom her husband conveys real property in payment of money due from him to her is entitled to be regarded as a purchaser in good faith, and hence her title is not divested by a sale under execution issued against him when the lien of the judgment has expired. (Neb.) *Harvey v. Godding*, 841.

See Evidence, 1; Witnesses, 1.

*Note.*

**Husband and Wife, homicide, when the one is guilty of by inattention or neglect of the other, 322, 328.**

**Indictment, sufficiency of, general rules respecting, 655.**

**INFANTS.**

See Guardian and Ward; Parent and Child; Witnesses.

**INJUNCTION.**

**1. INJUNCTION Against Erection of Building Where Title is in Dispute.**—A court may properly restrain the completion of a building of a substantial, permanent character, pending the final determination of an action wherein the right and title to the land upon which the building stands is in issue; but the injunction should not be so broad as to prohibit the builder from entering the premises to do whatever is necessary for the preservation of the structure. (Nev.) *Phenix v. Frampton*, 926.

**2. INJUNCTION—Domestic Fowls.**—An injunction will lie to restrain domestic fowls from trespassing upon the premises of another, when repeated invasions thereon by them have occurred in the past and are threatened in the future. (Iowa.) *Keil v. Wright*, 282.

**3. INJUNCTION Against Repeated Trespasses.**—If the nature and frequency of trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land, an injunction will be granted. (Neb.) *Sillasen v. Winterer*, 803.

**INSANITY.**

**INSANITY of a Person Under Sentence of Death, How to be Inquired into.**—If a person has been convicted of murder and sentenced to death, and the sentence affirmed on appeal, the court wherein the conviction was had has power to stay the execution for the purpose of instituting an inquiry as to the sanity of the prisoner, and if it is conceded that such trial court has lost jurisdiction to stay

execution because of such affirmance, then the appellate court has power to stay the execution until the trial court can inquire into the sanity. (Ala.) *Ex parte State*, 79.

### INSTRUCTIONS.

See Trial, 3-6.

### INSURANCE.

#### *Brokers and Agents.*

**1. INSURANCE BROKER Distinguished from Insurance Agent.**—An insurance broker is one who acts as a middleman between the insured and the insurer, and who solicits insurance from the public under no employment from any particular company; "whosoever, not being the appointed agent or officer of the insuring company, for compensation acts for or in any manner aids another in effecting insurance or reinsurance. (Minn.) *Fredman v. Consolidated Fire etc. Ins. Co.*, 608.

**2. INSURANCE BROKER—Whether Represents Insurer or Insured.**—Unless otherwise provided, an insurance broker represents the insured, although he may represent either the insured or the insurer, or both, for certain purposes. The question is one of fact to be determined from the evidence. He may be the agent of the insurer for the purpose of delivering the policy and collecting the premiums, for the collection of the premiums only, or not even for that purpose. (Minn.) *Fredman v. Consolidated Fire Ins. Co.*, 608.

**3. INSURANCE COMPANY—Whether Bound by Knowledge of Broker.**—An insurance company is bound by the knowledge of its agent; but it is not bound by the knowledge of a broker unless actually communicated to it. (Minn.) *Fredman v. Consolidated Fire Ins. Co.*, 608.

**4. INSURANCE BROKER—Authority as Fixed by Statute.**—The provision of the Minnesota statute that every person soliciting insurance and procuring an application therefor shall be held to be the agent of the party afterward issuing insurance thereon, or a renewal, must be construed with the other provision of the statute which declares the extent of the agency of an insurance broker; it does not increase or extend the power of such broker. (Minn.) *Fredman v. Consolidated Fire etc. Ins. Co.*, 608.

**5. INSURANCE BROKER—When does not Bind Company.**—If an insurance broker applies to A to renew an insurance policy on his stock of liquors, which A declines to do, whereupon they agree that the broker may procure a policy in the same amount as the existing policy but on A's restaurant furniture; and the broker then notifies agents of the insurance company that the old policy is to be renewed, without informing them of the real agreement with A, and the company then issues a renewal policy on the liquor accordingly and delivers it to the broker for delivery to A, which A keeps for several months, supposing that it covers the furniture, until the furniture is destroyed by fire, A cannot maintain an action to reform the policy and recover the loss, for the broker was not the agent of the company in making the contract of insurance. (Minn.) *Fredman v. Consolidated Fire etc. Ins. Co.*, 608.

**6. INSURANCE AGENT, Implied Powers of as to Permitting Policy to Remain in Force After Receiving Instruction to Cancel.**—It is within the apparent scope of the authority of an agent of an insurance company with the power to write insurance and issue policies to determine how long the policy shall remain in force in the absence of some restriction on his authority, and the assured has

the right to deal with the agent upon the faith of such apparent authority, unless he has notice of restrictions placed on the agent. (Ky.) *Citizens' Ins. Co. v. Henderson Elevator Co.*, 371.

7. **INSURANCE—Principal and Agent.**—As an insurance company selects its own agent, it must be held bound by his acts within the apparent scope of his authority, except as against persons who have notice of restriction thereon. (Ky.) *Citizens' Ins. Co. v. Henderson Elevator Co.*, 371.

*Forfeiture and Cancellation of Policy.*

8. **INSURANCE—Waiver—Cancellation of Policy.**—Though an agent of the insurer notifies the assured that the former is instructed to cancel the policy, yet if the agent tells the assured that the policy may remain in force until such agent gets the assured another policy for the same amount, then the cancellation is waived, unless the assured knows that the insurer directed the agent to cancel the policy immediately. (Ky.) *Citizens' Ins. Co. v. Henderson's Elevator Co.*, 371.

9. **INSURANCE—Waiver of Forfeiture.**—Even though the provisions of a policy of insurance providing for forfeiture are automatic, they may be waived by the parties, and such waiver may be indicated by conduct as well as by express language. (Ala.) *Galliher v. State Mut. Life Ins. Co.*, 83.

10. **INSURANCE, Waiver of Forfeiture Caused by Nonpayment of Premium Notes.**—Notwithstanding notes are given in payment or part payment of a premium, and the policy provides that on default in the payment of the notes, the policy shall become ipso facto null and void, the forfeiture can be waived by the insurer, and is waived, if, after such default, the insurer continues to assert liability on the part of the insured to pay such notes in full. (Ala.) *Galliher v. State Mut. Life Ins. Co.*, 83.

11. **INSURANCE, Forfeiture, Consent of the Assured to the Waiver of.**—Conceding that the consent of the assured is necessary to the waiver of a forfeiture and the keeping alive of the liability to pay premium or premium notes, his assent may be inferred when demand after forfeiture is made for the payment of the premium note, and is met by its partial payment and the promise to pay the balance as soon as able. (Ala.) *Galliher v. State Mut. Life Ins. Co.*, 83.

*Accident and Life Insurance.*

12. **INSURANCE, ACCIDENT—Knowledge of Agent—Estoppel.**—The knowledge of an insurance agent, acting within the scope of his authority, respecting any material fact which affects the risk, is imputed to the company, and it is estopped from setting such fact up in defense, unless the person dealing with the agent knows of his limited powers and that he is exceeding them. (Ky.) *Crawford v. Travelers' Ins. Co.*, 425.

13. **INSURANCE, LIFE—Married Women—Pregnancy.**—A married woman who is an applicant for life insurance is under no duty, after her application is approved, and a policy issued to notify the insurer of any subsequently discovered evidence that she is pregnant. (Neb.) *Merriman v. Grand Lodge Degree of Honor, A. O. U. W.*, 867.

14. **INSURANCE, LIFE—Married Women—Pregnancy—Application.**—A statement by a married woman in her application for life insurance made at a time when she is pregnant, and upon which insurance subsequently issues, that she is in sound bodily health is not a false representation by reason of such pregnancy. (Neb.) *Merriman v. Grand Lodge Degree of Honor, A. O. U. W.*, 867.

*Fire Insurance.*

15. **FIRE INSURANCE—Mortgage of Personalty.**—Where a policy of insurance is issued to A upon two articles of personal property, loss payable to B and C as their interest may appear, the interest of B being that of a vendor of one of the articles, who has retained title to secure payment, and the interest of C being of a similar character as to the other article, which facts are known to the insurance company, a prohibition in the policy against encumbering the property is violated when A executes to B a mortgage upon his interest in the article purchased from C. (Ga.) *Hartford Fire Ins. Co. v. Liddell Co.*, 157.

16. **INSURANCE, FIRE—Furniture in Bawdy-house.**—A policy of fire insurance on the furniture used in a house of prostitution is not void upon the ground that it issued upon property used in an unlawful business. (Miss.) *Conithan v. Royal Ins. Co.*, 701.

17. **INSURANCE, FIRE—Unlawful Business.**—If a contract of insurance is made in good faith, without any purpose to effect, advance or encourage acts in violation of law, the policy is not void. (Miss.) *Conithan v. Royal Ins. Co.*, 701.

18. **FIRE INSURANCE—Forfeiture by Bankruptcy Proceedings.**—Voluntary bankruptcy proceedings do not avoid a policy of insurance on the property, where a loss occurs after the filing of the petition but before the appointment of a receiver and a trustee, for until such appointment the title to the property, together with the right of possession, remains in the bankrupt. (La.) *Gordon v. Mechanics' etc. Ins. Co.*, 434.

*Title Insurance.*

19. **TITLE INSURANCE—Return of Premiums on the Insolvency of Company.**—Where a title insurance company is judicially declared insolvent and a receiver appointed to close its affairs, a policy which it has issued is thereby annulled, and the insured is entitled to a return of the unearned part of the premium paid by him less the amount which the company is entitled to retain for the examination of the title preparatory to issuing the policy. (Minn.) *State v. Minnesota Title Ins. etc. Co.*, 633.

See Beneficial Associations.

**INTERSTATE COMMERCE.**

See Commerce.

**INTOXICATING LIQUORS.**

**LIQUORS—Imposition of Prohibiting License.**—The power to impose a liquor license does not include the power to impose a license so large in amount as to be in effect prohibitory. (La.) *State v. Police Jury*, 430.

See Deeds, 8-10; Nuisance, 3.

*Note.*

**Intoxicating Liquors**, judicial notice of what are, 28.

**JOINT TORTS.**

See Torts.

**JUDGMENTS.**

*In General.*

1. **JUDGMENTS—Right to Modify or Correct Judgment During Term.**—During the term at which a judgment or decree is rendered

the court has inherent power to correct, modify or vacate it, and its action in such case will not be disturbed on appeal except for an abuse of discretion. (Or.) *Ayers v. Lund*, 1046.

**2. JUDGMENTS—Collateral Attack.**—A judgment, though erroneous, is not subject to collateral attack. (Neb.) *Staats v. Wilson*, 806.

**3. JUDGMENT, When Becomes Dormant in Nebraska, and Effect of a Sale Thereunder.**—Under the statutes of Nebraska providing that no judgment on which execution shall not have been taken out and levied before the expiration of five years next after its rendition shall operate as a lien on the estate of any debtor to the preference of any bona fide judgment creditor or purchaser, a judgment becomes dormant after such five years, and a sale thereunder does not pass title as against such judgment creditor. (Neb.) *Harvey v. Godding*, 841.

**4. JUDGMENT AND ATTACHMENT LIENS, Merger of and the Effect of a Sale After the Expiration of the Judgment Lien.**—The fact that a judgment was aided by an attachment, and the judgment contains an order for the sale of the attached property, does not continue the judgment lien beyond the time fixed by statute. The lien of the attachment merges in that of the judgment, and the latter being lost by the lapse of time, no lien exists, and a sale subsequently made under execution is without effect as against one acquiring title from the judgment debtor before the expiration of the judgment lien. (Neb.) *Harvey v. Godding*, 841.

#### *Disqualified Tribunal.*

**5. JUDGMENTS—Disqualification of Member of Tribunal.**—The personal disqualification to act in a particular case of a participating member of a judicial tribunal having jurisdiction of the subject matter renders the judgment voidable, and liable to be set aside upon certiorari. (N. H.) *Rollins v. Connor*, 983.

**6. JUDGMENTS—Disqualification of Member of Tribunal.**—Judicial action by a tribunal, one of whose members is disqualified to act, is voidable if the disqualified member participates therein without reference to the fact whether the result was produced by his vote. (N. H.) *Rollins v. Connor*, 983.

#### *Res Judicata.*

See Corporations, 1; Torts.

**7. RES JUDICATA.—An Erroneous Judgment is Binding on the Parties thereto though it is overruled by a subsequent decision of the highest court.** (Ky.) *Cain v. Union Central Life Ins. Co.*, 313.

**8. RES JUDICATA—Judgment on the Merits, What is.**—A judgment on the demurrer to a reply to the defendant's answer to the effect that the action cannot be maintained, and dismissing it absolutely, is a judgment on the merits, precluding any subsequent controversy on the same question between the same parties. (Ky.) *Cain v. Union Central Life Ins. Co.*, 313.

**9. RES JUDICATA—Insanity, Collateral Attack Based upon.**—If, in a suit brought to enforce a vendor's lien, a decree is entered, its effect as *res judicata* cannot be avoided by the heirs of the complainant by proving that before the commencement, and during the progress, of the suit he was insane. An attack on this ground is collateral, and hence not permissible in an action of ejectment. (Ala.) *Wilkinson v. Lehman-Durr Co.*, 75.

#### *Res Judicata—Ejectment—Partition.*

**10. RES JUDICATA—Effect of Decree in Equity upon a Subsequent Action of Ejectment.**—If a suit in equity involves the validity of a conveyance referred to in the pleadings, and such validity, though

not denied by any of the parties, is necessarily affirmed by the decree, it is conclusive of such validity in a subsequent action of ejectment between the same parties or their privies in estate. (Ala.) *Wilkinson v. Lehman-Durr Co.*, 75.

11. **JUDGMENTS IN PARTITION**—*Res Judicata*.—A pro confesso judgment taken against cotenants, by one of them ignoring a deed made by one of the defendants to another does not divest the title made by the deed, nor prevent the grantee from claiming his share of the proceeds of the sale. (Miss.) *Shuler v. Murphy*, 708.

**Note.**

**Judgments**, collateral attack on officer's return, cases permitting, 762-764.

collateral attack on officer's return, cases refusing to permit, 760, 761.

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**JUDICIAL NOTICE.**

See Evidence, 7.

**Note.**

**Judicial Notice**, caution to be exercised in applying to matters of fact, 22.

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## **JUDICIAL SALES.**

1. **JUDICIAL SALES—Amendments Without Notice.**—If land is sold to purchasers at judicial sale and a deed made to them, minor orders to have the record corrected, though made without notice to the former owner of the land, are not prejudicial to him. (Ky.) *Forrester v. Howard*, 394.

2. **JUDICIAL SALES—Confirmation, What Amounts to.**—Although the record does not show that the report of a sale of land made by a commissioner was confirmed, an order of court directing that a deed be made is, in effect, a confirmation of the sale. (Ky.) *Forrester v. Howard*, 394.

3. **JUDICIAL SALES—Conveyance—Presumption—Correction of Mistake.**—It is presumed that the description in a deed made by a court commissioner in pursuance of an order for a judicial sale of land follows the description contained in the pleadings and judgment, but if, through neglect or mistake, such description is wrong in the deed only, the court may at any time permit its commissioner to correct such conveyance and make a new deed, conforming to the description contained in the judgment. (Ky.) *Forrester v. Howard*, 394.

## **JURISDICTION.**

See Courts, 2-4.

## **LACHES.**

See Estoppel, 4.

## **LANDLORD AND TENANT.**

### *In General.*

1. **LANDLORD AND TENANT—Definition of Tenant.**—A tenant is one who occupies the premises of another in subordination of that other's title and with his assent, express or implied. (Ky.) *Alexander v. Gardner*, 378.

2. **LANDLORD AND TENANT—Relation of, When Exists Between a Land Owner and the Purchaser of Timber.**—If a land owner sells and conveys the timber standing on his land, giving the purchaser the rights of way and privileges usually extended to lumbermen, including the right to erect tramways, cabins, buildings and appliances necessary to remove such timber, and the purchaser agrees that at the end of three years the timber shall be removed, and that all refuse timber, barns, houses and other structures remaining on the premises shall revert to the owner, the relationship of landlord and tenant is thereby created between the land owner and the purchaser. (Ky.) *Alexander v. Gardner*, 378.

### *Assignment, Subletting and Renewal of Lease.*

3. **LANDLORD AND TENANT—Covenant to Renew Lease, Effect upon of the Breach of Covenant not to Assign.**—If there has been a breach of a covenant not to assign a lease, such breach constitutes a good defense to a suit to specifically perform a covenant to renew the lease. (Mass.) *Squire v. Learned*, 525.

4. **LANDLORD AND TENANT—Covenant not to Assign Lease, Effect upon of an Assignment by the Will of the Lessee.**—A bequest by the lessee of his lease to his executors, to be followed by their transfer to themselves as trustees under the will, and their actual transfer to themselves accordingly, do not constitute a breach of a covenant not to assign such lease. (Mass.) *Squire v. Learned*, 525.

5. **LANDLORD AND TENANT—Sublease.—The Original Lease does not Pass to a subtenant; there is no contractual tie between the**

subtenant and the original lessor. (La.) Audubon Hotel Co. v. Braunnig, 456.

6. **LANDLORD AND TENANT**—A Subtenant in Asserting Contract Rights must address himself to his immediate lessor and not to the original landlord. (La.) Audubon Hotel Co. v. Braunnig, 456.

7. **LANDLORD AND TENANT**—Renewal of Lease.—The Right of a Subtenant to enjoy the property does not include the right of renewal given by the first lessor to his lessee. (La.) Audubon Hotel Co. v. Braunnig, 456.

8. **LANDLORD AND TENANT**—Renewal of Lease.—A Subtenant has no Action against the owner or original lessor for a renewal of the lease, for there is no contract between him and the original lessor, and no legal tie which he can invoke. (La.) Audubon Hotel Co. v. Braunnig, 456.

9. **LANDLORD AND TENANT**—A Subtenant has a Direct Action against the original lessor for his torts. (La.) Audubon Hotel Co. v. Braunnig, 456.

*Failure to Repair—Dangerous Premises.*

10. **LANDLORD AND TENANT**—Defective Condition of Premises—Injury from Falling Objects.—The owner of a building erected over the sidewalk of a street is not absolved from liability for the fall of a part of the building or of something attached thereto, by reason of the fact that he has leased the property, and his tenant has obligated himself to keep the property in repair. In such case both the owner and tenant are responsible. (Ky.) Mitchell v. Brady, 408.

11. **LANDLORD AND TENANT**—Breach of Promise to Repair—Tort.—Though a landlord in a lease covenants to keep the premises in repair, yet the tenant cannot sustain an action of tort for personal injuries received by him because of the breach of such covenant. (Mass.) Miles v. Janvrin, 575.

12. **LANDLORD AND TENANT**—Contract to Keep Premises in Repair or to Make Specific Repairs.—There is no difference, so far as the liability of the landlord is concerned, between a promise to keep the premises in repair generally during the time of the lease and a contract to make special repairs, but there is a difference between the landlord's agreeing to maintain the premises in a safe condition for the tenant's use and a contract to keep the premises in repair. (Mass.) Miles v. Janvrin, 575.

13. **LANDLORD AND TENANT**—Right of the Latter to Maintain Tort for a Failure to Repair.—A tenant cannot maintain an action of tort against a landlord for injuries due to the latter's breach of a contract or covenant to keep the premises in safe condition or repair, unless the contract is such that, notwithstanding the lease, the premises, so far as their safety is concerned, must be deemed to remain in the control of the landlord, with nothing but a right in the tenant to use them. (Mass.) Miles v. Janvrin, 575.

14. **LANDLORD AND TENANT**—Notice to the Former to Repair, When Necessary.—Where, by the force of a contract, the landlord is to maintain the premises in safe condition for the tenant's use, no notice is necessary, but where the landlord's contract is to keep the premises in repair as the premises of the tenant during the time of the lease, notice is necessary before the landlord is in default. (Mass.) Miles v. Janvrin, 575.

15. **LANDLORD AND TENANT**—Who may not Maintain an Action for Injuries Due to a Failure to Keep Premises in Safe Condition. The wife of the tenant cannot maintain an action of tort against the landlord for personal injuries due to his breach of a contract or

covenant to keep the premises in repair and in a safe condition. (Mass.) *Miles v. Janvrin*, 575.

**16. LANDLORD'S FAILURE TO REPAIR as Affecting Liability for Rent.**—While the breach of a landlord's agreement to repair may not relieve a tenant in possession from liability to pay rent, still if the failure to repair amounts to a constructive eviction, the tenant will be justified in leaving the premises, and his liability for rent will thereupon terminate. (Minn.) *Rea v. Algren*, 627.

**17. LANDLORD'S FAILURE TO REPAIR as Constructive Eviction.**—The failure of a landlord to perform his agreement to repair a leaky roof and defective plumbing amounts to a constructive eviction, so that the tenant may abandon the premises and be absolved from liability for subsequently accruing rent. (Minn.) *Rea v. Algren*, 627.

See Forcible Detainer.

#### LARCENY.

**1. LARCENY—Diverse Ownership—Single Taking.**—However diverse the ownership of property which is the subject of larceny if the act of taking constitutes but a single act, but one offense is committed. (Miss.) *Dalton v. State*, 637.

**2. LARCENY—Diverse Ownership—Indictment.**—An indictment which charges the larceny of property belonging to different owners in a single count is not demurrable. (Miss.) *Dalton v. State*, 637.

#### LAW.

**LAW—Standard of Honesty and Business Integrity.**—The law is satisfied with the standard of honesty and business integrity which it has itself erected, and it recognizes the right of no man or set of men to erect for another any other standard and coerce him to measure his conduct by it. (Mo.) *State v. Stock Exchange*, 776.

#### LAW OF OTHER STATES.

See Evidence, 8-10.

#### LIBEL AND SLANDER.

**1. A CORPORATION is Liable for Slander as Well as for Other Torts.** (Ala.) *Singer Mfg. Co. v. Taylor*, 90.

**2. SLANDER, Liability to Joint Action for.**—A slander must be regarded as an individual act for which two or more persons cannot be held liable in a single action. (Ala.) *Singer Mfg. Co. v. Taylor*, 90.

**3. CORPORATION—Slander.**—A Corporation and Its Agent cannot be held liable in a single action for slander uttered by such agent. (Ala.) *Singer Mfg. Co. v. Taylor*, 90.

**4. CORPORATION, Liability for Slander Uttered by Agent.**—If the agent of a sewing-machine company at his office calls a person a thief in the presence of others, his principal cannot be held liable, in the absence of evidence of a previous authorization or a subsequent ratification. (Ala.) *Singer Mfg. Co. v. Taylor*, 90.

#### LIMITATION OF ACTIONS.

##### *In General.*

**1. LIMITATION OF ACTIONS, Effect of Statute.**—The limitation, even when the bar is perfected, does not annul the contract itself, but only takes away the remedy provided by law for its enforcement. (Ala.) *Galliher v. State Mut. Life Ins. Co.*, 83.

**2. LIMITATION OF ACTIONS—Computation of Time Including Day of Injury.**—Under a statute providing that an action for personal injury shall be commenced within a certain time after the accrual of the cause of action, in computing the time within which the action must be commenced, the day of the injury is included. (Ky.) *Geneva Cooperage Co. v. Brown*, 388.

**3. LIMITATION OF ACTIONS—Computation of Time—Sunday.**—If a statute provides that an action for personal injury shall be commenced within a certain time, and the last day of that period falls on Sunday, that day is included, and the time within which the action may be brought cannot be extended to the following day. (Ky.) *Geneva Cooperage Co. v. Brown*, 388.

**4. LIMITATIONS OF ACTIONS—Parties.**—An action against an alleged corporation, which is in fact a partnership, is not the commencement of an action against the individual owners of such firms, and hence will not suspend the running of the statute of limitations against them. (Ky.) *Geneva Cooperage Co. v. Brown*, 388.

*Part Payment.*

**5. LIMITATIONS OF ACTIONS—Part Payment of Joint Obligation.**—Payment of a part of a joint obligation by a maker thereof or by his agent or legal representative revives it against all persons who were liable thereon, though made without their knowledge or consent. (Or.) *Scott v. Christenson*, 1041.

**6. LIMITATIONS OF ACTIONS—Payment by Joint Maker.**—A payment by either of the joint makers of a note to be indorsed thereon at his request is sufficient to extend the statute of limitations, which had not run when such payment was made. (Or.) *Scott v. Christenson*, 1041.

**7. LIMITATIONS OF ACTIONS—Part Payment—Evidence.**—Testimony by the holder, in an action against the joint makers of a note, that on a certain day when the note was not barred by limitation a part payment thereon was made to him by one of them is competent, though he is unable to identify the one who made the payment. (Or.) *Scott v. Christenson*, 1041.

**8. LIMITATION OF ACTIONS—Indorsement of Part Payment.**—An indorsement on a note purporting to acknowledge the receipt of money by the holder thereof is admissible in his favor to repel the presumption of the bar of the statute of limitations, on his testifying that one of the joint makers of the note made the payment to him to be credited on the note. (Or.) *Scott v. Christenson*, 1041.

See Adverse Possession; Contracts, 12; Judgments, 3.

**LIQUORS.**

See Intoxicating Liquors.

**LIS PENDENS.**

**1. LIS PENDENS—Purchaser Bound by Judgment.**—A *lis pendens*, prosecuted in good faith, is notice to any and all purchasers so as to affect and bind by the decree any interest in the property which they may acquire by reason of their purchase. (Mo.) *Turner v. Edmonston*, 739.

**2. LIS PENDENS—Purchaser from Attorney Pending Writ of Error.**—Where a judgment is made a lien on the land of the defendant, and the plaintiff purchases at the execution sale thereof and then conveys to his attorney who tried the case, and thereafter the defendant sues out a writ of error, and while the writ is pending in the supreme court the attorney conveys the land to his brother, the latter is a *lis pendens* purchaser, and takes subject to the result of

the suit, although at the time the attorney purchased he no longer represented the plaintiff. (Mo.) *Turner v. Edmonston*, 739.

### **LIVESTOCK.**

See *Carriers*, 22-30.

### **LOST WILLS.**

See *Wills*.

### **MANDAMUS.**

1. **MANDAMUS, Creditors' Bill not Barred Because There is a Remedy by.**—The fact that persons bringing a creditors' bill to reach property conveyed by a municipality might have secured an adequate remedy by mandamus does not prevent the maintenance of such bill. (Ala.) *Southern Ry. Co. v. Hartshorn*, 68.

2. **A WRIT OF MANDATE will Ordinarily be Denied Where the Applicant has Another Remedy.** (Ind.) *Couch v. State*, 221.

3. **MANDAMUS cannot be Invoked to Settle Doubtful Claims to an Office or to have the title thereto adjudicated between adverse claimants.** (Ind.) *Couch v. State*, 221.

4. **MANDAMUS may Issue to Put One in Possession of an Office who holds a prima facie uncontested title.** (Ind.) *Couch v. State*, 221.

5. **MANDAMUS to Compel Admission to Public Office, Who may be Joined in the Proceedings as Defendants.**—If one has received a certificate of election and qualified as a member of the board of trustees of a town, and, on presenting his credentials, the member of the board whose term had expired and the remaining members refuse to permit the new member to exercise the functions of his office, all may properly be joined in a proceeding to compel them to admit the applicant to such office. (Ind.) *Couch v. State*, 221.

6. **MANDAMUS to Compel Admission to a Public Office—Parties Defendant.**—It is no objection to an application for a writ of mandate to compel the members of a board of trustees of a municipality to permit one elected and qualified to exercise the functions of a member of such board that the proceedings were brought against such members personally and not against the municipality or its president or board of trustees. (Ind.) *Couch v. State*, 221.

7. **MANDAMUS to be Admitted to an Office—Questions Which may be Presented by the Answer.**—In an application by one who has received a certificate of election and qualified for a public office for a writ of mandate to compel him to be admitted to exercise the functions, the only question to be tried is the prima facie right to possession, and an answer, therefore, will not be permitted to present as an affirmative defense matters which might have been relied upon in a contest for the office. (Ind.) *Couch v. State*, 221.

### **MANSLAUGHTER.**

See *Homicide*.

### **MARRIAGE.**

1. **MARRIAGE, Statute Validating. Extraterritorial Effect of.**—A statute providing that if a person having a living spouse enters into a marriage, the other party to which acts in good faith, and the former marriage is subsequently annulled, and the parties continue thereafter to live together as husband and wife, they shall be held to have been legally married from and after the removal of the impediment, has no extraterritorial effect, and if the impediment is

removed while the parties reside in another state, it has no effect on the status of the parties, although they subsequently remove to the state where such statute is in force. (Mass.) *Commonwealth v. Stevens*, 555.

2. **MARRIAGE, Cohabitation After Void.**—If the solemnization of a marriage is unlawful, cohabitation under it is unlawful in the beginning and can only become lawful upon a new solemnization after the impediment is removed. (Mass.) *Commonwealth v. Stevens*, 555.

3. **COMMON-LAW MARRIAGE.—A Marriage Simply by Agreement of the Parties,** followed by cohabitation as husband and wife, and such other attendant circumstances as are necessary to constitute what is termed a common-law marriage, is valid in Colorado. (Colo.) *Klipfel v. Klipfel*, 96.

4. **COMMON-LAW MARRIAGE.—Cohabitation and General Reputation.**—Where contract of marriage is denied and cannot otherwise be shown, its existence may be proved by, and presumed from, evidence of cohabitation as husband and wife and general reputation. Cohabitation as here used means something more than sexual intercourse. (Colo.) *Klipfel v. Klipfel*, 96.

5. **COMMON-LAW MARRIAGE.—What Constitutes Cohabitation.** Cohabitation is not a sojourn, nor a habit of visiting nor even remaining with for a time. None of these fall within the true idea of cohabitation as a fact presumptive of marriage. To cohabit is to live or dwell together, to have the same habitation, so that where one lives and dwells there does the other live and dwell with him. (Colo.) *Klipfel v. Klipfel*, 96.

6. **COMMON-LAW MARRIAGE.—By General Reputation and Repute,** as these terms are used in defining common-law marriages, is meant the understanding among neighbors and acquaintances with whom the parties associate in their daily life that they are living together as husband and wife and not in meretricious intercourse. In its application to the fact of marriage it is more than mere hearsay. It involves and is made up of social conduct and recognition, giving character to an admitted and unconcealed cohabitation. (Colo.) *Klipfel v. Klipfel*, 96.

7. **COMMON-LAW MARRIAGE.—Cohabitation and Reputation.—To Establish Common-law Marriage, It is Necessary** that there be evidence both of cohabitation and reputation before such a marriage can be presumed. Proof of one alone is not sufficient to sustain the presumption. (Colo.) *Klipfel v. Klipfel*, 96.

8. **COMMON-LAW MARRIAGE.—Cohabitation Attendant with Other Facts is Merely a Circumstance from Which Marriage in Fact may be Presumed,** but where facts are proved from which a contrary presumption arises, all former evidence falls or at least is neutralized. (Colo.) *Klipfel v. Klipfel*, 96.

9. **COMMON-LAW MARRIAGE.—One of the Essential Obligations of a Valid Marriage Contract** is, that it binds the parties to keep themselves separate and apart from all others and cleave to each other during their joint lives. (Colo.) *Klipfel v. Klipfel*, 96.

10. **COMMON-LAW MARRIAGE.—Presumption of Illicit Intercourse.**—Where intercourse between a man and woman is in its inception not only meretricious but intentionally criminal, the continuance of like intercourse must be presumed; and the marriage contract, where it is sought to establish the presumption of marriage by cohabitation and repute, must be established by convincing and positive evidence. (Colo.) *Klipfel v. Klipfel*, 96.

11. **COMMON-LAW MARRIAGE.—Cohabitation with Two Women.** Where the evidence shows that a man cohabited with two women, the presumed innocence of either cohabitation must fall, for it is impossi-

ble for two marriages to exist together, and neither is by such evidence established. (Colo.) Klipfel v. Klipfel, 96.

**12. COMMON-LAW MARRIAGE—Intention of Parties.**—Where a woman alleges that she is the wife of a man by virtue of a common-law marriage, evidence that at the time of their alleged marriage he also cohabited with another woman, and was reputed to be married to her, shows that he had no intention to live in matrimonial union with the first. (Colo.) Klipfel v. Klipfel, 96.

**13. COMMON-LAW MARRIAGE—Consent of Parties.—A Marriage is a Contract Based upon Consent,** and hence the consent of both parties is essential to its validity. (Colo.) Klipfel v. Klipfel, 96.

See Breach of Promise to Marry; Husband and Wife.

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**MASTER AND SERVANT.****Minor Employé.**

1. **MASTER AND SERVANT—Safe Place for Minor to Work.**—Where an employer, in violation of his understanding with the father of a minor employé, assigns the minor to a duty for which he was not employed, and thereby places him in a position necessarily dangerous even for an experienced mechanic, the employé has the right to rely upon the protection and superior knowledge of his employer. (La.) *Bourg v. Brownell-Drews Lumber Co.*, 448.

**Railways Employés.**

2. **MASTER AND SERVANT—Failure of Trainman to Slacken Speed at Switch.**—When a railway conductor and engineer have been notified that a crippled car is on the main track at a certain station, and that they must pass this point on a switch or passing track, it is negligence for them to run the train into an open switch at that station at a speed of fifty miles an hour, in consequence of which the train is wrecked and a master-mechanic of the company thereon is killed. (Mo.) *Tabor v. St. Louis etc. Ry. Co.*, 728.

3. **NEGLIGENCE—Railroads—Duty to Give Warning to Employé.**—It is the duty of railroad employés in charge of a construction train, to give to an employé who, in the course of his employment, is upon the railroad track, some warning that the train is to be moved in his direction especially when he has no reason to believe that such train will be moved toward him. (Iowa) *Christopherson v. Chicago etc. R. R. Co.*, 284.

4. **NEGLIGENCE, CONTRIBUTORY—Railroads.**—If a railroad employé has reasonable ground to believe that a train will not be backed toward him, it is for the jury to say whether he was negligent in not looking for the train before attempting to cross the track. (Iowa) *Christopherson v. Chicago etc. R. R. Co.*, 284.

5. **RAILROADS—Negligence—Death of Employé.**—If a railroad section foreman, while walking along a piece of new and unballasted track, is killed by the derailment of a mixed freight and passenger train, being run at the rate of thirty or forty miles per hour, while the schedule for freight trains is fifteen miles per hour, the railroad company is liable for such death. (Miss.) *Mobile etc. R. R. Co. v. Hicks*, 679.

6. **RAILROADS—Negligence—Wrongful Death.**—If a railroad sectionman while walking along a new unballasted railroad track is killed by the derailment of a mixed train, being run at an excessive rate of speed, the injury is not due to accident so as to relieve the railroad company of a charge of negligence. (Miss.) *Mobile etc. R. R. Co. v. Hicks*, 679.

7. **RAILROADS—Negligence—Damages—Evidence.**—In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotive, or the cars of such company, is by the code of Mississippi. *prima facie* evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury. (Miss.) *Mobile etc. R. R. Co. v. Hicks*, 679.

**Fellow-servants.**

8. **FELLOW-SERVANTS—Conductor, Engineer and Master-mechanic.**—A master-mechanic in the employ of a railroad company is not, while riding on an engine for the purpose of discovering defects therein, a fellow-servant with the conductor and engineer. Therefore, if he is killed through their negligence in failing to slow down as they approach an open switch, an action therefor lies against the railroad company. (Mo.) *Tabor v. St. Louis etc. Ry. Co.*, 728.



9. **RAILROADS—Fellow-servants.**—If a section foreman is killed while walking along the track, by the fact that a mixed freight and passenger train is being operated at a negligent and excessive rate of speed, the decedent is within the class of employes entitled to the benefit of a statute abrogating the fellow-servant rule with regard to certain employes of a railroad company injured as the result of the negligence of a fellow-servant engaged in another department of the labor. (Miss.) *Mobile etc. R. R. Co. v. Hicks*, 679.

10. **RAILROADS—Fellow-servants—Liability.**—A statute or constitutional amendment exempting railroad employes from the application of the fellow-servant rule protects the injured employe, not against what he himself is doing, but against what his coemployes of certain kinds are doing. (Miss.) *Mobile etc. R. R. Co. v. Hicks*, 679.

11. **RAILROADS—Fellow-servants, Who are not.**—A railroad section foreman is not a fellow-servant with the crew running a mixed freight and passenger train. (Miss.) *Mobile etc. R. R. Co. v. Hicks*, 679.

12. **MASTER AND SERVANT—Fellow-servants—Defense—Burden of Proof.**—To show that the injury to a servant was not due to the negligence of his fellow-servant, the burden of proof is on the master. (Miss.) *Mobile etc. R. R. Co. v. Hicks*, 679.

13. **RAILROADS—Negligence—Right to Sue.**—If a statute provides that railroad companies shall be liable for the death of their servants caused by the negligence of fellow-servants in certain cases, and that the legal or personal representative of the injured person shall have the same rights and remedies as are allowed to the representatives of other persons, and that the statute shall not deprive an employe or his legal or personal representative of any right or remedy now possessed by him by law; and another statute provides that whenever a death is caused by a negligent act, which would, if such death had not ensued, have entitled the injured person to recover damages, and such deceased person leaves a widow or children, or both, the party liable if death had not ensued or the representative thereof shall be liable in damages notwithstanding such death, the action may be brought in the name of the widow for the death of her husband, or in the name of a child for the death of its parent, but there can be but one suit for the same death, which shall inure to the benefit of all the parties, and if the widow and children have brought suit for the wrongful death of the husband and father, the widow is not entitled to bring another action as her husband's administratrix to recover damages sustained by her husband. (Miss.) *Mobile etc. R. R. Co. v. Hicks*, 679.

See Constitutional Law, 10-13.

## MECHANICS' LIENS.

### *In General.*

1. **MECHANICS' LIENS—Acceptance by Note.**—The fact that a subcontractor accepts a note from the main contractor for the amount of the claim does not affect his right to enforce his mechanic's lien against the property. (Ky.) *Mivelaz v. Johnson*, 398.

2. **MECHANICS' LIENS—Liability of Vendor.**—If a vendor and his vendee co-operate in plans for the erection of improvements upon real estate covered by their agreement, the interest of the vendor, as well as that of the vendee, is bound for the payment of liens for labor and material furnished for such improvements. (Neb.) *Guion v. Ryckman*, 877.

*Statement of Claim—Description of Property.*

**3. MECHANICS' LIENS—Statement of Claim—Name of Owner.** A statement of a mechanic's lien, is not fatally defective by reason that it misstates the name of the owner, where the name of the owner must be given only when known, and there is no such person as the one named in the statement in the vicinity, nor owning property therein. (Ky.) *Mivelaz v. Johnson*, 398.

**4. MECHANICS' LIENS—Statement of Claim—Description of Property.**—A mechanic's lien is not invalidated merely because the claim therefor describes more or less land than the loan can lawfully cover. (Ky.) *Mivelaz v. Johnson*, 398.

**5. MECHANICS' LIENS—Statement of Claim—Description of Property.**—Failure to properly describe, in a mechanic's lien statement, a portion of the premises, upon which the lien is claimed, does not invalidate the lien as to the portion correctly described. (Ky.) *Mivelaz v. Johnson*, 398.

**6. MECHANICS' LIENS—Statement of Account.**—If a contract is entered into for a specific sum for labor or material, and is complete within itself, and is filed with the statement of the lien, a more detailed statement of the account is unnecessary. (Neb.) *Guiou v. Byckman*, 877.

**7. MECHANICS' LIENS—Affidavit for—Description of Property.** If, in an affidavit for a mechanic's lien enough appears in the description to enable a person familiar with the locality to identify the premises intended to be described with reasonable certainty, it will be sufficient. (Neb.) *Guiou v. Byckman*, 877.

**MENTAL SUFFERING.**

See Damages, 3-8.

**MONOPOLIES.***Combination of Hotel Proprietors.*

**1. RESTRAINT OF TRADE.**—A Contract Between the Proprietors of the Only Two First-class Hotels in a town of five thousand inhabitants that one of them shall close during the period covered by the contract in consideration of a sum to be paid monthly by the proprietor of the other, the intention being to give a monopoly of the business, is in unreasonable restraint of trade, against public policy and void, and no recovery can be had of the amount thus agreed to be paid. (Ky.) *Clemons v. Meadows*, 339.

*Combination by Traders' and Livestock Exchange.*

**2. RESTRAINT OF TRADE—Boycotting by Traders' Exchange.**—In a suit against members of a livestock exchange and of a traders' exchange for an injunction against their maintenance of a combination to control the livestock market in Kansas City, it is no defense to the members of the livestock exchange that they are constrained to act unlawfully in refusing to deal with others than members of the traders' exchange for fear of boycott by the latter, and if the acts of the members of the traders' exchange amount to an unlawful interference or constraint, the court will enjoin the members of the latter exchange from boycotting the members of the other exchange. (Mo.) *State v. Stock Exchange*, 776.

**3. RESTRAINT OF TRADE—Boycott—Combination by Voluntary Associations.**—While a voluntary association of livestock buyers cannot sue or be sued, still a suit to enjoin an unlawful combination in restraint of trade by means of the association may be brought against the individuals composing it, and the name of the association may

be used to distinguish the defendants in their associated capacity. (Mo.) *State v. Stock Exchange*, 776.

4. **RESTRAINT OF TRADE—Boycott—Liability of Associations in Unlawful Combination.**—While the members of a voluntary association to boycott competing traders are not partners in a legal sense, still where they in considerable numbers pursue a course of conduct agreed upon to effect the boycott, they become responsible, not only each for his own acts, but each for the acts of the other and for all. (Mo.) *State v. Stock Exchange*, 776.

5. **RESTRAINT OF TRADE—Boycott—Right to Withhold Trade.** The rule that an individual has the right to refuse to deal with another without giving any reason therefor, and that what he has a right himself to do he may agree with others to do, is not without limitations. (Mo.) *State v. Stock Exchange*, 776.

6. **RESTRAINT OF TRADE—Joint or Individual Action.**—It is the combination or agreement that results in restraint of trade that the anti-trust statutes denounce, whether the result is accomplished by the act of each individual on his own account doing as he agreed to do, or by the joint action of all. (Mo.) *State v. Stock Exchange*, 776.

7. **RESTRAINT OF TRADE—Boycott—Combination of Livestock Associations.**—A petition stating that the defendants who are members of a traders' exchange refuse to have any dealing in livestock with persons not members of the exchange, for the reason only that they are not members, and that by threats of boycott they have so intimidated the members of a livestock exchange that they will not deal with persons not members of the traders' exchange, by which means the traders' exchange has obtained control of the market in Kansas City, states a cause of action under the anti-trust laws. (Mo.) *State v. Stock Exchange*, 776.

8. **RESTRAINT OF TRADE—Exclusion from Market of Nonmembers of Association.**—A voluntary association of livestock traders cannot lawfully exclude from the market persons not members of the association for no other reason than that they are not members. (Mo.) *State v. Stock Exchange*, 776.

*Corporate Trust—Consolidation of Companies.*

9. **CORPORATIONS—Trusts—Illegal Evidence.**—In determining whether a corporation is an illegal trust the courts may look through the various steps which led to its organization to discover the reason therefor. (Miss.) *Southern Electric Securities Co. v. State*, 638.

10. **CORPORATIONS—Illegal Trusts.**—A combination of two or more corporations for legitimate purposes, unobjectionable as a combination, may be subject to attack, if an illegal trust form is adopted. (Miss.) *Southern Electric Securities Co. v. State*, 638.

11. **CORPORATIONS—Consolidation—Monopolies.**—The consolidation of several corporations into a new one, and the control of the stock of the old ones by the new, leaving each to continue its corporate existence for the purpose of stifling competition, is an illegal trust, for which each of the constituent members of the trust may be attacked in the court having jurisdiction in the locality of its existence, and the whole trust body may be proceeded against in the state in which it exists, or in the courts of other states to whose jurisdiction it may be amenable. (Miss.) *Southern Electric Securities Co. v. State*, 638.

12. **CORPORATIONS—Consolidation—Monopolies—Action by State.**—If several corporations consolidate to stifle competition by organizing a dominating corporation, the state may proceed against any one of them organized under its laws which violates its charters or public policy, or it may pass over such corporation and proceed against the dominating corporation, domestic or foreign, which, within the state, attempts in any way to prosecute a business,

which a subordinate corporation could not. (Miss.) *Southern Electric Securities Co. v. State*, 638.

**13. CORPORATIONS, Foreign—Combinations—Right of State to Control by Injunction.**—If a corporation is organized in another state for the primary purpose of doing business therein, instead of that of its domicile, and the purpose of its organization is to dominate and control a domestic corporation which is itself engaged in a combination and illegal trust, the courts of the state have power to control its corporate power, and by injunction prevent it from doing any act within the state having relation to, and in furtherance of, the contract under which it was organized. (Miss.) *Southern Electric Securities Co. v. State*, 638.

### MORTGAGE.

**1. A CONVEYANCE Intended as a Mortgage conveys the legal title to the premises described therein.** (Neb.) *McCague v. Eller*, 863.

**2. FORECLOSURE Without Necessary Parties, Effect of.**—If a deed intended as a mortgage is foreclosed without making parties heirs of the grantor, the foreclosure conveys the legal title, but, as to heirs not parties to the suit, leaves them the equity of redemption, but the purchaser at the foreclosure sale obtains the right to demand and obtain such redemption or apply to a court of equity for its foreclosure. (Neb.) *McCague v. Eller*, 863.

**3. MORTGAGE—Invalid Foreclosure, Effect of.**—If a foreclosure is defective because heirs of the mortgagor are not made parties thereto, their right of redemption is not affected, but the purchaser at the sale becomes subrogated to an unpaid residue of the mortgage debt in so far as requisite for the protection of his title. (Neb.) *McCague v. Eller*, 863.

**4. MORTGAGE—Remedy of the Purchaser at a Foreclosure Defective for Want of Parties.**—If a mortgage transferring the legal title is foreclosed without making all the heirs of the mortgagor parties, the purchasers become subrogated to the interests of the mortgagee, and entitled to the sale of the mortgaged premises for the unpaid residue of the mortgage debt. (Neb.) *McCague v. Eller*, 863.

### MUNICIPAL CORPORATIONS.

*Wharf at End of Street.*

**1. MUNICIPAL CORPORATIONS—Public Streets, Right of to Maintain Wharf in Front of.**—If a land owner dedicates a public street terminating on the bank of a navigable river, the municipality has a right to maintain a free wharf at the end of the street where it intersects with the river. (Ala.) *Williams v. City of Gainesville*, 66.

*Loafing on Streets.*

**2. CRIMINAL LAW—Municipal Ordinances—Loafing on Street.**—Lounging, standing and loafing around street corners and other public places, unaccompanied by disorderly conduct or interference with the use of the streets, cannot be declared a public offense by ordinance. (Mo.) *St. Louis v. Gloner*, 750.

*Injury to People in Streets—Automobiles—Street Railways.*

**3. MUNICIPAL CORPORATIONS—Want of Notice—Falling Objects.**—If an iron pipe attached to the side of a building adjoining the street and abutting upon the sidewalk, in falling, kills a person on the sidewalk, but there is no evidence of notice on the part of the city of the defective and dangerous condition of the pipe, the city is not liable. (Ky.) *Mitchell v. Brady*, 408.

4. **AUTOMOBILES—Negligence.**—A person who is driving an automobile at a high rate of speed on one of the principal streets of a city, and is unable to see a street-crossing or a pedestrian thereon on account of a street-car being between him and the crossing, and who fails to stop his machine until the car has passed, is guilty of gross negligence. (Ky.) Gregory v. Slaughter, 402.

5. **NEGLIGENCE, CONTRIBUTORY, with Respect to a Team in the Public Streets.**—One who is crossing the streets in front of an approaching dray drawn by two horses, which are then walking, and who has entered a crowded street-car and is standing on the running-board looking for a seat, is warranted in assuming that he has reached a place of safety where he need not pay any further attention to such team. (Mass.) Sibley v. Nason, 520.

6. **NEGLIGENCE in Injuring Person on a Street-car by a Team and Dray.**—If, in daylight, where there is no obstruction to the view, a team of horses attached to a dray and moving on a walk is so driven as to crush with the hub of one wheel a person standing on the running-board of a street-car, a finding that the teamster was negligent is justifiable. (Mass.) Sibley v. Nason, 520.

*Gifts—Appropriation and Expenditure of Funds.*

7. **MUNICIPAL CORPORATIONS, Gifts of, When Assailable by Creditors.**—If a municipal corporation pays for property and has it conveyed as a gift to a railway corporation, such property may be reached by a bill filed by the creditors of the municipality, to subject it to the payment of their debts. (Ala.) Southern Ry. Co. v. Hartshorn, 68.

8. **MUNICIPAL CORPORATIONS have no Power to Spend for Other than Public Uses Money Raised by Taxation.** (Mass.) Wheelock v. City of Lowell, 543.

9. **MUNICIPAL CORPORATIONS—Public Uses.**—The Erection of a Town House in Which the Inhabitants may Assemble is a public purpose, for which towns may raise money under a general phrase of the statute empowering appropriations for "other necessary charges." (Mass.) Wheelock v. City of Lowell, 543.

10. **MUNICIPAL CORPORATIONS—Town Halls Used for Some Purpose Which is not a Public Use.**—If the dominating motive for the erection of a hall is a strictly public use, then the expenditure for it is legal, although occasionally it may be devoted to uses which are not public. If, however, the project of the city is merely colorable, masking under the pretext of a public purpose, the general design of entering into the private business of maintaining a public hall for gain, or devoted mainly to any other than a public use as a gathering place for citizens generally, such an attempt would be a perversion of power and a nullity, and no public fund could be appropriated for it. (Mass.) Wheelock v. City of Lowell, 543.

11. **MUNICIPAL CORPORATIONS—Public Use—Halls for the Meeting of Citizens.**—A commodious, convenient hall in which the citizens may exercise their right of assembling and discussing public affairs is an object for which the city may lawfully expend public moneys. (Mass.) Wheelock v. City of Lowell, 543.

12. **MUNICIPAL CORPORATIONS, Officers or Commissioners of Who Need not be Elected Under any General or Special Law.**—A municipal corporation may, by ordinance, provide for a commission to act as the agent of the city in the erection of a public hall, and determine the manner in which the members shall be chosen, whether by appointment by the mayor, with or without confirmation by either or both branches of the city council, or in any other reasonable and legal way. (Mass.) Wheelock v. City of Lowell, 543.

13. **MUNICIPAL CORPORATIONS, Appropriation by, in What Manner may be Made.**—An appropriation for the use of a commission

to erect a public hall may be made by order as well as by ordinance, bill or resolution. (Mass.) *Wheelock v. City of Lowell*, 543.

See Execution, 1; Parliamentary Law.

## MUTUAL BENEFIT SOCIETY.

See Beneficial Associations.

### NAMES.

**NAMES—Christian and Middle Names.**—The common law recognizes but one Christian name, and failure in judicial or other proceedings, in giving the name of a party, to state his middle name or the initial thereof as commonly used, is not fatal to their validity. But this rule is not without exceptions. (Minn.) *D'Autremont v. Anderson Iron Co.*, 615.

Note.

**Navigable Waters**, nuisance in, right of private person to abate, 603, 605, 606.

### NEGLIGENCE.

#### *In General.*

1. **NEGLIGENCE—What Constitutes.**—To render a person liable in negligence, it is not necessary that he should have contemplated, or even been able to anticipate, the particular consequences which ensued, or the precise injuries sustained by the plaintiff, and it is sufficient if, by the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or, that consequences of a generally injurious nature might have been expected. (Miss.) *Mobile etc. R. R. Co. v. Hicks*, 679.

2. **NEGLIGENCE—Proximate Cause.**—It is not Necessary to a Defendant's Liability, after his negligence has been established, to show, in addition thereto, that the consequences of his negligence could have been foreseen by him. It is sufficient that the injuries are the natural, though not the necessary and inevitable, result of the negligent fault—such injuries as are likely, in ordinary circumstances, to ensue from the act or omission in question. (Mo.) *Phillips v. St. Louis etc. R. R. Co.*, 786.

3. **NEGLIGENCE—Proof of.**—If an injury is intentionally inflicted, proof that the defendant did the act establishes his fault, but if negligence only is charged, proof of the act must be supplemented by proof that the average or ordinary man would not have done it. (N. H.) *Cunningham v. Pease House Furnishing Co.*, 979.

4. **NEGLIGENCE—Child Riding Without Invitation or Objection, Liability for Injury to.**—If children, in the absence of a milkman, enter his wagon, he having previously given them rides, and on his return he does not eject them, but drives ahead, leaving them sitting on the seat, they are mere licensees, to whom he owes only the duty of not setting traps for their injury and of refraining from reckless, willful or wanton misconduct tending to their injury, and if one of them suffers injury in attempting to alight, the milkman is not liable, though guilty of a want of ordinary care not amounting to culpable negligence. (Mass.) *West v. Poor*, 541.

5. **NEGLIGENCE—Instinct of Self-preservation.**—In cases where there is active participation by the deceased in bringing about a dangerous situation, and the duty rests upon him as well as upon the defendant of actively and vigilantly exercising ordinary care under the circumstances, the absence of all evidence of what he did at the time cannot be supplied by conjecture, and although the instinct of self-preservation may furnish an explanation or excuse for his careless acts after he got into a place of danger, it is not evidence that his acts were the acts of an ordinarily prudent man before the danger became imminent. (N. H.) *Wright v. Boston etc. R. R. Co.*, 949.

*Contributory Negligence.*

6. **NEGLIGENCE, CONTRIBUTORY—Presumption.**—Unless contributory negligence is conclusively shown, the presumption arising from the instinct of self-preservation is sufficient to sustain the burden of proof in the first instance, that a person injured was not in fault for the accident. (Iowa) *Christopherson v. Chicago etc. R. R. Co.*, 284.

7. **NEGLIGENCE, CONTRIBUTORY—Burden of Proof.**—A person who sues to recover for personal injury alleged to have been caused by defendant's negligence must prove by a preponderance of evidence not only that the defendant was guilty of negligent acts adequate for the infliction of the injury received, but also that he, himself, exercised ordinary care for his own safety under the circumstances. (N. H.) *Wright v. Boston etc. R. R. Co.*, 949.

8. **NEGLIGENCE, CONTRIBUTORY.**—The presumption that every person will take care of himself from regard to his own life and safety cannot supply the place of direct evidence to that effect when the burden of proof is upon the plaintiff. (N. H.) *Wright v. Boston etc. R. R. Co.*, 949.

9. **NEGLIGENCE, CONTRIBUTORY—Burden of Proof.**—A plaintiff who has the burden of presenting evidence that he was free from fault does not prove it in the absence of direct evidence by a legal presumption arising from the fact that an ordinarily prudent man would have exercised care under the circumstances. (N. H.) *Wright v. Boston etc. R. R. Co.*, 949.

*Dangerous Substances—Liability of Vendor.*

10. **NEGLIGENCE—Destructive Materials.**—One who puts destructive materials in situations, where they are likely to do mischief, must respond in damages to those who are injured on account of his acts, if he either knew or ought to have known that such materials were dangerous. (N. H.) *Cunningham v. Pease House Furnishing Co.*, 979.

11. **NEGLIGENCE—Representations of Seller.**—One who represents that a certain stove polish sold by him may be used with safety upon a hot stove is liable, either to the purchaser or to a member of his family injured by an explosion of such polish. (N. H.) *Cunningham v. Pease House Furnishing Co.*, 979.

*Dangerous Premises—Trespassers.*

12. **TRESPASSERS, Who are.**—A person who goes upon premises upon the invitation of the superintendent of the owner thereof alone, for his own pleasure and not to promote the interests of such owner, is not the guest of the latter, but is a trespasser or bare licensee. (N. H.) *Hobbs v. Blanchard & Sons Co.*, 944.

13. **TRESPASSERS—Duty of Land Owner to.**—An owner of premises knowing of the presence of a trespasser thereon is bound not to actively render the situation of the latter unreasonably dangerous. (N. H.) *Hobbs v. Blanchard & Sons Co.*, 944.

14. **TRESPASSERS, DUTY TO—Creating Unnecessary Danger.**—Leaving dynamite upon the ground in a logging camp, where strangers, though trespassers, are liable to be who are unacquainted with its use or its explosive properties, and who are not notified of its presence where they are liable to walk, is negligence. (N. H.) *Hobbs v. Blanchard & Sons Co.*, 944.

15. **TRESPASSERS—Duty of Land Owner to.**—A land owner cannot escape liability when injury results to a trespasser from the land owner doing upon his land an unusual and dangerous act, which an ordinarily prudent man would not do under the circumstances. (N. H.) *Hobbs v. Blanchard & Sons Co.*, 944.

**16. TRESPASSERS—Negligence—Concealed Danger.**—If negligence toward a trespasser consists in the owner creating upon his and a concealed danger, not justified or required by his business, when he knows of the presence of such trespasser upon his premises and of his probable ignorance of the existence of the danger, he is liable to him for an injury resulting therefrom. (N. H.) *Hobbs v. Blanchard & Sons Co.*, 944.

**17. TRESPASSERS, Duty of as to Hidden Danger—Contributory Negligence.**—A trespasser upon premises who does not know of the presence of an unnecessary hidden danger thereon, and is in no fault for not knowing of such presence, need not conduct himself as though he was informed of the danger, to relieve himself of a charge of contributory negligence. (N. H.) *Hobbs v. Blanchard & Sons Co.*, 944.

See Adjoining Owners; Animals; Damages; Death; Landlord and Tenant, 10-17; Railroads.

## NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

## NEW TRIAL.

**NEW TRIAL to Procure Evidence of Acquitted Codefendant.**—Where two persons are jointly indicted for manslaughter and one is tried and convicted, and subsequently the other is tried and acquitted, a new trial will be granted the former to obtain the testimony of the latter which before was unavailable because of the pendency of the indictment against him, if it appears that the new evidence is material to the defense. (Tex. Cr.) *Sanders v. State*, 1101.

## NOTARIES.

See Acknowledgments.

## NUISANCE.

**1. NUISANCE—Baseball—Injunction.**—The owner of a vacant lot cannot be enjoined from knowingly permitting the use of his lot for playing baseball thereon without pecuniary compensation to himself, although the result of such playing is likely to be the batting of the ball upon adjoining premises. (Iowa) *Spiker v. Eikenberry*, 259.

**2. NUISANCE—Baseball.**—The playing of the game of baseball is not a nuisance per se, against which persons living in the vicinity where the game is played are necessarily entitled to equitable relief. (Iowa) *Spiker v. Eikenberry*, 259.

**3. NUISANCE in the Keeping of a Place for the Sale of Intoxicating Liquors.**—A house in which beer is kept for sale by the keg and in front of which crowds of men collect, after first contributing the moneys necessary to make a purchase of a keg, and where, after procuring and drinking beer, they become boisterous, intoxicated and disorderly, and continue about the house, so that the public are disturbed and women avoid the street, is a public nuisance, and indictable as such. (Ky.) *Jung Brewing Co. v. Commonwealth*, 376.

**4. PUBLIC NUISANCE—The Right of an Individual to Abate.**—An individual suffering peculiar injuries has a right to remove an obstruction in a ditch under some circumstances, but this extra-judicial remedy does not exist as a matter of absolute right; and where he attempts to exercise it when a number of legal questions are involved, and at such a time and under such circumstances that the property



of others will be jeopardized, they may have him enjoined. (*Miss.*) *Felt v. Elmquist*, 588.

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#### **OCCUPATION TAX.**

See Taxation, 2-4.

#### **OFFICERS.**

##### ***In General.***

1. **PUBLIC OFFICER**—Who is.—A policeman is a public officer, and hence must be appointed for some specified time under a constitution providing that the term of all offices shall be for some specified period. (*Miss.*) *Monette v. State*, 715.

2. **CONSTITUTIONAL LAW**—Public Officer—When cannot Hold During Good Behavior.—Under a constitutional provision that an officer must be appointed for some specified time, a law or ordinance which provides for the appointment of an officer during good behavior is void. (*Miss.*) *Monette v. State*, 715.

3. **OFFICER, PUBLIC, Duty to Surrender.**—It is the duty of the incumbent of a public office at the expiration of his term to surrender it to one who has received a certificate of election and has qualified thereunder. If it is desired to contest the eligibility, election or qualification of such person, this may be done in the manner prescribed by law for determining claims to an office. (*Ind.*) *Couch v. State*, 221.

**4. OFFICER AND DEPUTY, Liability of the Former for the Negligence of the Latter.**—The clerk of a court is liable for damages resulting from the careless or negligent act of his deputy. (Ky.) *Commonwealth v. Johnson*, 368.

*De Facto Officers.*

**5. DE FACTO OFFICER.**—A Writ Signed by a Female Deputy Clerk is not subject to collateral attack. She is at least an officer de facto. (La.) *State v. Police Jury*, 430.

**6. OFFICER DE FACTO.**—The Payment to an Officer De Facto of the Salary appertaining to the office releases the municipality from liability to pay it to the officer de jure for the same period. (Colo.) *Board of County Commissioners v. Rohde*, 134.

*Liability for Frauds.*

**7. BANKS AND BANKING**—Effect of the Deposit of Money by a Public Officer.—If money realized from a judicial sale is directed by the court to be kept in its registry until further orders, but the register deposits it in a local bank in his name as register, such money becomes part of the funds of the bank, subject to its use as any other of its property, and the relation of debtor and creditor is created between the bank and the officer. (Ala.) *Clisby v. Mastin*, 64.

**8. OFFICER, When Guilty of the Conversion of Moneys.**—If a public officer having money in his hands deposits it in his own name in a local bank, this amounts to its conversion by him. (Ala.) *Clisby v. Mastin*, 64.

**9. PUBLIC OFFICER, When Becomes, with His Sureties, Liable for Moneys and Interest.**—If one in an official capacity has moneys in his hands which he deposits in a bank without any order of court for so doing, he and his sureties become bound absolutely as for a debt, and a cause of action arises against him and them in favor of the persons to whom the money belongs, and this liability bears interest. (Ala.) *Clisby v. Mastin*, 64.

See *Mandamus*.

**PARENT AND CHILD.**

*Action for Death of Child.*

**1. PARENT'S ACTION FOR DEATH OF CHILD.**—The Mental Suffering and Deprivation Caused to a Parent by the negligent death of his child is an element of damages in an action against the negligent party; and as such damages are not susceptible of exact measurement, it is sufficient for their recovery that the jury and the court are satisfied from the evidence that the actual relations between the plaintiff in the action and the deceased were the normal ones which should exist between parent and child. (La.) *Bourg v. Brownell-Drews Lumber Co.*, 448.

**2. PARENT'S ACTION FOR DEATH OF CHILD.**—The Earnings of a Minor are not to be considered in an action by his parent for damages for the death of the minor through the negligence of his employer. (La.) *Bourg v. Brownell-Drews Lumber Co.*, 448.

**3. PARENT'S ACTION FOR DEATH OF CHILD.**—The Right of a Parent to Look to his Child for Support in case of need should not be considered in an action by the parent for damages caused by the death of the minor through the negligence of his employer, when there is no evidence that the parent is in need or ever expects to be. (La.) *Bourg v. Brownell-Drews Lumber Co.*, 448.

See *Assignments*, 2, 3.

*Note.*

**Parent and Child, homicide, when the one is guilty of by inattention or neglect of the other**, 325, 326.

## PARLIAMENTARY LAW.

**MUNICIPAL CORPORATIONS**—Municipal Council, Proceedings by not in Accordance with Cushing's Manual on the Law and Practice of Legislative Assemblies.—Though a common council, or other legislative body of a city, may have adopted Cushing's Manual or some other law and practice of legislative assemblies, it is within its power to abolish, modify or waive its own rules intended as security against hasty action. (Mass.) *Wheelock v. City of Lowell*, 543.

## PARTITION.

1. **PARTITION**—Judgment in—*Res Judicata*.—A judgment in partition, unless appealed from, is final, and estops the parties, there-to from claiming a greater interest than is given them by the decree, even though the proceedings were irregular. (Neb.) *Staats v. Wilson*, 806.

2. **PARTITION, PAROL**—Retention of Benefits—*Estoppel*.—A parol partition, joined in by one who retains the benefits thereof and who acquiesces therein for a considerable time, operates as an estoppel. (Neb.) *Staats v. Wilson*, 806.

### *Gift to Child.*

4. **GIFT FROM PARENT TO CHILD**—Independent Advice—Presumption of Undue Influence.—When a child upon whom a parent has become dependent accepts a gift from the parent of all of his or her estate, a court of equity, moved by the apparent improvidence of the gift, presumes that the donor did not appreciate the character or consequences to himself of his act, and casts upon the donee the burden of showing that the donor had the benefit of proper independent advice, which advice means that the donor had the preliminary benefit of conferring fully and privately upon the subject of his intended gift with a person who was not only competent to inform him correctly as to its legal effect, but who was furthermore so disassociated from the interests of the donee as to be in a position to advise with the donor impartially and confidently as to the consequences to himself of his proposed benefaction. (N. J. Eq.) *Post v. Hagan*, 997.

See Judgments, 11.

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## PARTY-WALLS.

1. **PARTY-WALLS**.—The Term "Party-wall" is Usually Applied to Such Walls as are built on the land of another for the common benefit of both in supporting timbers used in the construction of contiguous buildings. And a division wall may become a party-wall by agreement, either actual or presumed. (Md.) *Coggins & Owens v. Carey*, 468.

2. **PARTY-WALL**—Right to Make Windows.—A Party-wall Means a Solid Wall, and one of the owners has no right to open windows therein against the objection of the other, whether or not the latter intends to use the wall. (Md.) *Coggins & Owens v. Carey*, 468.

3. **PARTY-WALL**—Injunction Against Windows.—When One of the Owners of a party-wall opens windows therein, the other owner may have a mandatory injunction requiring them to be closed and the wall made solid. (Md.) *Coggins & Owens v. Carey*, 468.

## PASSENGERS.

See Carriers, 1-10.

**PERJURY.**

**PERJURY—Indictment.**—An indictment for perjury which fails to allege that the accused gave false testimony in a material matter is fatally defective. (*Miss.*) *Moore v. State*, 652.

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**Perjury**, indictment for, American statutes respecting, 755, 756.

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### PHYSICIANS AND SURGEONS.

**PHYSICIANS.**—An Employer Who Summons a Physician and Requests Him to Care for an Employé, who has suddenly become ill while in the discharge of his duties and unable to act for himself, is under no implied obligation to pay for the medical services rendered. (Ga.) *Norton v. Bourke*, 187.

See Hospitals.

Nota.

**Physician and Surgeon**, homicide, when guilty of by inattention or neglect of duty, 330.

### PICKETING BY STRIKERS.

See Trade Unions.

### PLEADING.

1. **PLEADING**—Rule as to Paragraph.—The question whether a pleading complies with the statutory rule requiring all petitions to "set forth the cause of action in orderly and distinct paragraphs numbered consecutively," must be left largely to the discretion of the trial judge. (Ga.) *Atlanta etc. R. R. Co. v. Camp*, 151.

2. **PLEADING**—Demurrer, When not a Proper Remedy.—If a complaint makes out a recoverable right, but contains a claim for non-recoverable damages, the defect may be urged by a motion to strike out, objections to evidence, or by asking special instructions to the jury, but not by demurrer. (Ala.) *Hayes v. Miller*, 93.

3. **PLEADING**—Statute Requiring the Denial of the Genuineness of a Signature, Construction of.—A statute providing that the signature to a written instrument which is declared on as a cause of action shall be taken as admitted, unless the party sought to be charged thereby files a specific denial of the genuineness thereof, and a demand that it shall be proved at the trial, does not apply to an action on the passbook of a savings bank claimed to have been transferred to the plaintiff, because no signature is necessary to such transfer where it is accompanied by the delivery of the passbook. (Mass.) *Bryant v. Abington Sav. Bank*, 552.

4. **PLEADINGS**—Averment of Transfer, When not Admitted.—An averment that the transfer alleged in the complaint, if it should appear to have been signed by the transferor, was made when he had not sufficient capacity to render it valid, does not admit that such transfer was made, and does not preclude contesting the genuineness of the signature if it should be offered in evidence. (Mass.) *Bryant v. Abington Sav. Bank*, 552.

5. **PLEADINGS**—Aider by Verdict.—An imperfect allegation in a complaint is cured by a general verdict for the plaintiff, if the issue joined necessarily required proof of the facts imperfectly alleged. (Or.) *Scott v. Christenson*, 1041.

See Estoppel, 3, 4.

**POLICE POWER.**

See Constitutional Law, 6-9.

**POOLSELLING.**

See Gaming.

**PREGNANT WOMAN.**

See Damages, 9, 10.

**PREScription.**

See Adverse Possession.

**PRINCIPAL AND AGENT..**

*In General.*

1. **PRINCIPAL AND AGENT—End of Agency.**—An agency, though presumed to have continued until shown to have ceased, necessarily ends the moment that the transaction which created it has become complete. (Or.) *McLeod v. Despaign, 1066.*

2. **PRINCIPAL AND AGENT—Duty to Trace Application of Payment.**—One who pays his obligation to an agent of the payee who has the evidence of the debt in his possession is under no obligation to see that the payment is properly applied. (Or.) *McLeod v. Despaign, 1066.*

3. **PRINCIPAL AND AGENT—Insolvency of Agent.**—If a person acting as trustee for another for the receipt of payments on secured notes retains the securities which the payments are intended to cancel, his authority to receipt for payments does not cease until after his insolvency becomes known. (Or.) *McLeod v. Despaign, 1066.*

4. **PRINCIPAL AND AGENT—Guaranty by Agent.**—An agent may guarantee to his principal the payment of claims handled by him for such principal, especially when the agent is one of the beneficiaries in conjunction with the parties whom he is to and does represent. (Or.) *McLeod v. Despaign, 1066.*

5. **PRINCIPAL AND AGENT—Books as Evidence.**—The books and statements of a bank in which an agent is cashier, while acting for others in receiving money on a claim against the debtors of his principal, are admissible in evidence to show the payment by the debtors on the claim held by him as agent. (Or.) *McLeod v. Despaign, 1066.*

6. **PRINCIPAL AND AGENT—Acts of Agent.**—If a person, while acting as agent, purchases a farm from the debtor of his principal and credits the purchase money paid him therefor to the agency account in a bank, in which he keeps any money received when paid by such debtors, his principal is bound thereby, and the debtor is entitled to a credit for the amount. (Or.) *McLeod v. Despaign, 1066.*

*Ratification of Agent's Acts.*

7. **PRINCIPAL AND AGENT—Ratification of Acts.**—One of the most unequivocal methods of showing a ratification of an agent's act is the bringing of a suit based upon it. (Or.) *McLeod v. Despaign, 1066.*

8. **PRINCIPAL AND AGENT—Ratification of Part of Act.**—If a principal elects to ratify any portion of an unauthorized act of his agent he must ratify the whole of it. He cannot avail himself of such acts as are beneficial to him, and repudiate such as are detrimental, whether the ratification be expressed or implied. (Or.) *McLeod v. Despaign, 1066.*

9. **PRINCIPAL AND AGENT**—Adoption of Act of Agent.—A principal must adopt or reject the act of his agent as an entirety, and cannot receive the benefit of such agency without bearing its burdens. (Or.) *McLeod v. Despain*, 1066.

*Torts of Agent.*

10. **PRINCIPAL AND AGENT, Liability of the Former for the Torts of the Latter.**—It is essential to the liability of a principal for the tort of his agent that the tortious act be either authorized or ratified by the principal, or committed by the agent in the course of the business of the principal and of the agent's employment. (Ala.) *Singer Mfg. Co. v. Taylor*, 90.

11. **PRINCIPAL AND AGENT, Slander, When Imputable to the Latter.**—Evidence of slanderous words must be ascribed to the personal malice of the agent rather than to an act performed in the course of his employment and in aid of the interests of his employer, unless authorized or ratified by the principal. (Ala.) *Singer Mfg. Co. v. Taylor*, 90.

**PRIVILEGED COMMUNICATIONS.**

See Evidence, 1.

**PROCESS.**

*Issuance, Service and Return.*

1. **SUMMONS.**—An Objection to a Writ Because Signed by a Female is Waived if not raised before the case is decided on its merits. (La.) *State v. Police Jury*, 430.

2. **PROCESS.**—A Commercial Firm Should be Cited by service on any of the partners in person, or at their store or counting-house by delivery to their clerk or agent. (La.) *Caldwell v. Nelson Morris & Co.*, 446.

3. **PROCESS**—Conclusiveness of Sheriff's Return.—A suit will not lie for equitable relief from a judgment on the ground that the defendant was not served with process, for the sheriff's return of service is conclusive and the defendant has an adequate legal remedy. (Mo.) *Reiger v. Mullins*, 755.

*Publication of Summons.*

4. **PUBLICATION OF SUMMONS**—Mistake in Name.—If a mistake is made in the middle initial of the defendant's name in a summons where service is made by publication, the court does not acquire jurisdiction over the real defendant, but probably an entire failure to insert his middle name or initial is not a fatal error. (Minn.) *D'Autremont v. Anderson Iron Co.*, 615.

5. **PUBLICATION OF SUMMONS**—Strict Compliance with Law. Statutes authorizing the service of process by publication are in derogation of the common law, and the mode which they prescribe must be strictly pursued. (Minn.) *D'Autremont v. Anderson Iron Co.*, 615.

6. **PUBLICATION OF SUMMONS**—Mistake in Name.—The publication of summons in partition directed to "George H. Leslie" does not confer jurisdiction upon the court to adjudicate the rights of "George W. Leslie." (Minn.) *D'Autremont v. Anderson Iron Co.*, 615.

**PROHIBITION.**

1. **PROHIBITION** is an Extraordinary Legal Remedy, and can be Resorted to only in cases of usurpation of power or jurisdiction by the inferior court, or when, in the exercise of jurisdiction in handling

matters clearly not within its cognizance, that court transgresses the bounds prescribed to it by law. (Ala.) Ex parte State, 79.

2. **PROHIBITION** cannot be Resorted to because of errors committed in the progress of the cause for which an appeal will lie. (Ala.) Ex parte State, 79.

3. **PROHIBITION and Habeas Corpus.**—If the Want of Jurisdiction is Disclosed on the Face of the Petition, prohibition may be awarded notwithstanding relief may also be had on habeas corpus. (Ala.) Ex parte State, 79.

4. **PROHIBITION** will Issue to Prevent a Court from Hearing and Determining Habeas Corpus Proceedings of which it has no jurisdiction. (Ala.) Ex parte State, 79.

### **PUBLICATION OF SUMMONS.**

See Process, 1-6.

### **PUBLIC OFFICE.**

See Officers.

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### **QUITCLAIM DEEDS.**

See Deeds, 24-26.

### **QUO WARRANTO.**

**QUO WARRANTO**, Who has not an Interest Entitling Him to Maintain to Test Title to an Office.—One who has received a minority of the votes cast at an election for a public office has not such an interest as entitles him to become a relator and maintain a proceeding to oust an ineligible candidate who has received a majority of the votes cast. (Ind.) State v. Bell, 203.

### **RACING.**

See Gaming.

### **RAILROADS.**

*Contract to Locate Station.*

1. **RAILROADS**—Contract to Locate Station at Certain Point.—A contract between a railroad company and a prospective purchaser of property along its line, to locate and maintain a station at a certain point, is not void per se. But such person is charged with notice of the character of the corporation with which he is contracting and of the duties which it owes to the public; and it becomes a part of the contract that the maintenance of the station at that particular point is limited, not by the time specified in the contract, but to that time when, consistently with the discharge of the public duties of the company, the station can be maintained in the manner provided in the agreement. (Ga.) Atlanta etc. R. R. Co. v. Camp, 151.



## **Relief Department.**

**2. RAILROADS—Relief Department—Remedies.**—Under a contract of membership in a railroad relief department, providing that the acceptance of the benefit by the beneficiary of the member shall bar an action for damages arising from his death, the acceptance by the widow of a member of such benefit bars her claim against the company for damages for herself, but does not defeat the rights of her minor children, and after having received such benefit, she may, as administratrix of the deceased, prosecute an action for damages in favor of such children. (Neb.) Chicago etc. R. R. Co. v. Healy, 830.

**3. RAILROADS—Relief Department—Forfeiture—Public Policy.**—A provision in a contract of membership in a railroad relief department that if suit is brought against the company for damages arising from, or growing out of, the death of a member, any benefit otherwise payable shall thereupon be forfeited, is against public policy and void. (Neb.) Chicago etc. R. R. Co. v. Healy, 830.

## **Injury at Crossings.**

**4. NEGLIGENCE—Attempt to Cross in Front of Engine.**—A person whose business is not of an urgent character requiring great haste and expedition, and who has no excuse for his hazardous attempt to cross in front of a rapidly approaching engine, is guilty of negligence. (N. H.) Wright v. Boston etc. R. R. Co., 949.

**5. NEGLIGENCE—Attempt to Cross in Front of Engine.**—One who attempts to cross a railroad track in front of a rapidly approaching engine may be negligent without being willfully reckless, and while the instinct of self-preservation may be evidence of no attempt to commit suicide, yet it does not prove that he was not negligent. (N. H.) Wright v. Boston etc. R. R. Co., 949.

**6. NEGLIGENCE—Burden of Proof.**—If a person attempts to cross a railroad track in front of a rapidly approaching train, and is killed in the attempt, by being struck by the engine, the burden of proving that the deceased was reasonably careful is upon the plaintiff, who sues to recover his death. (N. H.) Wright v. Boston etc. R. R. Co., 949.

**7. NEGLIGENCE, CONTRIBUTORY.**—While want of contributory negligence on the part of a person killed at a railway crossing may be established by inferences from the circumstances, such an inference cannot be drawn simply from a presumption that a person exposed to danger will exercise care and prudence in regard to his own safety. (N. H.) Wright v. Boston etc. R. R. Co., 949.

See Carriers; Eminent Domain; Hospitals; Master and Servant.

## **Note.**

**Railways, employes of, homicide, when guilty of by inattention or neglect of duty, 331-335.**

## **RECORDS.**

**1. PUBLIC RECORDS—To What Extent Open for Examination.**—The records in the office of a county recorder are public only to the extent that they may be freely examined by all persons having any interest in the property affected by them, or under the ordinary rules of agency by the attorney or representative of persons so interested. (Nev.) State v. Grimes, 883.

**2. PUBLIC RECORDS—Who may Examine.**—Persons having, or seeking to acquire, an interest in property may examine for themselves the records in the office of a county recorder, or exercise their choice in employing an attorney or some one to search for them, or

they may have an abstracting company furnish an abstract or guarantee the title. (Nev.) State v. Grimes, 883.

**3. PUBLIC RECORDS—Right of Abstractor to Examine and Copy.** A corporation organized to furnish abstracts and guarantee titles may, free of charge, during regular business hours, inspect and make memoranda and copies of all files and records in the office of the county recorder so far as they relate to current transactions in which it is authorized or employed by persons having or seeking to acquire an interest in property, the examination and copying to be made at such times and under such circumstances as will not prevent the recorder from discharging his duties or interfere with the right of other persons to have access to the records; but such corporation has no right to inspect and copy all the records of the office for the purpose of compiling an independent set of abstract-books covering all the property to which the records relate in order to equip its own office. (Nev.) State v. Grimes, 883.

See Deeds, 1-5.

# REFORMATION OF DEED.

**1. REFORMATION OF DEED—Sufficiency of Proof.—To Authorize** a court of equity to correct, upon parol evidence, mistakes in deeds, only such full and strict evidence is required as is sufficient to satisfy the mind of the court. (Md.) Coggins & Owens v. Carey, 468.

**2. REFORMATION OF DEED.—A Mistake in a Deed by Inserting** the words "party of the second part" instead of "party of the first part" may be corrected in equity. (Md.) Coggins & Owens v. Carey, 468.

# RELIEF DEPARTMENT.

See Railroads, 2, 3.

# REPAIRS.

See Landlord and Tenant, 10-17.

# REPLEVIN.

**REPLEVIN—Failure to Assess Value—Conversion Pending Suit.**—A judgment in replevin in favor of the defendant for the return of the goods, and not in the alternative for their value, is good as far as it goes, so that if the plaintiff has sold them pending the suit, he is guilty of conversion and liable for their value. (Mo.) Caldwell v. Ryan, 717.

# REPUTATION.

See Evidence, 11, 12; Homicide, 4-6.

# RES GESTAE.

See Evidence, 3; Homicide, 4, 5.

# RES JUDICATA.

See Judgments, 7-11.

# RESTRAINT OF TRADE.

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# RETURN.

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## **RIPARIAN RIGHTS.**

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## **SALES.**

**1. CONTRACT for the Sale of Lumber, Meaning of Words in.**—

A contract for the sale and shipment of lumber to the purchaser containing a provision guaranteeing "count and inspection of all lumber at point of destination," means that the seller guarantees that the lumber, when it reaches the point of destination, shall come up to the count and inspection as in the bills rendered to the purchaser. Such a provision does not justify the exclusion of evidence to prove the real condition of the lumber when it reaches its destination. (Ala.) Byrd v. Beall, 60.

**2. VENDOR AND PURCHASER—Delay in the Shipment of Goods, What does not Amount to as a Matter of Law.**—Under a plea setting up that a contract required a shipment at once, a delay of seventeen days cannot be held, as a matter of law, to be unreasonable. (Ala.) Green v. Lineville Drug Co., 17.

**3. VENDOR AND PURCHASER—Shipment of Goods so that Purchaser Could not Get Possession of Them at the Place Agreed upon.**—Where a contract of sale provides for the payment of the purchase price when the goods arrive at L., it is not satisfied by a shipment requiring payment at a different place and before the goods arrive at L. (Ala.) Green v. Lineville Drug Co., 17.

**4. VENDOR AND PURCHASER—Pleading, When Sets Up a Breach of a Contract to Sell.**—A plea in an action by a vendor for the price of goods sold which alleges that the agent of the plaintiff represented to the defendant that he could and would have the property shipped at once and delivered within ten days, and by making such statement, induced the defendant to sign the contract, which he would not otherwise have done, is sufficient. (Ala.) Green v. Lineville Drug Co., 17.

**5. SALES—Negligence of Seller.**—A purchaser of an article upon representations by the seller that it may be used in safety for a certain purpose, who is injured by its explosion when used, may maintain an action for negligence against the seller, although his representations when made were not knowingly false, provided they were made upon insufficient knowledge and without such investigation as

an ordinary man would make under like circumstances. (N. H.) *Cunningham v. Pease House Furnishing Co.*, 979.

6. **DECEIT**—Misrepresentations of Seller.—The common law imposes upon the seller the duty to refrain from falsely misrepresenting material facts for the purpose of misleading the buyer. (N. H.) *Cunningham v. Pease House Furnishing Co.*, 979.

See Damages, 1, 2; Negligence, 11.

#### SAVINGS BANK.

See Gifts.

#### SETOFF AND COUNTERCLAIM.

1. **SETOFF**—Claims Resting in Contract and in Tort.—A debt cannot be set off against a demand for damages arising in tort. Therefore, where a plaintiff sues for conversion, the defendant cannot plead as a setoff prior judgments recovered by him. (Mo.) *Caldwell v. Ryan*, 717.

2. **SETOFF**—Whether a Positive Statutory Right.—The right of setoff in Missouri is not given or withheld as the conscience of the chancellor in a given case may dictate. It is a positive legal right given by statute. (Mo.) *Caldwell v. Ryan*, 717.

3. **SETOFF**—Nature of Right.—The right of setoff was in the beginning a creature of equity jurisprudence and was unknown to the common law; but in Missouri the right is given by statute, and the procedure for enforcing it is also prescribed by statute, the courts having authority to enforce the law only as it is written. (Mo.) *Caldwell v. Ryan*, 717.

4. **SETOFF**—Right to Hold Property Exempt.—The right of a plaintiff to hold property exempt from execution does not impair the right of the defendant to set off a debt the plaintiff owes him against a debt he owes the plaintiff; the meaning of the statute of setoff is that the defendant is not to be adjudged indebted to the plaintiff unless it is in a sum beyond the amount which the plaintiff is found indebted to him, and then the judgment goes only for the excess. (Mo.) *Caldwell v. Ryan*, 717.

5. **SETOFF**—Claim of Exemption Subordinate to Setoff.—A plaintiff in conversion cannot plead in his reply that as the head of a family he is entitled to hold the judgment he seeks to recover exempt from execution, and that therefore the defendant had no right in his answer to set off judgments previously recovered by him and amounting to more than the judgment prayed for by the plaintiff. (Mo.) *Caldwell v. Ryan*, 717.

6. **SETOFF**—Whether Subordinate to Exemption.—The right of setoff is not subordinate to the right of exemption from execution. (Mo.) *Caldwell v. Ryan*, 717.

See Exemption, 2.

#### SCHOOLS.

See Constitutional Law, 15, 16.

#### SLANDER.

See Libel and Slander.

#### SPECIFIC PERFORMANCE.

1. **SPECIFIC PERFORMANCE**—Certainty of Terms of Contract. In order to warrant the specific performance of a contract, it must be definite and certain in its terms, and free, not only from ambiguity,

but likewise from all shade or color of ambiguity. (Md.) Offutt v. Offutt, 491.

2. **SPECIFIC PERFORMANCE**—Discretion of the Court.—Specific performance is not a matter of right in the litigant, but it is one of sound judicial discretion controlled by established principles of equity, and will be granted or withheld by the court upon a consideration of all the circumstances of each particular case. (Md.) Offutt v. Offutt, 491.

3. **SPECIFIC PERFORMANCE**—Promise of Support in Consideration of Marriage.—Where a man, in proposing marriage, writes to the woman "That I have tolde you and rote to you you are first with me above all other you are one that my honner before God that I have plege myself to take care of and support as long as you live," and she marries him in consideration of this assurance, the letter is evidence sufficiently definite to entitle her to a specific performance against his heirs by a decree in equity providing means for her support out of his estate. (Md.) Offutt v. Offutt, 491.

4. **SPECIFIC PERFORMANCE** of Contract, When Becomes Proper Though Original Contract was Lacking in Mutuality.—Where the performance of a contract not required to be in writing is not compulsory on one party and he has an election to perform or not as he chooses, and elects to perform and the other party accepts the election, the want of mutuality is thereby eliminated, and each may have specific performance in a proper case against the other, although no cause of action would originally lie for a breach of performance. (Ky.) Louisville etc. R. R. Co. v. Coyle, 384.

#### **STARE DECISIS.**

See Courts, 1.

#### **STATIONS.**

See Railroads, 1.

#### **STATUTE OF FRAUDS.**

See Frauds, Statute of.

#### **STATUTE OF LIMITATIONS.**

See Limitation of Actions.

#### **STATUTES.**

##### *Title of Act.*

1. **CONSTITUTIONAL LAW**—Title of Act.—Under a constitutional provision that an act shall embrace but one subject and matters properly connected therewith, which subject shall be embraced in the title, the title is sufficient if it expresses the subject matter of the act, without specifying the matters connected therewith. (Iowa) City of Newton v. Board of Supervisors, 256.

2. **CONSTITUTIONAL LAW**—Title of Act—Sufficiency.—An act entitled "An act to revise, amend and codify the statutes in relation to roads, bridges and ferries and the destruction of thistles," sufficiently expresses the subject of the act, although it does not mention all matters properly connected therewith. (Iowa) City of Newton v. Board of Supervisors, 256.

3. **CONSTITUTIONAL LAW**—Title to Statute.—Whether the Subject Matter of an Act is Clearly Expressed in the Title must be determined from its own contents, without regard to the source of the power of which the act is an expression. It makes no difference

whether authority for the act is found in an express constitutional provision or in the unwritten police power. (Colo.) *Burcher v. People*, 143.

4. **CONSTITUTIONAL LAW**—**Title of Act to Regulate Employment.**—The title, "An act to prescribe and regulate the hours of employment for women and children in mills, factories, manufacturing establishments, shops, stores and any other occupation which may be deemed unhealthful or dangerous," does not embrace a section therein which prohibits the employment of women for more than eight hours a day in a mill, factory or store, for the title relates to employment in dangerous and injurious occupations only. (Colo.) *Burcher v. People*, 143.

*Construction of Statutes.*

5. **STATUTES, CONSTRUCTION OF.**—**The Word "Shall,"** when used in a statute directing that a public body do certain acts, is to be construed as mandatory and not permissive, and excludes the idea of discretion. (Iowa) *City of Newton v. Board of Supervisors*, 256.

6. **STATUTORY CONSTRUCTION.**—**Expressum Facit Cessare Tacitum** may be translated: "Where a lawgiver sets down plainly his whole meaning, we are prevented from making him mean what we please ourselves." (Mo.) *Caldwell v. Ryan*, 717.

7. **STATUTES**—**Construing Language in Ordinary Sense.**—The prime object of all rules for the interpretation of statutes is to ascertain the will and intent of the lawmaker; this may oftenest be done, and usually can best be done, by giving effect to the language used, considered and construed in its ordinary sense. (Tex. Cr.) *Ex parte Woods*, 1107.

8. **STATUTES**—**Aiding the Meaning of One Provision by Reference to Others.**—It is a cardinal rule of construction that the meaning of one portion of an act may be aided by other provisions contained in the same act, and that that construction should be placed upon such legislation as will give the whole effect. (Tex. Cr.) *Ex parte Woods*, 1107.

9. **STATUTES.**—**If the Words of a Statute are Free from Ambiguity or doubt,** and express plainly and clearly the intent according to the most natural import of the language, there is no occasion to look elsewhere for their meaning. (Tex. Cr.) *Ex parte Woods*, 1107.

**STOCK AND STOCKHOLDERS.**

See Corporations.

**STREET RAILWAYS.**

*Speed of Cars.*

1. **STREET RAILWAYS**—**Speed of Cars—Expert Evidence.**—In an action against a street railway for damages for the negligent killing of a person on its track, expert evidence by car operators as to what would be a safe and reasonable rate of speed for a car while being operated at the point where the injury occurred is inadmissible. (Ky.) *Ford's Admr. v. Paducah City Ry.*, 412.

2. **STREET RAILWAYS**—**Speed of Cars.**—If the jury is informed how fast the particular car causing an accident was moving at the time, the condition of the track over which it was moving and the use to which the street was put, it is for the jury to judge as to whether or not the rate of speed, under the conditions and circumstances shown to exist, was excessive. (Ky.) *Ford's Admr. v. Paducah City Ry.*, 412.

3. **STREET RAILWAYS—Ordinance Regulating Speed of Cars—Evidence.**—The violation of a city ordinance regulating the speed of street-cars is of itself no evidence of negligence on the part of the company. (Ky.) *Ford's Admr. v. Paducah City Ry.*, 412.

*Injury to Persons in Street.*

4. **STREET RAILWAYS—Right of Way.**—Street-cars have the right of way over the streets of a city, and it is the duty of the citizen, whether on foot or in a vehicle, to give unobstructed passage to cars. (Ky.) *Ford's Admr. v. Paducah City Ry.*, 412.

5. **STREET RAILWAYS—Duty of Person on Track.**—The motorman in charge of a street-car, on seeing a trespasser on the track, has a right to assume that he will get out of the way, and need take no steps to stop his car to avoid injury to him, unless he has reason to believe that such person is not aware of the danger or is unable to protect himself. (Ky.) *Ford's Admr. v. Paducah City Ry.*, 412.

6. **STREET RAILWAYS—Care Required of Person on Track.**—If a person is walking along the edge of a street-car track, the motorman on a car has a right to suppose that upon hearing the bell, such other person will leave the track in time to avoid being struck by the car, and is not required to stop it, nor to take steps to avoid injuring him, until it becomes reasonably apparent that he is not going to get out of the way. (Ky.) *Ford's Admr. v. Paducah City Ry.*, 412.

*Injury to Persons on Car.*

7. **STREET RAILWAYS and Teams in the Streets, Duty to Avoid Injuring Passengers by the Latter.**—A team in the public streets must be so guided as not to injure people rightfully upon the running-board of a street-car. (Mass.) *Sibley v. Nason*, 520.

See *Municipal Corporations*, 5, 6.

*Note.*

**Street Railways, employes of, homicide, when guilty of by inattention or neglect of duty, 334, 335.**

**STRIKES.**

See *Trade Unions*.

**SUBLEASES.**

See *Landlord and Tenant*.

**SUCCESSION.**

See *Descent and Distribution*.

**SUMMONS.**

See *Process*.

**TAXATION.**

*Property Subject to Taxation.*

1. **TAXATION by the State of Spirits in a Bonded Warehouse.**—Whisky contained in a government warehouse though before the payment of taxes due thereon to the United States is property, and, as such, subject to taxation by the state. (Ky.) *Thompson v. Commonwealth*, 362.

*Occupation Tax.*

2. **OCCUPATION TAX—Lack of Uniformity in Operation.**—If a statute which imposes a tax upon the sale of nonintoxicating malt

liquors provides that it shall not apply to regular druggists who, "as such, keep for sale as a part of a regular drug stock, such proprietary medicines as 'malt extract,' 'malt medicine' and 'malt and iron' used exclusively as medicine and not as a beverage," such statute violates a constitutional provision that all occupation taxes shall be equal and uniform upon the same class of subjects. (Tex. Cr.) Ex parte Woods, 1107.

**3. OCCUPATION TAX—Lack of Uniformity of Operation.**—An occupation tax upon the sale of nonintoxicating malt liquors cannot be sustained as a police regulation if it violates a constitutional provision that occupation taxes shall be equal and uniform. (Tex. Cr.) Ex parte Woods, 1107.

**4. OCCUPATION TAXES—Want of Uniformity in Operation.**—A tax upon the sale of nonintoxicating malt liquors which applies only to prohibition territory cannot be sustained under a constitutional provision that occupation taxes shall be equal and uniform within the limits of the authority levying them. (Tex. Cr.) Ex parte Woods, 1107.

#### *Tax Sales and Titles.*

**5. TAX SALES—Retroactive Legislation.**—The legislature has power to enact that tax sales theretofore made shall be valid, although the required levy was not made as required by statute. (Or.) Ayers v. Lund, 1046.

**6. TAX TITLES—Burden of Proof** is on the holder of a tax title to maintain it by affirmatively showing that the provisions of the law have been complied with. (Or.) Ayers v. Lund, 1046.

**7. TAX SALES—Sales to Counties.**—A statute providing that in case of a tax sale to a private purchaser the deed shall be prima facie evidence that the provisions of the law have been fully complied with does not apply to a purchase by the county, as no deed is provided for in such case. (Or.) Ayers v. Lund, 1046.

**8. TAX DEEDS—Recitals as Evidence.**—A statute providing that a deed given by a sheriff at a sale of real property shall be conclusive evidence of the regularity of all proceedings to pass the title applies only to the regularity of such proceedings as are the foundation of the deed, and cannot operate as evidence of the regularity and existence of the proceedings necessary to transfer the tax debtor's title to the county. (Or.) Ayers v. Lund, 1046.

**9. TAX SALES—Sufficiency of Return.**—The return of an officer making a tax sale consisting of a printed notice of such sale cut from a newspaper and headed, "Sheriff's Sale for Delinquent Taxes," which is attached to the delinquent tax-roll, and upon which is interlined or written at the time of or after the sale opposite the name and description of the property, the name of the purchaser and the selling price in each case, and to which is attached a certificate that "the foregoing return of delinquent tax sales is true and correct in every detail," is not a compliance with a statute providing that the warrant for the collection of delinquent taxes must be executed and returned in like manner as an execution against property, and that the sheriff must make written return of an execution, setting forth his doings thereon. (Or.) Ayers v. Lund, 1046.

**10. TAX SALES—Advertisement and Return.**—Without a due return showing the advertisement of property and its sale for delinquent taxes, there is no evidence of title in the county. These are essential elements in the proceedings, and the absence of them cannot be cured by legislation. (Or.) Ayers v. Lund, 1046.



## **TELEGRAPHS AND TELEPHONES.**

**1. TELEGRAPH POLE—Removal by Owner of Fee.**—The erection of a telegraph pole in a private alley, without permission or condemnation, is a trespass; and if it interferes with the use of the alley by an abutting proprietor who owns the fee, he may, after giving notice to the telegraph company and reasonable opportunity to remove the pole, cut it down in a peaceable manner; and he is not liable to the company for incidental injuries which the pole and its fixtures suffer by falling. (Md.) Maryland Telephone etc. Co. v. Ruth, 506.

**2. TELEGRAPH POLE—Consent to the Erection of Reversioner.** The owner of the reversion cannot authorize the erection of a telegraph pole in an alley against the prohibition of the lessee in possession under a lease for ninety-nine years. (Md.) Maryland Telephone etc. Co. v. Ruth, 506.

## **TENANCY IN COMMON.**

See Waters and Watercourses, 4.

## **TENDER.**

**TENDER.**—A Tender Need not be Made when no purpose can thereby be served; parties are not required to do vain things. (La.) State v. Police Jury, 430.

## **TITLE INSURANCE.**

See Insurance, 19.

## **TITLE OF STATUTES.**

See Statutes, 1-4.

## **TORTS.**

**JUDGMENT IN TORT** When One of the Defendants Dies During the Pendency of the Action.—If, in an action against two for a tort, one of them dies, judgment may be rendered against the survivor without any revivor. (Ala.) Hayes v. Miller, 93.

## **TRADE NAMES.**

**TRADE NAME—Refusal of Protection Because of Owner's Fraud.**—Equity will not refuse to protect a trade name merely because the complainant for several years circulated literature falsely representing his exclusive right to the name, if such false representations have ceased and there is no proof that they in any material degree tended to create the value of the name. (N. J. Eq.) Johnson v. Seabury, 1007.

## **TRADE UNIONS.**

**PICKETING BY STRIKERS—Whether a Crime.**—A person who stands two hours each day at a certain place in the public streets of a great city doing "picket duty" during a strike, but conducting himself in an orderly manner, disturbing no one and committing no overt acts, is within his lawful rights and cannot be convicted under an ordinance which declares that any person who lounges, stands or loafs around streets or public places shall be guilty of a misdemeanor, for such ordinance is unconstitutional as an interference with personal liberty. (Mo.) St. Louis v. Gloner, 750.

## **TRESPASSERS.**

See Negligence, 12-17.

**TRIAL.***In General.*

1. **PRACTICE**—Improper Time for Presenting Prayers for Rulings.—The presentation of prayers for rulings with a request to the judge to pass upon them in the midst of the examination of a witness is irregular. (Mass.) *Wood v. Skelley*, 516.

2. **JURY TRIAL**—Taking Papers to the Jury-room.—It is discretionary with the trial judge whether he shall permit exhibits to be taken by the jurors to their room. (Mass.) *Sibley v. Nason*, 520.

*Instructions.*

3. **TRIAL**—Instructions—Method of Giving.—Instructions should be delivered in open court, and if the jury, after retiring, desire to be informed as to any part of the law arising in the case, they should request that they be conducted to the court, where the information desired may be given them. (Neb.) *Martin v. Martin*, 815.

4. **TRIAL**—Instructions—Method of Giving.—If, after the jury has retired, and the court is engaged in a trial, a request is presented for further instructions, the court may, with the consent of the parties, send an answer to the jury by the officer in charge thereof. (Neb.) *Martin v. Martin*, 815.

5. **JURY TRIAL**—Instruction, Failure to Ask for Qualification of.—Where an instruction given properly states the law so far as it goes, but a qualification might properly be added, still the failure to add it cannot be urged on appeal, where the addition or qualification was not asked for in the trial court. (Mass.) *Sargent v. Inhabitants of Merrimac*, 528.

6. **JURY TRIAL**—Instructions, When Properly Refused.—If the instructions asked for are not applicable or are contrary to the evidence, they are properly refused. (Mass.) *Wood v. Skelley*, 516.

*Verdict in Homicide Case.*

7. **JURY TRIAL**—Verdict by Eleven in Homicide Case.—Where it is agreed in open court by the parties in a homicide trial that one of the jurors may be excused, a verdict thereafter returned by the eleven remaining jurors cannot be upheld. The constitution places the right of trial by twelve jurors in a felony case beyond the power of the accused to waive. (Tex. Cr.) *Jones v. State*, 1097.

**TROVER AND CONVERSION.**

1. **CONVERSION, JOINT**—Settlement—Extinction of Liability.—If two persons are jointly liable for the conversion of funds, a settlement with one of them must be of such character as to relieve him from further liability to operate as a discharge of the liability of the other. (Iowa) *Home Sav. Bank v. Otterbach*, 267.

2. **CONVERSION, JOINT**—Election of Remedies—Settlement.—If two persons are jointly liable for a conversion of funds, a criminal prosecution against one of them therefor does not constitute an election of remedies, or a settlement which will relieve the other from liability. (Iowa) *Home Sav. Bank v. Otterbach*, 267.

See *Replevin*.

**TRUSTS.**

**TRUSTS**.—Notice of the existence of a trust imposes the duty of inquiry as to its character and limitations, and whatever is sufficient to put a person of ordinary prudence upon inquiry is constructive notice of everything to which that inquiry might have led. (Or.) *McLeod v. Despain*, 1066.

See *Monopolies; Bills and Notes*, 1, 2.

## **USAGES.**

See Customs and Usages.

## **VENDOR AND VENDEE.**

1. **CONVEYANCE, Secret Equities and Want of Notice Thereof.**—If a party relies upon the record to establish his title to realty, and to relieve him of knowledge of secret equities known to his grantor, the record itself must show, or tend to show, a chain of conveyances disclosing perfect title in the grantor. (Neb.) *Weatherington v. Smith*, 855.

2. **VENDOR AND VENDEE.**—Where a Deed Under Which One Claims title recites facts which, if followed up, would give him actual notice of trust relations, he cannot claim to be a purchaser without notice. (Mo.) *Turner v. Edmonston*, 739.

3. **VENDOR AND VENDEE—Notice of Trust Relations.**—One who purchases trust property with notice of such facts as are sufficient to put him on inquiry holds the property in trust for the beneficiaries, who may follow the property into his hands. (Mo.) *Turner v. Edmonston*, 739.

## **VENUE.**

**VENUE—Sufficiency of Proof of.**—Venue may be established like any other fact, and where the fair inference from the evidence adduced or the circumstances proven is that the transaction in question occurred within the county, the finding of the jury cannot be disturbed on appeal. (Iowa) *State v. Meyer*, 292.

## **VERDICT.**

See Trial, 7.

Note.

**Vessels at Sea, homicide, officers, when guilty of by inattention or neglect of duty**, 335-337.

## **VOTING MACHINES.**

See Elections, 1.

## **WAGES.**

See Assignments; Bankruptcy, 4, 5; Constitutional Law, 10-13.

## **WARRANTY.**

See Covenants.

## **WATERS AND WATERCOURSES.**

1. **WATERS—Flowage Rights—Percolation.**—The owner of flowage rights, by maintaining a dam across the stream and creating a reservoir for the storage of water to be used in the development of mill power or for other useful purpose, is not liable to an adjoining owner for the percolation of water unless such use is unreasonable. (N. H.) *Moore v. Berlin Mills Co.*, 968.

2. **WATERS—Riparian Rights.**—The owners of the land through which a stream runs may divert it from its channel for any lawful use, provided they do not detain the water unreasonably, do not overflow the land of the next upper proprietor, and return it to its channel above the land of the next lower proprietor in substantially the same condition as when it reached their land. (N. H.) *Roberts v. Claremont Ry. etc. Co.*, 962.

3. **WATERS—Riparian Rights—Joint Owners—Partition.**—If two persons are joint owners of a right to divert the water of a stream

for power purposes, either has a right to have the water divided and his share assigned to him in severalty, if that can be done without unreasonably interfering with the rights of the other. (N. H.) *Roberts v. Claremont Ry. etc. Co.*, 962.

4. **WATERS—Riparian Rights—Cotenancy in—Accounting.**—A common owner of the right to use water who uses more than his share thereof must account to his cotenants for their equitable share of the benefit he has received from the use of their share of such water. (N. H.) *Roberts v. Claremont Ry. etc. Co.*, 962.

### WEAPONS.

1. **CONCEALED WEAPONS—Absence of Intention to Carry.**—Where a pistol is placed in a man's pocket by other persons, and he does not know it is there, and has no intention to violate the law against carrying concealed weapons, he cannot be convicted of that offense. To make him guilty, it is not sufficient that the jury should believe that he might have known by the exercise of reasonable diligence that the pistol was in his pocket; the failure on his part to discover the pistol, in the absence of knowledge that it was there, or any intention to violate the law, does not make him guilty. (Tex. Cr.) *Miles v. State*, 1106.

2. **CONCEALED WEAPONS—Carrying Pistol to Repair-shop.**—A person who carries a broken pistol to a blacksmith-shop to have it repaired, and not finding the blacksmith at home, carries it farther and returns to the blacksmith-shop where he has it repaired, does not violate the law against carrying concealed weapons. (Tex. Cr.) *Fitzgerald v. State*, 1095.

### WHAIVES.

See Municipal Corporations, 1.

### WILLS.

1. **WILLS, LOST—Establishment—Burden of Proof.**—Secondary evidence is admissible to show the contents of a lost will, but the burden of proof is upon the proponent to clearly establish its execution. (Or.) In re *Miller's Will*, 1051.

2. **WILLS, LOST—Presumption of Revocation.**—If, when last seen, a will is shown to have been in the possession of the executrix, and it cannot be found, it must be presumed that she destroyed it. (Or.) In re *Miller's Will*, 1051.

3. **WILLS, LOST—Presumption of Revocation—Possession by Stranger.**—If the possession of a will, claimed to have been lost, is shown to have been intrusted to a third person, the burden of retracing it into the hands of the testatrix is upon the contestant to raise the presumption of revocation. (Or.) In re *Miller's Will*, 1051.

4. **WILLS, LOST—Presumption.**—If, in a proceeding to probate a will claimed to have been lost, it is shown that the will was duly and regularly executed, the presumption is strong in favor of its existence, and its revocation must be clearly proven. (Or.) In re *Miller's Will*, 1051.

5. **WILLS, LOST—Declarations of Testator.**—If a will is claimed to have been lost, the declarations made by the decedent subsequently to the execution of her last will and within a reasonable time prior to her death not only showing the will to have been deposited as claimed with a third person, but that it was still there to within a few days of her death, and declarations tending to show her affection toward the devisees, with no change in her feelings toward them, corroborated by direct evidence that after the making of the declara-

tions she had no opportunity to withdraw the will, or otherwise come into possession of it, are admissible for the purpose of raising the inference that the will had not been returned to her possession nor revoked. (Or.) In re Miller's Will, 1051.

#### **WITNESSES.**

1. **WITNESSES—Competency—Testimony of Wife for Husband—Joint Interest.**—If a husband, as administrator of his son, brings an action to recover for his wrongful death, the damages belong equally to the husband and wife, and in such case she is a competent witness for her husband. (Ky.) Mitchell v. Brady, 408.

2. **WITNESSES—Competency of Child.**—A child of tender years showing a sensibility of the wickedness of telling a falsehood and comprehending the danger of not telling the truth, and of sufficient capacity to understand the obligation of an oath, is competent as a witness. (Iowa) State v. Meyer, 291.

3. **WITNESSES—Competency of Child.**—To render a child of tender years competent as a witness, it is not necessary to show that it understands that the obligation to speak the truth on the witnessstand is greater than at other places. (Iowa) State v. Meyer, 291.

4. **WITNESSES—Competency—Discretion of Court—Appeal.**—The trial court must pass upon the capacity of a witness to testify, and unless there is a clear abuse of discretion, his decision will not be disturbed on appeal. (Iowa) State v. Meyer, 292.

See Criminal Law.

#### **Nota.**

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